LERC MONOGRAPH SERIES

UNIVERSITY OF OREGON

Arbitration Under Oregon's PECBA

DARYL GARRETTSON
NANCY HUNGERFORD
WILLIAM LANG
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TOM LEVAK
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PAT MOSEY
LUELLA NELSON
SHARON RUDNICK
SANDRA SMITH GANGLE
SUMMER STINSON
MARCUS WIDENOR

EDITED BY
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by Daryl Garrettson, Nancy Hungerford, William Lang, Howell Lankford, Tom Levak, Rick Liebman, Gene Mechanic, Pat Mosey, Luella Nelson, Sharon Rudnick, Sandra Smith Gangle, Summer Stinson, and Marcus Widenor

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The Authors

Daryl Garrettson received his bachelor's degree in history from Portland State University in 1973, and his J.D. from Northwestern School of Law at Lewis & Clark College in 1976. He is a member of the firm of Hoag, Garrettson, Goldberg, Fenrich, and Makler, which currently represents over seventy public safety organizations in Oregon and Washington. He has been involved in all aspects of public safety labor law over the last seven years, from the arbitration of discipline grievances and contract issues to arguing the Ballot Measure 8 PERS pension issue before the state supreme court.

Nancy Hungerford has represented Oregon school districts in labor relations, personnel matters, and other employment issues, as well as other school law matters, for twenty-two years. A former teacher and school district personnel administrator, she is now the senior partner of the Hungerford Law Firm of Oregon City, Oregon, which now includes her daughter, son, son-in-law, and daughter-in-law. She is the editor and publisher of *Oregon Labor Law Digest* and *Oregon Labor Law Today*, two reference books regarding all aspects of Oregon public sector labor law. She is the author of several articles in the *LERC Monograph Series*.

William A. Lang received his B.A. in international relations and his J.D. from the George Washington University. He is an arbitrator and mediator, and a member of the Oregon Bar and American Bar Association.

Tom Levak has been a member of the National Academy of Arbitrators since 1983. He has issued over 2,500 traditional labor grievance and interest awards in almost every area of the public and private sectors. He is currently on approximately twenty permanent rosters, including those of the U.S. Postal Service, the Social Security Administration, the General Services Administration, the States of Oregon, Alaska and Montana, Weyerhaeuser, Boise Cascade, the City of Denver, and the Las Vegas Metro Police. He has also acted as a AAA Employment Law Arbitrator since 1989.

Howell Lankford received his B.A. from Reed College, 1965; a M.A., K.Phl. (philosophy) from Northwest University, 1968; and a J.D. from the University of Oregon, 1977. He has been a member of the Oregon State Bar since 1991. He is editor of the Washington *Labor Law Digest*

and practices full-time as an arbitrator and mediator with offices in Milwaukie and Los Angeles.

Rick Liebman has been representing employers for thirty years in labor and employment law. He is former chair of the Oregon State Bar's Labor Law Section and is management editor of the Oregon State Bar's book and supplements entitled *Labor and Employment Law*. He is listed in the *Best Lawyers in America (1995-2003*) and is a national fellow of The College of Labor and Employment Lawyers.

Gene Mechanic is a partner in the Portland, Oregon law firm of Goldberg, Mechanic, Stuart & Gibson LLP. His practice emphasizes labor law, involving representation of private and public sector labor unions, as well as employee benefit law. He is an author of chapters in the Oregon State Bar's manual on private sector labor and employment law and is an assistant editor to the American Bar Association's *Developing Labor Law*, published by BNA. He is a past chairperson of the Oregon State Bar Labor Law Section and is a member of the board of directors of the National AFL-CIO's Lawyers' Coordinating Committee. Gene graduated from the University of Rochester in 1969 and George Washington Law School in 1972.

Pat Mosey provides labor relations consultation services to public employers. A member of the Oregon State Bar from 1976 until 2000, Mr. Mosey was an assistant attorney general from 1976–1980 and served as a member of Oregon's Employment Relations Board for approximately fifteen years.

Luella Nelson has recently been appointed a member of the Employment Relations board. She is a member of the National Academy of Arbitrators and has served on arbitration and mediation panels maintained by various federal, state, city, and private entities in Oregon, Washington, Montana, Alaska, California, and Nevada. She is a graduate of Harvard Law School (J.D., 1976) and Macalester College (B.S. cum laude, economics and political science with honors in economics, 1973). Before opening her arbitration practice, she worked for ten years for the NLRB in Washington, D.C. and Oakland, California.

Sharon A. Rudnick is a shareholder of Harrang Long Gary Rudnick P.C., and manages the firm's labor and employment practice. She is a graduate of the University of California at Los Angeles School of Law, and a member of the Oregon, Washington, and California State Bars. Her practice is chiefly devoted to labor and employment mediations

and arbitrations, representing employers before administrative agencies such as BOLI, the EEOC, the NLRB and the Oregon Employment Relations Board, and to employment litigation in state and federal courts.

Sandra Smith Gangle is a full-time arbitrator and mediator in Salem, Oregon. She earned her law degree at Willamette University College of Law in 1980 and practiced law for twenty years before limiting her practice to neutral work in 2000. A labor arbitrator since 1985, Gangle is currently on the labor arbitrator rosters of the Federal Mediation and Conciliation Service, the American Arbitration Association and the states of Oregon, Washington, and Montana. Her previous articles on labor arbitration issues have been published in *Arbitration Quarterly of the Northwest,* and in the *LERC Monograph Series*.

Summer Stinson Summer Stinson received a B.S. in liberal studies from Oregon State University and received her J.D. from the University of Oregon in May 2003. During law school, she served as a graduate research fellow for the Labor Education and Research Center and the Notes & Comments Editor for the *Oregon Law Review*.

Marcus Widenor is an associate professor at the University of Oregon Labor Education and Research Center. He received his B.A. in History from Antioch College and a masters degree in history from the University of Massachusetts. He has worked as an organizer for the International Ladies' Garment Workers' Union in Alabama and a labor educator at the University of Minnesota. Widenor has served as editor of the *LERC Monograph Series* since 1996.

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Dedication
Emory Via
1925–2003

This edition of the LERC Monograph is dedicated to former LERC director Emory Via, who died April 15, 2003, in Eugene, Oregon.

Emory was LERC's second director, leading the program for ten critical years from 1978 to 1988. During that time the Center grew, a Portland office was opened, and innovative programs were developed. Emory brought with him to LERC a national reputation in the field of labor education, which prompted the establishment of numerous education programs with national labor unions and the George Meany Center for Labor Studies. During his tenure LERC was awarded its first safety and health grant (New Directions), establishing a program which continues to thrive today.

Among the LERC programs established during Via's directorship was the annual Public Employment Relations Conference (PERC), first held in 1980. Emory believed that part of LERC's mission was to provide forums where all parties to the industrial relations system—labor, management, and neutral—could meet and exchange ideas. Behind this notion was a belief that a problem solving system such as collective bargaining works best when all its institutional and individual participants are well educated.

An outgrowth of PERC was the annual *Monograph Series*, which appeared first in 1981, under LERC faculty member Jim Gallagher's editorship. Emory was a member of the monograph's editorial board during his tenure at LERC, and helped develop it into a recognized source on Oregon public sector labor relations.

Emory F. Via was born in Lynchburg, Virginia, in 1925. He received a B.A. from Emory University, and a M.A. and Ph.D. in political science from the University of Chicago. He married Margaret Johnson, an artist, in 1952, his partner for life.

Via's professional career was spent as a labor educator, with deep roots in the civil rights movement. Emory was a rare phenomenon in this era—a white Southerner, working to bring racially integrated

worker education to southern unions. He spent his early years as a labor education instructor in various capacities in Philadelphia, Atlanta, and Chicago. From 1959–1968 he was a professor of labor education at the School for Workers at the University of Wisconsin in Madison.

From 1968–1976 he worked for the Southern Regional Council, in Atlanta, as the director of the Resources Development Center, the coordinator of work with the Commission on the Future of the South (Southern Growth Policies Board), and the director of the labor program. He was a visiting professor at Georgia State University from 1976–1978. He moved to Eugene to become the director of the Labor Education and Research Center at the University of Oregon in 1978. He held that position until his retirement in 1988. He was the national president of the University and College Labor Education Association (now UALE) from 1984–86.

All of us at LERC will miss Emory. This volume of the monograph is dedicated to his memory.

Marcus Widenor,
Monograph Editor

Introduction

Marcus Widenor

Disputes surrounding grievance and interest arbitration have fueled the litigation process under Oregon's PECBA since the passage of SB 750 in 1995. On the grievance arbitration side, the controversies have centered on changes to the statute that addressed the "public policy exception" to the enforcement of arbitrator's awards. This topic has been commented on extensively in the past three issues of the Monograph and cases before the ERB continue to illustrate how contentious this issue is between labor and management.[1]

Interest arbitration saw a radical transformation under SB 750—switching from a conventional form to a higher stakes, Last Best Offer (LBO) type of arbitration. This change affected not only the interest arbitration process itself, but also the broader dynamics of the negotiation process that lead up to this method of impasse resolution. Again, past monographs have dealt in detail with the changes made in the statute.[2]

Monograph 17 focuses exclusively on the arbitration process in Oregon's public sector, with attention to both grievance and interest arbitration.

Grievance Arbitration

In the grievance arbitration section of the Monograph we have four articles. The first is written by a tripartite group composed of arbitrators Howell Lankford, Tom Levak, and Luella Nelson, along with union and management advocates Gene Mechanic and Rick Liebman. The authors explore the interaction between grievance arbitration under collective bargaining agreements and the arbitration of non-union, "employee handbook" cases. In doing so they look at a familiar, but sometimes misunderstood principle in industrial relations—the concept of "just cause" for disciplinary action. The authors examine court decisions throughout the west coast that interpret the just cause principle when applying it in non-unionized situation. The paper addresses whether or not court interpretations of just cause will alter the discretion usually allowed arbitrators in applying the principle.

Arbitrator William Lang offers our second article on grievance arbitration. He poses the question of whether our widely recognized

principle of "progressive discipline" is a useful tool when deciding disputes involving claims of discrimination based on disability. If a worker is disabled, is it practically or ethically appropriate to follow a traditional path of enforcing a regime of successively more stringent penalties when a worker is unable to perform a particular job?

Our third paper revisits the thorny question of the "public policy exception" that was raised by SB 750s modifications in the PECBA. Management advocate Nancy Hungerford looks at some of the most recent ERB decisions in this area and critiques the ERB's application of the statute.

The final paper in the grievance arbitration section is by arbitrator Sandra Smith Gangle. She offers a neutral's perspective on the public and media debate over the public policy exception. Smith Gangle argues that the high profile and sensational nature of such cases sometimes obscure the appropriate role of an arbitrator in interpreting collective bargaining agreements in light of the statute.

Interest Arbitration

Our interest arbitration section contains four papers. In the first paper, monograph editor Marcus Widenor and UO law student Summer Stinson offer an historical overview of trends in interest arbitration since the inception of the PECBA, with special attention to how the SB 750 revisions have altered the process. They find that the number of cases going to arbitration and the number of individual issues taken to arbitration have declined since enactment of the new law.

In our second paper former ERB member, and now management representative, Pat Mosey offers his personal perspective on how Oregon's Final Offer Package interest arbitration system is operating.

Finally, in the last set of papers, we have two perspectives on the statutory criterion which is at the heart of most interest arbitration disputes—the comparability of wages and benefits. Labor attorney Daryl Garrettson gives his analysis of the use of comparables in the interest arbitration process, and how that has changed since the modifications of the law in SB 750. He is joined by a commentary from management attorney Sharon Rudnick on the same topic.

As always, the Monograph is a huge undertaking involving many different people. First, I would like to thank the entire ERB—Dave Stiteler, Rita Thomas and Katie Whalen. Their ongoing support of this

project and their willingness to help when called upon is much appreciated. Other ERB staff have also assisted with this year's project. Sandy Elliot was invaluable in helping me sift through the files of back-interest awards in the Conciliation Service's office. State Conciliator Wendy Greenwald and mediator Bob Nightingale were also available to give me good advice on sources for information on interest arbitration. Finally, I owe a special note of thanks this year to ERB ALJ Bill Greer who provided valuable editorial assistance with the monograph.

Our Monograph Editorial Board is always helpful in guiding us through the process from the solicitation of articles, through review of manuscripts and final publication. My special thanks this year to former LERC director Margaret Hallock, now on Governor Kulongoski's staff, and to Howell Lankford, who has always offered sound advice and enthusiastic support for the Monograph.

Former LERC faculty member Jim Gallagher will not be continuing as an editorial board member. I want to thank him for his guidance over the years. Jim is truly the architect of the *Monograph Series*, which began with the publication of issue number 1 in 1982. We all owe a debt of gratitude to Jim for developing it into a recognized reference authority in the field.

LERC and UO Staff are always crucial in helping put out the monograph. My thanks to LERC secretary Trisha Bates-Wickman for her patience and perseverance in helping produce the monograph. Also, thanks to LERC secretary Leola Jewett and office manager Karen Spradling for their assistance. Wendell Anderson served well as our new copy editor this year, helping us to produce a volume that is both professional and accessible at the same time.

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[1] See Howell L. Lankford, *Grievance Arbitration Under SB 75*0, 14 LERC MONOGRAPH SER. (1996). John Bishop*, The PECBA's Public Policy Exception to Arbitral Finality: A Plea for Principled Application*, 15 LERC MONOGRAPH SER. (1998). Gene Derfler and Les Smith*, The Public Policy Exception Was Placed in SB 750 as a Wake-up Call*, 15 LERC MONOGRAPH SER. (1998).

William Greer, *ERB Review of Grievance Arbitration Awards: Enforcement of Awards Under the PECBA, and the SB 750 Highway to Deschutes County*, 16 LERC MONOGRAPH SER. (2000). Marcus Widenor, *The Deschutes County Case*. 16 LERC MONOGRAPH SER. (2000). Rhonda Fenrich, *Finality of Arbitration Awards post-Deschutes County: A Labor Perspective*, 16 LERC MONGRAPH SER. (2000). Andrea L. Hungerford and Nancy J. Hungerford, *What Does Deschutes County Signal for the Future: A Management Perspective* 16 LERC MONGRAPH SER. (2000).

[2] John Abernathy and Tim Williams, *Last Best Offer—Total Package: Oregon's New Form of Interest Arbitration*, 14 LERC MONOGRAPH SER. (1996).

Did He Do It?: Employer Handbook 'Just Cause' Meets the Collective Bargaining Agreement

Howell L. Lankford, Thomas Levak, Rick Liebman, Gene Mechanic, Luella Nelson

Introduction And Overview

Did he do it? is frequently the first disputed issue addressed by labor arbitrators considering discipline or discharge under a "just cause" provision in a collective bargaining agreement. In fact, it is not at all unusual for that to be the principal dispute that brought the parties to arbitration. On the other hand, as discussed below, courts have held that Did he do it?—that is, did the discharged or disciplined employee actually do whatever he or she was discharged or disciplined for—is generally beyond the reach of a jury, court, or arbitrator under a just cause provision in an employer-promulgated handbook. This article traces the legal history and the different public policies that have led the very same words to have such fundamentally different meanings depending on where those words are found.

Parties to many collective bargaining agreements have incorporated just cause or similar phrases in their contracts for more than 50 years, generally without defining that term. Instead, the term has been defined by arbitrators in numerous decisions and scholarly publications. Although early formulations of just cause did not require the employer to prove the employee actually engaged in the charged misconduct, most arbitrators in recent decades have made an independent review of the evidence and have required such a showing.

In recent years, courts have also addressed the meaning of just cause in cases that involve neither a collective bargaining agreement nor a negotiated just cause standard. Typically, the contractual basis for these cases has been either a handbook prepared unilaterally by the employer providing that employees will be discharged only for cause, or assurances from the employer (verbal or written) at the time of hire. Most of the court formulations, in what we will refer to as "handbook" cases, do not afford an independent review of the ultimate question of whether the employee actually engaged in the

charged misconduct. Instead, the focus of the courts in such cases has been the subjective good faith of the employer, as indicated by the presence of substantial evidence, a reasonable belief the evidence was true, and the lack of arbitrary, capricious, or illegal reasons for the discharge. Very similar formulations have been adopted by the highest courts in Oregon, Washington, Alaska, and California.

The highest courts in Oregon and California have found that their formulation of just cause in the handbook context was not intended to affect the manner in which arbitrators apply just cause provisions in collective bargaining agreements. As discussed below, the situation is more complicated in Alaska. In recent years, the highest court there may have confused the two lines of case law, applying the limited handbook analysis of the Did he do it question to the just cause provision of a public sector collective bargaining agreement. A case providing the opportunity to clarify the Alaskan courts' thinking is now on appeal there.

In this article we review the standards applied by arbitrators and courts, and examine the implications of the recent legal developments in Alaska. Considering the authorship of the article, it should come as no surprise that our basic thesis will be that sound policy and practical reasons support the view of the Oregon Supreme Court that the standard for just cause in the collective bargaining arena should remain the traditional one used by labor arbitrators rather than the newer formulation developed by the courts in handbook and implied contract cases. This article is limited to the area of the authors' usual practice: California, Oregon, Washington, and Alaska.

We look first at the history and public policy behind the labor arbitrator's longer reach under a just cause standard, then at the Did he do it? element of just cause as developed by labor arbitrators, then at the very different legal history and public policy foundation of the handbook just cause cases, and finally at the opportunities for confusion presented by these two quite different bodies of case law interpreting the same words.

Judicial Deference to Labor Arbitration

In 1960, in the *Steelworkers Trilogy*,[1] the U.S. Supreme Court laid down the basic rules regarding the enforcement or vacation of labor arbitrators' awards under Section 301 of the Taft-Hartley Act.

As noted in *Elkouri & Elkouri*, "the bible of labor arbitration," those landmark decisions distinguished between the traditional role of the courts in interpreting contract provisions as a question of law and the assumption of that role by a labor arbitrator in the grievance arbitration setting.[2] *Elkouri* stresses the Supreme Court's view of the distinction between an appellate court's de novo role in reviewing a commercial—which includes employment law—arbitration award and its very limited role in reviewing a labor arbitrator's award, explaining that commercial arbitration developed as an alternative to court action, while labor arbitration developed as a substitute for strikes and lockouts.[3] *Elkouri* describes the basis for the differing standards of review as follows:

> Parties to an industrial dispute must "live with" the judgment or award rendered by the adjudicator. *Courts of general jurisdiction are not often versed in labor relations problems.* *** [A]rbitrators *are presumed* to be familiar with the needs and techniques of industrial relations, so parties generally will be able to "live with" their awards. (Emphasis added.)[4]

The *Steelworkers Trilogy* built upon the Court's recognition three years earlier in *Lincoln Mills* that:

> Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[5]

Building on that legal foundation, the Court characterized the peculiar statutory and public policy status of the labor arbitrator. In *Warrior & Gulf Navigation*, for example, the Court explained:

> The labor arbitrator performs functions *which are not normal to the courts*: the considerations which help him fashion judgments may indeed be *foreign to the competence of courts*. ***The parties expect that *his judgment* of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. *The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance*, because he cannot be similarly informed. (Emphasis added.)[6]

Thus, the U.S. Supreme Court has made it clear that authority resides with the labor arbitrator, not with a court, to interpret and apply the provisions of a collective bargaining agreement, including the just cause clause, and that so long as the arbitrator's award merely "draws its essence" from the labor contract, an award cannot be vacated or modified.[7] As the Court put it over a quarter century later: "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[8]

A labor arbitrator's special expertise is critical in the determination of a just cause dispute. The labor arbitrator exercises his or her expertise and authority under the labor contract to either sustain the discharge or reinstate the grievant, with all, part, or no back pay and benefits, or sometimes to fashion an inventive remedy. For example, in a case where an employee commits a particularly egregious offense and simply should not be returned to the workplace, but the employer has itself committed a serious "due process" or "fairness" violation, the labor arbitrator may choose not to reinstate the grievant but simply to award the grievant a couple of months of back pay.[9] Courts that hear employer handbook wrongful discharge disputes, appeals of those disputes, or appeals of public sector administrative determinations almost never enter into such a remedy arena.[10]

The U.S. Supreme Court's "essence" doctrine—which is controlling precedent for every federal court—has been generally adopted by state appellate courts reviewing labor arbitrators' authority to interpret and apply the terms of a public sector labor contract, including the contract's just cause clause. Most of those courts have made clear the distinction between: (1) a court's traditional role as contract interpreter in a wrongful discharge law suit or as reviewer of an administrative agency's termination decision, and (2) the court's more limited role in a labor contract case in which a party to the labor contract seeks to vacate or enforce a labor arbitrator's final award rendered pursuant to the contract's grievance arbitration procedure.

The (Current) Developed Arbitral Case Law of 'Just Cause'

How, then, do labor arbitrators define and apply the term just cause?[11] The overwhelming majority of labor contracts that use that term do not define it.[12] That silence has left the issue to be determined

by the arbitrator in each particular case.[13] As one leading work has put it, just cause was (and frequently still is) "what a reasonable arbitrator thought it was."[14]

There are visible historical trends in the interpretation and application of just cause under collective bargaining agreements. Early labor arbitrators interpreted just cause by giving substantial deference to management's decision. They held that an arbitrator acted as an "appellate court," and would not set aside management's good faith decision if substantial objective evidence existed at the time the employer made its decision to support that decision.

A shift began after WW II. In the *Riley Stoker Corp*. award, Arbitrator Platt announced the appropriateness of a de novo hearing and a de novo determination of whether or not the grievant actually did whatever he or she had been disciplined or discharged for:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing *** but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[15]

Arbitrator Platt made no mention in *Riley Stoker* of the need for the employer to conduct a full and fair investigation as a requirement of just cause. So-called due process was not considered by Platt, or by most other labor arbitrators, as essential because the arbitrators were making de novo determinations of the reasonableness of the employers' termination decisions. Some arbitrators, however, felt that due process should be a part of the just cause requirement and began to address that subject. Since WWI arbitrators have wrestled with the principle of just cause in an attempt to develop a consensus on a more concise definition for the term, and one that would included due process requirements.[16] Commentaries on the subject have analyzed the so-called "seven tests" of just cause for discipline, as developed by Arbitrator Carroll R. Daugherty in *Grief Bros. Cooperage Corp*. and as

subsequently refined by him,[17] and also analyze subsequent similar attempts by other arbitrators. More significantly, however, they stress the limitations of the seven tests and other formulaic tests as absolute just cause requirements.

Regarding the seven tests, the authors of those treatises (and probably most NAA members) agree that, while those tests may have some use as guidelines, particularly for less experienced managers and arbitrators, just cause ordinarily should be examined from a broader, less restrictive perspective. As Daugherty originally wrote the seven tests, a "no" answer to any one of his seven questions *required* a finding that just cause did not exist and hence required an arbitrator to reinstate the discharged employee, normally with full back pay. As past NAA president John Dunsford pointed out, the major problem with the seven tests is that they were developed by Daugherty while a referee on the National Railroad Adjustment Board, an expressly *appellate* position, in which he did not make a de novo determination of the facts and was merely charged with the responsibility of assuring that the procedures that led up to discharge were fair.[18] Thus, Daugherty's emphasis on his seven tests, questions 3, 4, and 5, relating to investigation, often makes no sense at all in the private sector, where constitutional due process considerations do not exist and/or where the employer runs a small shop.[19] Indeed, Daugherty himself recognized the problem that an absolute application of the seven tests created: in subsequent decisions he wrote numerous exceptions to them and a caution against making them a rote formula. On the other side of the coin, however, within the public sector, questions 3, 4, and 5 ordinarily do not create a problem, *if* they are utilized simply as guidelines, because they basically just add public employee due process constitutional protections to Arbitrator Platt's "reasonable person" test outlined in *Riley Stoker*.

The seven tests became so popular that both the American Arbitration Association and the ABA Section on Labor and Employment Law initially, and for some period of time, included them in their training materials. Ultimately, however, given that labor arbitrators are expected to make de novo determinations, and largely due to the efforts of the NAA, the seven tests have been increasingly de-emphasized by labor arbitrators, and the noted training materials have been modified to reflect that de-emphasis. Indeed, while the fourth edition of *Elkouri* contained some discussion of the seven tests, the fifth edition,

published in 1996, mentioned neither the seven tests nor Arbitrator Daugherty by name.

Each of the three arbitrator authors has used a slightly different pattern of analysis of just cause issues. Arbitrator Levak commonly used this formulation:

> Whether an employee has been discharged for "just cause" commonly involves an analysis of whether three basic components of that term have been satisfied: 1) Was the employee afforded fundamental due process rights implicit in the "just cause" clause—for example, did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted; and was the employee treated fairly—for example, were the employer's rules consistently enforced. 2) Was the charged offense(s) proved? And 3) was the penalty imposed reasonably related to the seriousness of the offense(s),[20] the employee's disciplinary record and any mitigating or extenuating circumstances?

Arbitrator Lankford commonly used this:

> (1) Did the grievant do what he or she was disciplined or discharged for? (2) Should the grievant have understood before hand that that sort of misbehavior could result in the sort of discipline administered by the employer? And (3) was the discipline process conducted in a fair and regular manner?

Arbitrator Nelson commonly used this:

> While it cannot be said that arbitrators have settled on a single unified theory regarding its meaning, certain concepts have become so well accepted as to become part of the common understanding of the term "just cause" in the collective bargaining arena. First among the principles of "just cause" generally agreed upon by arbitrators is that employees must be afforded due process. . . . The second major principle is that the employer must prove the charges against the employee. The third major principle is that the discipline must fall within the range of reasonable responses considering the seriousness of the proven offense, the employee's disciplinary record, and any mitigating and aggravating circumstances.

Other arbitrators have other formulations.[21]

Parties, of course, could bargain a specific definition of just cause themselves or limit the labor arbitrator's authority to make an independent review of the employer's factual conclusions; however, they seldom do. A review of the most recent complete volume of *Labor Arbitration Reports*—the 2000 cases collected in 114 LA—shows just two cases in which the parties specifically bargained about the issues to be addressed by an arbitrator in discipline cases.[22]

In search of some hard data about how current arbitrators actually

deal with the Did he do it? issue, absent a bargained definition of just cause, one of the authors skimmed through all 1,800 plus pages of 114 LA (2000) looking at every reported discipline and discharge case.[23] There were 64 reported cases turning squarely on the resolution of the Did he do it issue and 63 with no substantial Did he do it issue.[24] Several arbitrators noted that one party or the other had argued the case in terms of the seven tests (which is discussed in "Opportunities for Confusion: *Manning* and the Seven Tests" below), but only two arbitrators specifically adopted and applied that standard.[25] With those two possible exceptions—neither of which presented a substantial factual Did he do it? dispute—the 1,800 plus pages of 114 LA include not a single case in which the arbitrator refuses to make a Did he do it determination or holds that that issue is beyond an arbitrator's authority under a just cause provision of a collective bargaining agreement. Not a single case includes a determination of whether the employer was "reasonable," "in good faith," and "supported by substantial evidence" in determining that the grievant actually did whatever he or she was disciplined for.

In short, labor arbitrators, interpreting and applying just cause as that term appears in collective bargaining agreements, sometimes honor the seven tests in passing, but overwhelmingly they go on to determine de novo whether or not the grievant actually did whatever he or she was disciplined or discharged for. They do not use the criteria developed by the courts in employee handbook just cause cases, discussed below.

The Developing Law Of Employee Handbook 'Just Cause'

At some point in the not-too-distant past, many employers began including just cause provisions in handbooks distributed to unrepresented employees. (The reason is quite beyond the scope of this article.)[26] By and by, employees began attempting to enforce these unilateral employer assurances. On the West Coast, at least, these cases first began to reach appellate courts in the late 1970s.[27] One of the major problems for courts in the early handbook cases was the legal character of an employee handbook's assurance of discipline only for just cause. Employees usually receive handbooks *after* they are hired, so the contents of a handbook do not seem to be part of the offer of employment, or of the employment contract, under strict traditional principles of contract formation.

Oregon was the first West Coast state to address the issue. In 1978, in *Yartzoff v. Democrat-Herald Publishing Co.*,[28] the Oregon Supreme Court stretched the traditional contract model to accommodate employee handbook just cause assurances. The court concluded that, if an employee showed she had received an employee handbook a couple days after hire, and showed that she had complied with the handbook as she understood it, a jury should be allowed to conclude that the "statements in the handbook were intended and considered by both parties to be a part of the terms of plaintiff's original contract of employment."[29]

That set the stage for the next issue: When an employee handbook restricted discharge to just cause, who was to make the *factual* determination of whether or not that restriction had been satisfied? The Oregon Supreme Court again led the way on the West Coast in 1982 in *Simpson v. Western Graphics*.[30] The court granted review specifically to decide whether, by agreeing to discharge employees only for just cause, a private employer also relinquished its right to resolve a factual dispute under that language.[31] *Simpson* arose five years after *Yartzoff*, and the *Simpson* Court cited that earlier case for the broad proposition that "the terms of the Employee Handbook are contractual terms of the plaintiff's employment." But the *Simpson* court carefully distinguished unilateral handbook pronouncements from bargained labor contracts:

> Here . . . there is a "just cause" provision, but no express provision transferring authority to make factual determinations from the employer to another arbiter. Neither is there reason to infer that such meaning was intended by the terms of the Employee Handbook. . . . The handbook was not negotiated. It is a unilateral statement by the employer of self-imposed limitations upon its prerogatives. It was furnished to plaintiffs after they were hired and the evidence affords no inference that they accepted or continued in employment in reliance upon its terms. In such a situation, the meaning intended by the drafter, the employer is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exist.
>
> * * *
>
> The arbitration cases cited by plaintiffs are fundamentally different from this one. Disputes go to arbitration precisely because the parties agreed that they should do so. Here, conversely, the employer agreed to the substantive standard embodied in the term "just cause," but did not agree to a secondary level of fact-finding authority.[32]

Thus *Simpson* made it clear that neither a court nor a jury, in an action to enforce a handbook just cause provision, has the authority to decide the fundamental factual question, Did he do it?

Washington was the next West Coast state to consider handbook just cause. In *Thompson v. St Regis Paper Co.*, the employee's "principal argument," according to the court, "was that the fact he was doing a good job, coupled with the quoted corporate policies, created an implied contract he would be fired only for cause." The court specifically rejected the implied contract model. Instead the court created an alternative, "public policy" model for enforcement of handbook just cause assurances:

> Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule.
>
> However, absent specific contractual agreement to the contrary, we conclude that the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship. Thus, the employer's reason for unilaterally issuing an employee policy manual or handbook, purporting to contain the company policy vis-a-vis employee relations, becomes relevant.
>
> We are persuaded that the principal, though not exclusive, reason employers issue such manuals is to create an atmosphere of fair treatment and job security for their employees. See, for example, *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 726-27, 649 P.2d 181 (1982). While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. . . . It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices . . . [the policies] established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "*instinct with an obligation*" (italics ours). *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 613, 292 N.W.2d 880 (1980). It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees justifiably rely on the expressed policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory. Therefore,

> we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises. See Restatement (Second) of Contracts at 2 (1981) (promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding a commitment has been made). [33]

Although the Washington court did not follow the Oregon court's characterization of employee handbook cases as arising in contract,[34] the Washington court soon did follow Oregon in leaving it to the employer to make the factual Did he do it? determination, in *Baldwin v. Sisters of Providence in Washington*.[35] Quoting the *Simpson* discussion set out above—beginning with the observation that "there is a just cause provision, but no express provision transferring authority to make factual determinations from the employer to another arbiter"—the Washington Court concluded:

> The reasoning of the Oregon Supreme Court is persuasive. The employer unilaterally decided to place the restriction of "just cause" upon its termination decisions. This "just cause" provision, by its terms, had no restrictions. However, the employer should not be allowed to make arbitrary determinations of "just cause." The balance sought to be achieved in *Thompson* would conflict with such a view, and defendants do not argue this position. As defendants argue, a standard which checks the subjective good faith of the employer with an objective reasonable belief standard strikes a balance between the employer's interest in making needed personnel decisions and the employee's interest in continued employment. See *Thompson*, at 232. A contrary result could encourage employers to remove such provisions from their handbooks and render the inroads made by *Thompson* ineffectual.[36]

The court made it clear that an employer that promulgates a just cause handbook provision does not thereby submit to any outside fact-finding authority, and that the burden of persuasion in employee handbook "public policy" cases remains on the employee and never shifts to the employer. Finally, the court addressed the standard for such cases:

> We hold "just cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence

and (2) reasonably believed by the employer to be true.[37]

Alaska was next in line on the West Coast. In *Braun v. Alaska Commercial Fishing and Agriculture Bank*,[38] the Alaska Supreme Court adopted the handbook just cause definition developed in *Baldwin* and *Simpson* by citation, without even a pretense of discussing the many issues presented.

Finally, California's consideration of the issues of handbook just cause was as careful and thorough as Alaska's was summary. In *Cotran v. Rollins Hudig Hall International, Inc.*,[39] the plaintiff was discharged based on allegations that he had sexually harassed two employees. The employer's asserted good faith belief that the plaintiff had committed misconduct was not at issue. The trial court placed on the employer the burden of proving that the plaintiff had actually committed the charged acts.[40] The California Supreme Court reviewed prior cases from its own courts of appeal and from neighboring states and then specifically rejected the trial court's submission of the factual Did he do it? issue to the jury.[41] Citing *Simpson* and *Baldwin*, among other cases, it reversed the trial court and came to this conclusion:

> On retrial, the jury should be instructed, in accordance with the views we have expressed, that the question critical to defendants' liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.[42]

Opportunities for Confusion: *Manning* and the Seven Tests

There is an obvious opportunity for confusion in the co-existence of two well-developed bodies of case law that require fundamentally different interpretations of the same term—just cause—depending on whether that term is found in a collective bargaining agreement or in a unilaterally promulgated employee handbook. That opportunity seems to have overtaken the Alaska Court in *Manning v. Alaska Railroad Corporation*.[43]

Manning rests in part on a peculiarity of Alaska labor and employment law. In the private sector—and, probably in the public sector in most states—a represented employee may not sue the employer directly to enforce a provision of the collective bargaining agreement.

The rare exception to that general rule occurs when the employee establishes that his or her union has violated its duty of fair representation (DFR), as discussed by the Supreme Court in the 1967 case *Vaca v. Sipes*.[44] *Vaca* is a fundamental bulwark between labor arbitration law and individual employment law.[45]

The Alaska Supreme Court expressly rejected *Vaca* in 1983 in *Casey v. City of Fairbanks*.[46] In *Casey*, the union chose not to contest a discharge and the employee sued the city directly. The Supreme Court's opinion discussed *Vaca* and concluded:

> We are unable to adopt the federal rule in this state because it is inconsistent with our conclusion that persons who are employed other than "at will" . . . have a sufficient property interest in continuing their employment, absent "just cause" for their removal, to require that they be given notice and an opportunity to be heard under the due process clause of the Alaska Constitution . . . before their employment is terminated).[47]

Since *Casey*, the Alaska court has developed a string of cases applying and refining that rule.[48] Some Alaska public sector bargaining units appear to have negotiated into their contracts a provision that might be called a *Casey clause*, which recognizes and regulates an individual employee's independent access to arbitration.[49]

Casey allowed courts and juries to interpret and apply collectively bargained just cause language far more often in Alaska public sector cases than in the private sector, where such opportunities are limited to DFR situations. What should a *jury* make of a collective bargaining agreement's just cause provision? The Alaska court provided an apparent answer to that question in 1993 in *Manning*. In *Manning*, an individual employee filed a wrongful discharge suit seeking to enforce a collectively bargained just cause provision after his union declined to press the matter to arbitration.[50] Mr. Manning had prevailed in his unemployment claim, over the employer's insistence that he had been dismissed for "misbehavior," and he moved for partial summary judgment, on that basis, in the trial of his wrongful discharge action. The trial court had denied that motion; and Manning appealed.[51] The question of issue preclusion required the Alaska Supreme Court to compare the "misbehavior" issue that had been
decided by the unemployment agency with the just cause issue that Manning wanted to present in his wrongful discharge suit based on the just cause provision of the collective bargaining agreement.

For better or worse, the court chose to use the handbook definition from *Braun* in framing the issue to be presented in Manning's individual action to enforce the collective bargaining agreement's just cause provision. The Alaska court included this footnote:

> Contrary to Manning's unsubstantiated assertion, *Braun* does, in fact, enunciate the "appropriate standard" for assessing "just cause" discharges.[52]

Although the Alaska Supreme Court specifically points out that it was quoting *Baldwin*, it apparently does not notice that the quoted passage in *Baldwin* follows immediately after the discussion quoted at page 27.[53] The *Baldwin* court, in other words, supplied a definition for handbook just cause to prevent those employers who unilaterally issued such handbooks from turning that phrase into "just because." And every other court on the West Coast has been very careful to distinguish between a court-established definition of *handbook just cause* and a labor arbitrator's interpretation of *a bargained just cause* provision in a collective bargaining agreement. *Manning* brings the two lines of cases together without any apparent recognition that it has done so.

Manning did not fall on deaf ears. Some Alaskan public sector employers promptly began to argue in arbitration that *Manning* conclusively established that collectively bargained just cause provisions were limited to the handbook just cause definition adopted in *Braun*. One such employer eventually convinced a trial judge. In an unpublished May 1, 2001, order granting summary judgment, a superior court in Juneau held that a labor arbitrator "committed gross error by imposing her own definition of 'just cause' over that of the supreme court." Citing *Manning*, the trial court overturned the arbitrator's award in a case arising under a collective bargaining agreement, not an employee handbook. The court stated that *Manning* arose "in a collective bargaining context" and set *Braun* as the standard.[54] The case is currently on appeal before the Supreme Court of Alaska.

Casey's rejection of *Vaca,* followed by *Manning's* mixture of handbook and collective bargaining agreement case law, make it uncertain how the Alaska Supreme Court will resolve the appeal. But the Juneau trial court's identification of collectively bargained just cause provisions with *Baldwin's* unilaterally-implemented handbook just cause definition would seem to have a most ironic consequence. The Alaska Supreme Court's attempt in *Casey* to provide additional protection for a few union-represented public sector employees would result, very

strangely, in depriving *every* union-represented public sector employee of the most fundamental component of collectively bargained just cause: the right to be disciplined or discharged only for misbehavior that the employee actually committed. One obvious way to avoid that result would be for the Alaska Supreme Court to take the occasion as the U. S. Supreme Court did in *Major League Baseball Players Assn. v. Garvey*,[55] to reiterate the basic lesson of *Steelworkers* and simply refuse to countenance such substantive court review of a labor arbitration award. If the court is reluctant to disturb *Manning*, one distinction on which it could rest a finding is that employees in cases arising under *Casey* pursue their claim despite their union's decision *not* to arbitrate. The traditional deference to arbitration is most appropriate where the union that bargained the just cause provision seeks to enforce it in the arbitral forum.

The public policy-based, employer handbook just cause standards that have spread over most of the West Coast from *Thompson* and *Baldwin* bear some resemblance to some of the seven tests. Certainly the seven tests did not rest on considerations at all similar to the Washington court's public policy discussion in *Thompson*. Yet the apparent overlap is extremely unfortunate. The emphasis on adequacy of investigation, on employer fairness and objectivity, and particularly the requirement of substantial evidence could, it seems to us, seduce a state court into the conclusion that the developing law of employee handbook just cause is not really that much different after all from the common labor arbitral standard. As a review of the published cases shows beyond any doubt, nothing could be further from the truth. The most obvious difference between the two is that the Did he do it issue—which is quite beyond the reach of a court, jury or arbitrator in handbook just cause cases—is, about half the time, the first and dispositive issue for an arbitrator interpreting and applying the terms of a collective bargaining agreement.[56]

Implications for Labor-Management Practitioners and Neutrals

It is troubling to contemplate the impact on public sector labor arbitration in Alaska if the Alaska Supreme Court adopts the *Braun* standard as the general standard for collective bargaining just cause in a case squarely raising the issue.[57] In labor arbitration, the parties' briefs or oral arguments often cite one or more of the well-known articulations of just cause described earlier in this article,[58] but parties

do not often introduce evidence of which, if any, of those formulations they had in mind when they bargained their just cause provision. Application of the *Braun* handbook just cause definition would appear to be inapposite in the face of specific evidence that the parties considered and rejected bargaining proposals that would have set a standard closer to the *Braun* definition. Thus, at least in Alaska, parties to collective bargaining agreements will have to consider, in each case, whether bargaining history evidence is available on this point. Where no bargaining history is available, the best evidence of the parties' intent may be whether the just cause provision predates *Braun* and thus could not have been negotiated with *Braun* in mind.

Alternatively, if the *Braun* standard is to be applied to all negotiated public sector just cause provisions in Alaska, regardless of the parties' intent in negotiating those provisions, the foreseeable result is a vast change in the nature of the evidence adduced, as well as the tenor of the arbitration hearings themselves. Greater emphasis will be placed on issues such as the adequacy of the employer's investigation and the reasonableness of its belief that the misconduct occurred, the latter of which is likely to boil down to a question of good faith. An adequate investigation is sometimes part of the due process element of just cause in labor arbitration, but it is rarely the central point. It may come in through the back door, as a factor in assessing the remedy, as often as it comes through the front door. This is in part because, as noted above, the majority of labor arbitrators conduct a de novo review of whether the charged misconduct actually occurred. Thus the reasonableness of the employer's belief that misconduct occurred is rarely a hotly contested point. It may well be that investigators and managers will be more closely questioned about their background, assumptions, and attitudes if the reasonableness of their conclusions assumes a more central role.

Regardless of the outcome in Alaska, the impact on the law of public sector arbitration in Oregon and California is likely to be negligible, because the case law in those states explicitly distinguishes between collectively bargained just cause and handbook just cause. Washington may be a bit of a question mark because its courts have not specifically addressed that distinction. The fact that the courts in two states have been quite clear in making that distinction is no guarantee that advocates will not argue the handbook standard in collective bargain-

ing cases even in those states. *Cotran* has been argued to one of the arbitrator authors in both public and private sector arbitration cases in California; *Braun* has been argued to more than one of the arbitrator authors in Washington public sector cases.

Thus even if one anticipates that this distinction will survive outside Alaska, confusion over the two lines of cases is likely to be a fact of life for advocates and arbitrators alike. If the distinction does erode over time, unions will likely propose collective bargaining agreement language that explicitly gives arbitrators the authority to decide all factual issues relating to discipline as part of the just cause analysis.

Conclusion

Developments in Alaska bear watching, if for no other reason than that courts of different states tend to cite one another as authority, and advocates argue accordingly. The fact that the Alaska Supreme Court is now squarely presented with the issue it offhandedly addressed in *Manning* gives it an opportunity to realize that it mixed two distinct lines of cases and, one hopes, reconsider. In the meantime, arbitrators should not be surprised to find *Braun* and *Manning* cited to them in the public sector, even outside Alaska. Advocates in Oregon and California will find it easier than their peers in other West Coast states to determine what the applicable test is, simply because of the greater refinement of the law in this area.

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[1] Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 46 LRRM 2416 (1960); Steelworkers v. American Manufacturing Co., 323 US 564, 46 LRRM 2414 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960).

[2] Volz & Goggin, Elkouri & Elkouri, How Arbitration Works. Fifth Edition. (Washington, D.C.: Bureau of National Affairs, 1997. In Chapter One, "Arbitration and Its Setting."

[3] Prior to the advent of binding arbitration, unions commonly "saved up" discharge disputes, and if enough accumulated, struck in an effort to force the company to reinstate the employees. During World War II, when the need to prevent strikes and lockouts was paramount, the War Labor Board, composed of recognized neutral labor relations experts, was created to resolve labor contract disputes. At the end of the war, those neutrals formed the nucleus of the National Academy of Arbitrators (NAA). Regarding the War Labor Board, *see* Elkouri, pp. 17-18; regarding the NAA, *see* Elkouri, p. 26.

[4] Elkouri at 11-12. *See also*, St. Antoine, Ed., *The Common Law of the Workplace: The Views of Arbitrators, National Academy of Arbitrators* ("*The Common Law of the Workplace*"), BNA, Ch. 2, Carlton Snow, "Contract Interpretation," § 2.2, citing the Steelworkers Trilogy: "Collective bargaining agreements are not ordinary contracts." *See, e.g.,* 6A Arthur Corbin, Contracts Sec. 1421, p. 343.

[5] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, 40 LRRM 2113, 2120 (1957).

[6] Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 46 LRRM 2416, 2419 (1960).

[7] *See*, Elkouri, Ch. 3, "Scope of Labor Arbitration," citing Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 46 LRRM 2424 (1960). Public policy exceptions to the basic rule developed by the courts and by statute, and discussed in *Elkouri* at pp. 917-18, are not relevant to the instant discussion and will not be discussed here.

[8] United Steelworkers v. Misco, 484 U.S. 29, 38 (1987).

[9] Brand, Ed., Discipline and Discharge in Arbitration, American Bar Association Section of Labor and Employment Law, p. 54 (BNA, 1998).

[10] One notable exception is what is referred to as the "Barber" remedy in California public sector law. Public sector employers in California are required to provide an opportunity to respond to the charges orally or in writing after notice of the proposed discipline, the reasons for the discipline, and a copy of the charges and materials on which the proposed discipline is based. *See* Skelly v. State Personnel Board, 15 Cal. 3d 194, 539 P.2d 774 (1975). In Barber v. State Personnel Board, 18 Cal.3d 395 (1976), the Court held that, where the public sector employer later introduces evidence that was not previously provided in the Skelly hearing, the employee is entitled to back pay for the period between the discharge and the date a proper hearing is provided. The Supreme Court of Alaska provided similar rights for public employees covered by a collective bargaining agreement requiring that discharge be for cause, in Storrs v. Municipality of Anchorage, 721 P.2d 1146, 1151 (Alaska, 1986).

[11] Collectively bargained agreements often, but not always, include discipline/discharge provisions calling for "cause," "just cause," "good cause," "good and sufficient cause," and other similar formulations, all of which have often been interpreted by arbitrators to mean pretty much the same thing. For ease of reference, all these terms will be referred to as "just cause" provisions. Some parties have agreed to standards that make no reference to "cause" whatsoever. Such formulations have been source of debate over the applicable standard. That debate, however, will not be addressed here.

[12] For the past twenty years or so, however, some employers have attempted to negotiate limitations on an arbitrator's just cause authority. In some states, such as Oregon, public sector employers also have been successful in persuading

the legislature to impose limitations on a public sector labor arbitrator's just cause authority. *See* ORS 243.706(1)

[13] In fact, even parties who agree on a "permanent panel" of arbitrators accept the fact that the members of that panel may apply somewhat different, if similar, definitions.

[14] Discipline and Discharge in Arbitration, *supra*, at 31.

[15] Riley Stoker Corp., 7 LA 764 (Platt, 1947).

[16] Discipline and Discharge in Arbitration, pp. 29-92 and The Proceedings of the 42nd Annual Meeting of the NAA, Ch. 3, John E. Dunsford.

[17] 42 LA 555 (1964). The more fully developed version of Daugherty's "seven tests," as reproduced in Whirlpool Corp., 58 LA 421 (1972), is as follows:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the company's rule or managerial [order] reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

3. Did the company, *before* administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the company "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

It is worth reading the many exceptions and cautions contained in the opinion portion of the case, including the notes (2-5 per test) that accompany that version of the seven tests.

[18] Discipline and Discharge in Arbitration, pp. 34-35 .

[19] As Discipline and Discharge in Arbitration notes, at pp. 53-54, due process violations do not always warrant the reversal of disciplinary action, particularly where there has been no prejudice to the grievant. Indeed, federal sector arbitrators who hear discharge cases involving veterans *must* apply the due process violation "harmful error" rule established by the Merit Systems Protection Board.

[20] That subcomponent concerns the "just cause" element of progressive discipline.

[21] For example: In Los Angeles County MTA, 114 LA 71, 76 (2000, Ronald Hoh):

"The existence of "just cause" in such cases is generally recognized as encompassing two basic elements. First, the record before the arbitrator, taken as a whole, must support a finding that the employee is guilty of conduct for which discipline may be assessed under the parties' practices or the contract." In INS, 114 LA 872, 881 (2000, Russell C. Neas), a federal sector case: "It is axiomatic that in a disciplinary case the employer has the burden of proving the grievant guilty as charged. If the employer proves the grievant guilty, the burden then swings to the union to prove that the penalty was not appropriate under the circumstances." In R.R. Donnelly Printing, 114 LA 7 (2000, Mario F. Bognanno): ". . . a well-settled two-step analysis: first, whether the Grievant engaged in the alleged misconduct; and second, whether the discipline imposed is appropriate under the relevant circumstances."

[22] In Mrs. Baird's Bakeries, 114 LA 59, 63 (2000, Barry J. Baroni), the arbitrator noted that the contract "gives the Company the sole and exclusive discretion to determine the existence or nonexistence of facts which (form) the basis of management's decision. As very evident from prior arbitration awards of the parties, this language has existed in the Contract unchanged since the 1970's, and has been upheld by many arbitrators." In Margaretta School Dist., 114 LA 1057, 1062 (2000, Matthew M. Franckiewicz), the arbitrator discussed just cause generally and then concluded: "In the current case, however, my discretion is much more limited [than under the developed arbitral common law of "just cause"], and the arbitral common law of "just cause" is immaterial, since the parties have specified their own fairly exhaustive disciplinary code in the agreement." As another example, the collective bargaining agreement between Lawrence Livermore National Laboratory and the Protective Services Officers Association, which represents guards, permits discharge for "reasonable cause." The parties have agreed that language means simply that the termination decision must not be arbitrary, capricious, or discriminatory, a standard more akin to the employment discrimination law underlying the court decisions in the employee handbook cases discussed below. As might be expected, the laboratory's personnel policy for nonrepresented personnel mirrors the court-developed handbook standard by setting as the standard "whether the management action was reasonable under the circumstances."

[23] The characterization of "discipline or discharge" cases is, of course, approximate. For example, discipline or discharge cases that were resolved on preliminary procedural issues were not counted, and cases that involved both substantial contract interpretation disputes and discipline issues might or might not be counted depending on the reader's instant judgment that the case was more in the one camp or in the other.

[24] There were also five cases that specifically turned on whether or not the employee had reasonable prior notice of the work rule and two or three that turned on inadequacy of the investigation (specifically on the failure of the process to put the grievant in a position to make a timely response to the charges before

the memory of the events fades). Two of the reported cases were so chaotically written that the reader had no idea what, if anything, they could stand for.

[25] In Sheraton Waikiki Hotel, 114 LA 1559 (2000, Michael F. Nauyokas) (discharge for falsification of reports), the arbitrator took seven tests as the model and did that analysis seriatim. But he went beyond the "substantial evidence" issue (#4) and found the grievant did what he was discharged for (and admitted doing it but claimed his supervisor approved, which the arbitrator did not believe). (At 1599-1600) In Des Moines Ind. School Dist., 114 LA 1146 (2000, Rex H. Waint), the arbitrator upheld a discharge for bringing a gun to work. Although he noted he "has a long history of using the standards set by Arbitrator Carroll Dougherty" and went through the tests seriatim, the conclusion seemed to turn primarily on his observation that "Bringing a gun to work, either intentionally or [as the Union claimed] unintentionally, is one of the most serious violations in American Labor Relations." There was no substantial dispute that the grievant did what he had been discharged for.

[26] The Washington Supreme Court's partial explanation in Thompson (set out below) seems moderate and convincing.

[27] Due to limited time and a strong desire to limit the length of this article, we have made no attempt to research the full history of employee handbook "just cause" cases across the country.

[28] 281 Or 651, 576 P.2d 356 (1978).

[29] 281 Or at 656.

[30] 293 Or 96, 643 P.2d 1276 (1982).

[31] The parties in Simpson agreed that the employee's alleged conduct—threats of violence against other employees—would constitute just cause under the handbook, so only the purely factual determination was at issue.

[32] 293 Or at 100-101. If the court seems to be rather backing away from its earlier decision to fit these employee handbook cases squarely into the traditional contract mold, perhaps that was in response to the dissent, which described the rule under contract law as follows:

> "Ordinarily, if a contract gives one party a right to act with respect to the interests of an event or fulfillment of a condition, the happening or fulfillment is a necessary predicate to exercise of the right. That the party who acts does so because there is evidence which leads that party mistakenly, albeit in good faith, to believe that the event or condition has happened is not good enough. The party injured by the action will find redress in the courts for injury resulting from the action, and the other party will not be heard to say that it is irrelevant whether the event or condition actually happened."

Simpson left unchanged this definition of handbook "just cause" used by the trial court:

> "To constitute "just cause", the employer . . . must make a good faith determination of a sufficient cause for discharge based on facts reasonably

> believed to be true and not for any arbitrary, capricious, or illegal reason. It is not necessary that the alleged reason for discharge . . . actually in fact has occurred, but only that the evidence . . . existed which the employer reasonably believed in good faith after an investigation."

Three years after Simpson, the Oregon Court of Appeals considered an employee handbook case raising the question of the *meaning* of handbook just cause, which had not been specifically at issue in Simpson. The Court of Appeals again distinguished the question before it from cases seeking to enforce a collective bargaining agreement, noting that "the statutory and public policy considerations unique to the interpretation and enforcement of such agreements do not apply to this case." Fleming v. Kids and Kin Head Start, 71 Or. App. 718, 693 P.2d 1363, 1364 (1985). It held that the employer's good faith interpretation of the meaning of just cause in a handbook was not conclusive; instead, it held that determination was a judicial function. It did not, however, venture a definition of that phrase.

[33] 102 Wn.2d 219, 865 P.2d 1081 (1984).

[34] The sense of the Washington court's rejection of the contract model for handbook just cause cases becomes clear, perhaps, in Ford v. Trendwest Resorts Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002). In Ford, a majority of the court (four to three) holds that only nominal damages are available for the breach of an at-will employment contract because at-will employees have no expectation of future earnings. In contrast, public policy based handbook cases do not depend on that traditional contract measure of damages.

[35] 112 Wash. 127, 769 P.2d 298 (1989).

[36] 112 Wn.2d at 138. As in Simpson, there was no dispute in Thompson that the misbehavior alleged—patient abuse—would have satisfied the "just cause" restriction, so the only issue presented was whether the employer's purely factual determination, that the misbehavior occurred, was dispositive.

[37] 112 Wa2d at 139 n8, 769 P.2d 298, 304 (1989).

[38] 816 P2d 140 (Alaska, 1991).

[39] 17 Cal. 4th 93; 69 Cal.Rptr. 2d 900; 948 P.2d 412 (1998).

[40] The jury found the plaintiff had not engaged in the charged behavior and awarded $1.78 million. Cotran was a particularly interesting case for a labor arbitration practitioner because, had it arisen in the labor arbitration venue, it might have invited a "split the baby" result. Thus, when initially confronted with the accusations, the plaintiff offered no information. Only at trial did he claim he had consensual sexual relationships with both women, offer documentary evidence and testimony to buttress that claim, and suggest their assertion of sexual harassment was because they were angry at him for "two-timing" them and to get a pay raise. Even if an arbitrator credited his version of events, the fact that he did not offer this explanation at the time he was interviewed would have argued strongly for reinstatement without back pay because he contributed to his own losses by not coming forward with the information that

would have given the employer the full picture.

[41] The court noted that Nevada had followed Simpson in Southwest Gas v. Vargas, 901 P.2d 693 (1995), and New Mexico had followed Baldwin in Kestenbaum v. Penzoil Co, 766 P.2d 280 (1988).

[42] Cotran v. Rollins Hudig Hall Intern., Inc. 17 Cal. 4th 93, 109, 948 P.l2d at 422-423 (1993). Justice Mosk concurred specifically to emphasize what the court was *not* doing in Cotran. His third point was that:

> Nothing in the majority opinion is intended to alter the different manner in which the term "good cause" is construed by arbitrators pursuant to a collective bargaining agreement between unions and employers. In such agreements the contract is express, the remedies more limited, the role of the arbitrator in policing collective bargaining agreements well established both contractually and customarily, and the contractual language supplemented by a well developed body of arbitration law concerning the meaning of "good cause" that the parties can be presumed to be aware of at the time they entered the agreement. 948 P.2d at 424.

He reiterated the majority was applying its "good cause" standard in the context of "implied contracts between employers and individual employees." *Id.*

[43] 853 P.2d 1120, 1125 (Alaska, 1993).

[44] Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842, 64 LRRM 2369 (1967). In fact, the development of the DFR doctrine usually turns on the question of whether or not an employee should be allowed to sue the employer directly in various specific situations.

[45] The success of that separation can be seen from the pages of past NAA Proceedings. Although article after article addresses the application in arbitration of various individual employee protections—ADA, Title 7—not a one that we can recall considers the role of collectively bargained language in individual employee direct litigation against employers.

[46] 670 P.2d 1133, 115 LRRM 5187 (1983).

[47] 670 P.2d at 1138. Strangely, the court cites Oregon's Simpson decision, in "*see also*" form, as authority here. But the Oregon court had dealt with the issue of property rights to public sector employment in an entirely different line of cases (see Tupper v. Fairview State Hospital, 276 Or 657, 556 P2d 1340 (1976)) Simpson was a private sector handbook case, and the Oregon Court took pains to distinguish handbook just cause from collectively bargained just cause.

[48] Alaska's public sector DFR rules are substantially different from the private sector rules, due to Casey. The court has recognized that there is reduced potential for damages in an Alaska DFR case because the union does not have "gatekeeper" responsibility. IBEW v. Lindgran, 985 P.2d 451, 162 LRRM 2917, 139 Lab. Cas. (CCH) P58,745 (1999). *See also* Anchorage Police Department Employees Assn. v. Feichtinger, 994 P2d 376, 163 LRRM 2422, 139 Lab. Cas. (CCH) P58,807 (1999). At least one of the Alaska Supreme Court justices has

had second thoughts about the rejection of Vaca: (see, State of Alaska v. Beard, 960 P.2d1, 158 LRRM 2538 (1998), Rabinowitz, concurring), but the Casey decision remains firmly in place.

[49] *See* Grant v. Anchorage Police Department, 20 P.3d 553, 555, 143 Lab. Cas. P59,249 (CCH) (2001), which notes that the collective bargaining agreement allowed an employee to pursue a termination grievance individually within three days of the union's election not to do so. Although it might appear from the cited portion of Casey that that holding is limited to "property value" cases such as discharge, the Alaska Court has applied Casey in a seniority/assignment dispute. The Court noted, however, that the employer in that case had failed to bring up the issue of Casey's limitation "to significant employment actions, such as termination." Larsen v. Municipality of Anchorage, 993 P.2d 428, 163 LRRM 2273, 140 Lab. Cas. (CCH) P58,853 (1999).

[50] Casey is such a well-settled part of Alaska public sector labor and employment law that the court in Manning does not even explain why the plaintiff could undertake such a direct action against his ex-employer without the accompanying DFR action which would be required almost everywhere else.

[51] The employer had also convinced the trial court that the action was an untimely appeal from the decision of a state administrative agency, *i.e.*, employer itself, and Mr. Manning appealed that dispositive ruling. The Supreme Court held that the agency's notice of final action had been faulty and overturned the trial court in that respect.

[52] Braun, 816 P.2d at 142 (quoting Baldwin, 769 P.2d at 304), footnote 853 P.2d at 1125:

[53] Baldwin, 769 P.2d at 303-304, (emphasis not in the original).

[54] The trial court also cited an unpublished Ninth Circuit case as authority that, under Manning, the Braun standard "is applicable to more than implied contract cases."

[55] 532 U.S. 504, 167 LRRM 2134 (2001).

[56] 114 LA includes one employee handbook case in which the arbitrator forthrightly made an independent Did he do it determination. Anywhere on the West Coast, at least, such a determination would appear to be an error of law absent language in the handbook giving the arbitrator that authority.

[57] At least in cases involving parties subject to the jurisdiction of the National Labor Relations Board, there is a good argument that a state judicial redefinition of the meaning of just cause is pre-empted by the National Labor Relations Act. It is thus somewhat less likely that arbitration in the private sector will be affected.

[58] For example, in appealing the unpublished Superior Court summary judgment previously mentioned, the union's brief cites a number of factors bearing on the parties' intent regarding the meaning of their just cause provision. Thus, according to the union's brief, beginning in 1990, the employer maintained

a "Supervisor's Guide to Employee Discipline" which quoted the seven tests verbatim as "the basis for judging whether management has acted fairly in imposing disciplinary action." It also argued the seven tests to a variety of arbitrators. In 1999 negotiations, it proposed to modify the language to require arbitrators' awards to be "consistent with Alaska law," but withdrew that proposal. Such bargaining and past practice evidence on this subject is rarely introduced in arbitration, unless the parties bargained a standard that limits the arbitrator to something other than one of the traditional formulations.

Use of Progressive Discipline and Other Considerations in ADA Cases

William A. Lang

The general idea of this article originated from deliberations in two recent unpublished arbitration awards involving disabled employees who were progressively disciplined and eventually discharged by their employers. In each case, the application of corrective discipline to disabled employees who were no longer capable of performing the duties of their position raised arbiter concern on the desirability of this approach. Should employers follow a progressive discipline approach designed to correct performance when it appears futile to do so or is there another alternative that may be more in keeping with their responsibilities under the Americans with Disabilities Act of 1990 (ADA).[1] This article examines how employers might deal with disabled employees in similar circumstances under their just cause provisions.

In addition, ADA related issues arose on the extent of the employer's obligation to determine the severity of the alleged disability and to explore what other accommodations would be suitable if the initial accommodations do not assist the disabled employee to meet employer expectations. Similarly, concerns were expressed on the *employee's* duty to provide information on what accommodations would be necessary and his responsibility to cooperate with implementing the recommended accommodations. Finally, should the arbitrator consider the ADA as a factor in just cause when, as in one situation, the union does not raise any ADA defenses. Before we examine these questions, however, it may assist our considerations to briefly review the employment and discipline of disabled employees over the last several decades.

Historic Perspective On The Discipline Of Disabled Employees

The right of disabled people to hold jobs they can perform was a societal value long before Congress enacted Title 1 of the ADA and its predecessor Rehabilitation Act of 1973.[2] It was not unusual that arbitrators, in evaluating the discipline of disabled employees under the typical just cause provisions, concentrated on whether the employee could perform the functions of the position. In 1969, in *J.R. Simplot*

Co., Arbitrator Alex J. Simon upheld the demotion of a partially blind employee for safety reasons when the company officials became aware of his disability.[3] In upholding the demotion, Arbitrator Simon cited the 1965 Report of the President's Committee on Employment of the Physically Handicapped that recommended that the same standards be used in evaluating a disabled employee's qualifications and ability to do the job under consideration that the company applied to other employees. Arbitrator Simon observed that industry had become more receptive to hiring and retaining disabled employees and that safety of the workplace should not be an issue because disabled employees who are properly placed are more efficient than normal-bodied employees. Simon thought that the disabled were entitled to prove their merit and should be given the opportunity to fill the position if they were willing and qualified. The arbitrator urged that jobs should be analyzed and limitations placed (in case of disabled employees) for safety reasons.[4]

Prior to the enactment of the ADA, arbitrators also considered accommodating a person's disability in the context of just cause.[5] In *Tenneco Oil Co.*, where an employee was severely injured by a fire at a refinery, the company had accepted medical recommendations of light duty in a dust free environment away from direct sunlight. When the employee returned to his normal job, he suffered extreme anxiety and was unable to perform his duties.[6] His psychiatrist recommended to the company that the employee be given a month's leave of absence to cope with his anxiety. The company, however, ignored the psychiatrist's recommended accommodation and terminated the employee for absenteeism. The arbitrator reinstated the employee, holding that the company failed to prove discharge was for just cause in view of the psychiatrist's recommended accommodation. Arbitrators have returned employees back to work where the evidence showed that the disabled employee could do the work.[7]

Other arbitrators arrived at a similar result when companies attempted to terminate disabled employees who had satisfactorily performed their jobs for a number of years. Employers who hired disabled employees were not allowed to later apply a higher standard to the job and terminate the employees because the employees were not able to meet higher standards.[8]

Post-ADA Discipline Of Disabled Employees

With the enactment of the ADA and ORS 659.425 in Oregon, disabled workers have been given greater protections and their rights have been more clearly defined.[9] The purpose of ADA is broad and remedial. The basic rules of the relevant portions of the act can be summarized in one sentence:

> An employer dealing with an individual with a known disability who is qualified for a job and capable of performing its essential functions with or without reasonable accommodation cannot discriminate against and must provide reasonable accommodation unless undue hardship would result or a direct threat is established.[10]

The first hurdle in ADA cases is that the employer must be made aware that the employee is disabled, or the disability must be obvious.[11] Where the disability is not obvious, the entire burden is on the employee to make the disability known.[12] An employee is determined to be disabled under the ADA when the person has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or is regarded as having such impairment.

The ADA applies to any recognized physical or mental or psychological impairment that substantially limits one or more "major life" activities.[13] Major life activities are those basic activities that an average person can perform with little difficulty such as learning, working, performing manual tasks, and using the senses. The major life activity that may be the most directly affected by a number of mental impairments is the ability to perform a particular job.[14] In *Davidson v. Midelfort Clinic Ltd.*, the court held that a woman who suffered from attention disorder deficit was not limited in a major life activity because she was limited in only one aspect of her job.[15]

Most recently the U.S. Supreme Court redefined a major life activity in *Toyota Motor Manufacturing v. Williams* to include an inability to perform a variety of tasks *central to most people's daily life* and not whether an employee was unable to perform tasks associated with a specific job.[16] This case dealt with an assembly line worker who had developed carpel tunnel syndrome and could no longer perform her duties, even after the company's good faith efforts over several years to accommodate her condition. The court noted that the ADA applied to not only job discrimination but also discrimination in public transport

and public accommodations. Therefore, the court concluded that to determine whether the claimant was impaired in a major life activity such as performing manual tasks, the employee must also show that he or she is not only unable to perform tasks in a broad range of jobs instead of a specific job but also must be unable to perform such other nonjob related manual tasks such as household chores, personal grooming, cooking, and gardening. In other words, the court enlarged the test of whether a person is disabled in performing not only tasks associated with a broad range of jobs but also tasks of central importance to daily life and not necessarily job related. The new test appears to make it more difficult for claimants to prove a disability under the ADA. The court justified the broader application of the test on the basis that the ADA also applied to non-job related activities.

After determining that they meet the definition of "disabled," employees must show that they are capable of performing the essential duties of the job with or without reasonable accommodations.[17] Reasonable accommodation is a key concept in the employment provisions of the ADA. An accommodation is deemed reasonable if it allows employees to fulfil the essential aspects of the job without hardship to the employer or if it does not constitute a direct threat to the workplace.[18] If the employee still cannot perform the essential functions of the position after reasonable accommodations, the employee may be placed in another vacant position in which he or she may be able to perform or be terminated. In *Bolstein v. Reich*, a US Department of Labor attorney was found not to be a "qualified handicapped individual" because no reasonable accommodation could enable him to function unsupervised. The court ruled that he was properly demoted to a position where he would be properly supervised.[19]

Use Of Progressive Discipline In Two Recent Cases

Generally, when an employee fails to perform a job in a satisfactory manner, the employer embarks on progressive discipline in order to correct the employee's deficiencies. It is during the process of progressive discipline that the employer may be informed, as in the two hypothetical examples that will be discussed, that the disciplined employee is suffering from a handicap or disability that is inhibiting the proper performance of the functions of the position. At this point, the employer must assess whether the disability is one recognized as being

within the purview of the ADA (or ORS 659.425) and, if so, take appropriate actions to accommodate the employee while continuing progressive discipline. The union may challenge the discipline by filing a grievance invoking the just cause provisions of the parties' collective bargaining provisions either during the progressive discipline process or after the employee is terminated. The union may question the employer's failure to properly accommodate the disability or complain of an improper evaluation, insufficient training, supervisory bias, or some other employer failing. The employee may later pursue remedies in alternative forums such as the EEOC or court while processing the grievance. The arbitrator is usually not aware of those actions.

As earlier noted, deliberations in two recent unpublished cases raised arbitrator concerns over the use of progressive discipline and the extent of the employer's obligations under the ADA. I will now examine these cases, which will be reconstituted into hypothetical examples to protect the privacy of the employers and individuals involved.

The Office Assistant

The first hypothetical case involved a part-time office assistant whose duties included typing and filing letters and other documents, mailing, photocopying, using a computer, and setting up meeting rooms. An acting supervisor became aware that the employee, who had more than 15 years of satisfactory service, was having difficulties typing accurately. The supervisor conducted typing tests to confirm her suspicion that the employee was not doing her job correctly. When the employee failed a written test on her job knowledge, the employer gave her a list of expectations. When the employee failed to meet expectation, the supervisor pursued progressive discipline to correct the employee's deficiencies.

After the second reprimand, the employee's attorney informed the employer by letter that the employee had a mental disability and was in the process of having her medications adjusted. The attorney enclosed a copy of a letter from the employee's physician confirming her disability.[20] The attorney requested ADA accommodations on taking the tests measuring her job skills, stating that the stress of the tests may contribute to her failures. The employer, apparently acting as if she were disabled, accepted the accommodations and provided

additional training. The employee continued to fail expectations. The employer then suspended the employee and later terminated her when she failed again to meet the employer's standard of typing accuracy. The union challenged her dismissal under the labor agreement's just cause provisions, contending that the typing tests were administered improperly.

The arbitrator ruled that the tests were indeed improperly scored but also noted that it should have been clear to supervisors long before the employee's discharge that something was seriously amiss when she seemed unable to do the job she had been doing for 15 years, especially after having been informed by her attorney and doctor that she was disabled under the ADA. The arbitrator held that the determined application of progressive discipline in this situation was futile in the face of mounting evidence that the employee would never in the prevailing circumstances meet the typing expectations of her supervisors.

Observing that the employer never contacted the employee's doctor to determine the extent of her disability or what other accommodations could be made, the arbitrator concluded that the employer should have taken steps to ascertain the severity and duration of her disability and whether her problems may have been complicated by an improper dosage of medication.

Even though the employee had other responsibilities and worked part-time, management insisted that typing letters was her primary duty. The employer officials testified they did not consider restructuring her job or placing her in another one because she already occupied an entry level position. The arbitrator thought otherwise, believing it necessary to determine in the event she could no longer type letters accurately whether her position could be restructured to accommodate her disability by assigning her primarily nontyping duties such as filing, photocopying or distributing mail, or whether she could be placed in a different position such as mail clerk. Because of these failures and the invalid tests, the arbitrator reinstated her with back pay, ordering the employer to ascertain the extent of her disability and consider restructuring her job or place her in another compatible with her skills.

The Section Coordinator

The second hypothetical case involved a section coordinator

employed by a health department, whose essential duties included evaluating evidence from health inspectors' reports and writing quasilegal documents to initiate the correction of violations of agency regulations by restaurants. The documents notified code violators of alleged facts and other circumstances supporting a complaint that the restaurant had violated specific health rules and informed the violator of assessed monetary penalties. When the employee's supervisor retired, he prepared a performance evaluation that rated the coordinator deficient in case preparation and management.

Even though the section coordinator had more than 10 years satisfactory service, he failed to prepare documents properly, erroneously citing rules alleged to have been violated and assessing the wrong penalties, frequently mis-stating facts and writing redundant or nonsensical sentences. The coordinator also showed poor work habits with frequent tardiness, unaccountable absences during work hours, and early departures.

The new supervisor and the section coordinator jointly prepared a work improvement plan, which was required under personnel rules. When the section coordinator's work failed to improve, the supervisor obtained Human Resource permission to extend the work plan another six months. The coordinator's continued poor performance of his duties compelled the supervisor to withhold his annual merit step increase. When the coordinator again failed to make any significant progress, his supervisor initiated progressive discipline by reprimanding him. At that point, the coordinator informed his supervisor that he suffered from apraxia, a mental disability, and asked to be accommodated.[21] The supervisor asked for details of what accommodations would be needed. Four months later the coordinator gave his supervisor letters from his doctor and his attorney, both of whom recommended accommodations of a quiet office removed from traffic, five minute breaks each hour or half hour, and an extended lunch. The supervisor began a dialogue with the coordinator on how to tailor his work schedule to meet the accommodations, but the employee seemed reluctant to discuss them. A quiet office was located a month later, and he was moved into it. The employee continued, however, to procrastinate on the implementation of a work schedule for three more months. Meanwhile, his work and attendance continued to be unsatisfactory, and he was again reprimanded and several months later suspended and eventually discharged.

The union contested the section coordinator's termination, arguing that the employer failed to accommodate him in a timely fashion or speak with the employee or his doctor on what other appropriate accommodations might be necessary.

The arbitrator rejected the union's arguments. The arbitrator upheld his discharge because the employee failed to correct his attendance violations and was unable to perform the duties of his position. The arbitrator found that the employee had a duty to cooperate with the accommodations offered. Because the employee failed to cooperate with implementing the initial recommended accommodations, he was not in the position to claim that more accommodations should be considered.

Over the two years of supervisor scrutiny, it was clear that the coordinator failed to make any real progress in correcting either his work deficiencies or his attendance problems. His supervisor expressed concern on several occasions, even before he knew of the employee's disability, that he lacked the analytical skill necessary to perform his duties. The arbitrator concluded from the record that the employee would be unable to correct his deficiencies regardless of progressive discipline or the accommodations made. In both this case and the preceding case, the arbitrator became concerned that the employer was doggedly pursuing progressive discipline beyond the point where it was obvious that the grievants could not perform the duties expected.

Use Of Progressive Discipline

Progressive discipline is specifically designed to afford an employee a fair opportunity to improve his or her performance in conformance with the employer's expectations.[22] When reviewing an employer's decision to discharge an employee, arbitrators are more likely to sustain the discharge when, in a "last straw" situation, it is preceded by a positive form of progressive discipline, such as a written warning or disciplinary suspension.[23] A review of the cases reported in *Elkouri & Elkouri* covering discharges for unsatisfactory job performance revealed only two cases of those reported since 1992 involved the employee's inability to do the job.[24] In *Phillips Petroleum Co.*, an employee was terminated because he failed to make reasonable progress during his probation and was thought to be unsuitable to work in a chemical plant.[25] Another employee was returned to his

former position when he was unable to perform in the job of press operator.[26] The other cases reporting terminations for unsatisfactory job performance covered a variety of situations, from employee negligence to low productivity. I will limit my considerations to those instances where the employee is unable to perform the functions of the job and will not consider terminations of employees rule violations unless they are concurrent with the inability to handle the responsibilities of the position.

In Non-ADA Cases

Incompetence vs. Disability

In a majority of cases where employees do not perform the duties of a job, arbitrators have upheld the employer's use of progressive discipline through discharge.[27] There are cases, however, where the progressive discipline of a normal-bodied employee who is incapable of performing the duties has been questioned.[28] These cases make a distinction between employees who are incompetent to do a job and those whose performance is inadequate due to a disability. In *Kerr-McGee Refining Co.*, Arbitrator A. Dale Allen, Jr., thought it irrelevant that the company did not follow progressive discipline steps because the discharge was not disciplinary in nature. Repeated trials and training over a period of a year failed to increase the employee's level of competence to acceptable standards.[29] In that case, the employee held a boardman position in a crude oil unit of a refinery where an error could have catastrophic consequences. Arbitrator Allen observed that it was axiomatic that employees perform the job for which they are hired. He thought the important factor in "incompetency" discharge cases was whether the employee was provided an opportunity to rehabilitate with further training. Stating it was not proper to proceed with progressive discipline because:

> Incompetence does not fit in the same mold as traditional forms of misbehavior necessitating discipline. One of the purposes of progressive discipline is to provide adequate warning to employees who are headed for discharge. Herein, the grievant was repeatedly warned that he needed to raise his level of competence if he was to keep his job. The decision was reasonable, nondiscriminatory and for just cause.[30]

Arbitrator John F. Sembower reached the same conclusion in *Northern Telecom Inc.*[31] In that case, the company tried to accommodate a 61-year-old woman who had a wonderful attitude and attendance by

extending her trial period. Later she was transferred to a job in which she did not use machinery, but she was eventually terminated for low productivity. Arbitrator Sembower upheld her discharge concluding he could not reinstate her for work that appeared so unsuited to her. Sembower observed:

> The term "discharge" is notably inappropriate to situations such as this because of its common overtones of wrongdoing. An employee such as this deserves anything but such opprobrium, considering the earnest and conscientious efforts she made albeit unsuccessful to measure up.[32]

As a practical matter, one may wonder if there is any real difference for a discharged employee's future employment opportunities if the employee is terminated because of rule violations or administratively separated for being unable to perform the duties of a position or allowed to resign. In the latter case, the employee, along with the former employer, can honestly inform prospective employers that he or she left the position because it wasn't his or her "cup of tea," and not because of wrongdoing. The difference would also affect a person's eligibility for unemployment benefits. Moreover, there would be nothing in the person's employment history that would imply past disciplinary problems.

In ADA Cases

In other cases involving unqualified disabled employees, the use of progressive discipline while the employer attempts to accommodate the disability has also been questioned. In *Frito-Lay*, the arbitrator found that if it becomes apparent that the disabled employee's failure to perform cannot be corrected through accommodations, the employer should handle the situation as a nondisciplinary office matter rather than continue with progressive discipline.[33] In that case, the arbitrator held that the discharge of a employee with a manic depressive disorder that rendered him unable to perform his job should have been handled as a nondisciplinary discharge because a permanent record of disciplinary discharge is arbitrary under the circumstances and unfairly disfavorable to his record of employment. The arbitrator concluded that because performance deficiencies are beyond the grievant's control, he cannot be expected to improve through the use of the disciplinary approach. The termination was changed to a nondisciplinary discharge.[34]

Other Considerations

Application of ADA When Neither Party Argues the ADA

In the first of our hypothetical cases (the office assistant), the employer, in post-hearing arguments, contended that the arbitrator should not apply the ADA to the facts of the case because there was not sufficient evidence that the office assistant was disabled and that she shouldn't be allowed accommodation under the ADA. The arbitrator rejected this argument because the record showed that she suffered from a disability that was detailed in letters to the employer. The arbitrator thought something was amiss which prevented her from doing a job she had performed for 15 years. The arbitrator concluded that the evidence raised a presumption of a mental impairment, which the employer failed to rebut.

The union did not raise ADA defenses but instead focused on the validity of the performance tests. The failure to raise ADA defenses arguments presented a dilemma because under the U.S. Supreme Court's *Enterprise Wheel* doctrine, the arbitrator is confined to applying and interpreting the collective bargaining agreement and should not consider external law. While it appeared that the ADA aspect of the case may be adjudicated in another forum, the arbitrator could not be certain it would be. Moreover, he could not ignore the ADA aspect because it was obvious that the office assistant's disability greatly affected her job performance. While most arbitrators agree, however, that in the case of a loosely formulated contract provision such as just cause, they may consider all relevant factors including relevant law.[35] In *Thermo King Corp.,* Arbitrator Jonathan Dworkin held that as part of just cause, an arbitrator is empowered to determine whether the penalty was just, and it would be appropriate to look at the ADA even if the labor agreement said nothing about the rights of handicapped workers.[36] In *Lucas Western Inc.*, the employer objected to the application of the California Workers' Compensation statute, arguing that the arbitrator's authority is limited to interpreting the contract.[37] The arbitrator ruled that he was not applying the law but merely noting that discrimination against injured workers is against the public policy and thus could be considered as a factor in determining just cause. The arbitrator in the hypothetical case, therefore, concluded, based on this precedent, that he had the authority to consider the ADA as a part of just cause.

ADA Obligations to Solicit More Information

In both hypothetical cases, substantial questions arose on the employer's obligation to obtain additional information on the nature of the disability and the need for accommodations beyond the initial recommendations. Initially, an employee has an obligation to inform the employer of a handicapping disability and what accommodations would be necessary to perform the duties to the employer's satisfaction.[38] After the accommodations are in place, the employer must assess whether the accommodations are sufficient to enable an otherwise qualified employee to successfully perform the functions of the position. If the employee still cannot do the job, the employer has an obligation to consider further accommodations.

There is substantial precedent holding that the employer must enter into an interactive process to determine what reasonable accommodations are appropriate in accordance with 29 CFR 1630.9. The Ninth Circuit Court addressed this in *Barnett v. US Air Inc.* when it stated that the interactive process:

> [R]equires the employer to analyze the job and identify essential functions, consult with the disabled employee to ascertain limitations imposed by disability, identify potential accommodations, assess their effectiveness at enabling the employee to perform essential job functions and implement the most appropriate accommodation giving consideration to employee preference. The interactive process requires communication and good faith exploration between employer and employee.[39]

The *Barnett* case dealt with an airline employee who had a back injury and required accommodation for lifting heavy loads. The employer delayed responding to his request for five months and then offered a forklift without any discussion with the employee regarding what he may need.[40]

Failure of Disabled Employee to Accept Accommodations

Our second hypothetical case (the section coordinator) presented a different set of problems. It is distinguished from the first case because the employee failed to cooperate with implementing the accommodations. His continuing problems with attendance combined with his procrastination made consideration of other accommodations unnecessary. An employee who fails to accept available reasonable accom-

modations cannot make a prima facie case of the employer's failure to accommodate him or argue other accommodations should have been provided.[41]

The use of progressive discipline in cases where the accommodations do not enable the disabled employee to correct the deficiency is appropriate when the employee has other nondisability related deficiencies. If the employee cannot achieve satisfactory performance after reasonable accommodation, the employee may be disciplined or discharged.[42]

Conclusion

Discharge has a catastrophic effect on the average employee. The effect on a disabled employee is even greater. In view of the harsh fact that the disabled are seriously disadvantaged in seeking employment, the employer should not unnecessarily put derogatory information in the employee's record of employment. The application of progressive discipline unfairly disadvantages the employee's record of employment. When it becomes apparent that no amount of accommodation will correct a deficiency that is the result of a disability, repeated discipline is inappropriate for an employee attempting to correct deficiencies that are beyond his or her capabilities.

It is clear in the two hypothetical cases discussed above that the employer reached a point in the application of progressive discipline where it was evident that repeated discipline would be futile. At this point, the employer should explore other approaches in consultation with the employee's representatives and doctor. In the office assistant case, it was obvious an employee was not performing duties that she had done for 15 years. The employer should have taken the steps to ascertain the limitations of her disability, its duration, and what other accommodations should be taken. The employer in the section coordinator case was faced with a different set of circumstances. Even though it was evident that after two years the employee was not able to do the job, ending progressive discipline would not have been appropriate because the coordinator had not corrected his attendance problems and had failed to cooperate on implementing the initial accommodations. In this kind of mixed motive case the employer would do best to separate the discipline-for-rule infractions from the ADA aspects. In other words, the employer would continue to apply progressive discipline to correct the attendance problem and meet with representatives of the employee to discuss the employee's procrastination

and concerns that the accommodations were not achieving the desired results. If the attendance problem continues, the employee would be terminated for that reason. If the attendance is corrected, the parties could then decide how they could, if possible, accommodate. It is important when the employer reaches the realization that the progressive discipline is futile that a less threatening and more constructive approach of dialoguing or mediation be attempted. This would avoid the costs of arbitration and may result in the placement of employees in positions more compatible with their skills.

A further commentary on the ironic outcome of the two cases may be appropriate. The two hypothetical cases demonstrate that arbitration is a strange undertaking. Consider that in the first hypothetical case, wherein the parties argued over the validity of the tests, the case was decided on ADA grounds, whereas the second case was decided in principle part on non-ADA grounds even though the parties argued ADA principles. The first case screamed for justice. In considering the second case, the arbitrator was not certain of its outcome until he wrote the last page. It was at that point that the arbitrator realized that the section coordinator clearly could not handle the job and could not be returned to work with his attendance problems.

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[1] 42 U.S.C. §§ 12101-12117, 12201-12213 (1994).

[2] 29 U.S.C. §§ 791, 793-94; Oregon law also prohibits discrimination of disabled persons by their employers under ORS 659.425.

[3] 53 LA 1181, 1188-9 (1969).

[4] For a general discussion of the fundamental requirements for the successful incorporation of disabled people into companies' workforce *See also* Glass Containers Mfrs. Inst., 66-3 ARB 8999 (Dworkin, 1966).

[5] *See* Volz & Goggin, *Elkouri & Elkouri, How Arbitration Works* (Fifth Edition, BNA 1997) at pages 792ff.

[6] 83 LA 1099, 1104 (King, 1984).

[7] *See* Farm Fresh Catfish Co., 91 LA 721 (Nickolas, 1988) where hypertension and diabetes were not shown to prevent the worker from doing the job.

[8] American Optical Co., 42 LA 818 (Teple, 1964) holding a person with cerebral palsy with 17 years satisfactory service may not be terminated for failing to meet new production standards that were not negotiated. United Gas Improvement Co., 40 LA 799 (Lande, 1963) reinstating an employee with poor eyesight who had performed satisfactorily for 11 years, even though he was determined

to be "industrially blind."

[9] A recent U.S. Supreme Court decision held that the ADA did not apply to state actions. Board of Trustees of the University of Alabama v. Garrett, 99-1240, February 21, 2001. For an excellent analysis of both the ADA and the application of ORS 659.425, which in many respects is similar to the ADA, *see* Gene Mechanic and Josephine Hawthorne, *LERC Labor Relations Policies and Practices Manual*, *An Overview: The American With Disabilities Act* Issue No. 2, (1992).

[10] 9 The Labor Lawyer 531 (1993).

[11] Walsted v. Woodbury County Iowa, 11 AD Cases 20 (2000).

[12] Landefeld v. Marion General Hospital Inc., 994 F2d 1178 (Sixth Cir. 1993) holding there is no discrimination where there is no evidence that employer knew of disability.

[13] The act, of course, does not cover all mental impairments. Among the specifically excluded disabilities are the current illegal use of drugs (a recovering drug addict however was found to be disabled), compulsive gambling, kleptomania, pyromania, and various sexual behavioral disorders.

[14] Psychiatry recognizes a number of classifications, including developmental disorders, brain injury, thought disorders (e.g. psychosis), mood disorders (e.g. manic-depressive illness), anxiety disorders, and personality disorders. Courts and administrators generally consult the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, known as DSM-IV.

[15] 8 AD Cases 77 (1998).

[16] No. 00-1089, January 8, 2002, 12 AD Cases 993.

[17] Lutter v. Fowler, 1 AD Cases 861 (1986).

[18] Ward v. Massachusetts Health Research Institute Inc., 10 AD Cases (2000). *See also* Amir v. St. Louis University, 184 F3d 1017, 1028 (Eighth Cir., 1999). Undue hardship is measured by excessive cost or undue disruption of the work place. Barth v. Gelb, 2 F3d 1180, 1186 (D.C. Cir, 1993).

[19] 3 AD 1761 (1995).

[20] The specific nature of the disability was not disclosed in the arbitration hearing because the physician's letter was not entered into evidence.

[21] Apraxia is a neurological disorder in which the person has difficulty in bringing ideas together and in writing, and is easily distracted.

[22] Steelworkers v. Enterprise Wheel and Car Corp., 80 S. Ct. 1358, 46 LRRM 2423 (1960).

[23] Interstate Brands Corp., 73 LA 771, 776 (Hamby, 1979).

[24] *See* Volz & Goggin, *Elkouri & Elkouri, How Arbitration Works* (Fifth Edition, BNA, 1997) at page 956.

[25] 100 LA 684 (Weisenberger, 1993).

[26] Thoroughbred Containers, 99 LA 400 (Volz, 1992).

[27] *See* Volz & Goggin, *Elkouri & Elkouri, How Arbitration Works* (Fifth Edition, BNA, 1997) at pages 956ff.

[28] See Shoonhoven, Fairweather's Practice and Procedure in Labor Arbitration (Third Edition, BNA, 1973) at page 230.

[29] 88-2 ARB 8330 (Allen, 1988).

[30] 88-2 ARB 8330 at 4686.

[31] 65 LA 405 (Sembower, 1975).

[32] 65 LA 408.

[33] 103 LA 993 (Bittel, 1994).

[34] *See also* Florsheim Shoe Co., 74 LA 705 (Roberts, 1980) holding that there is a class of nonculpable reasons that will ultimately support discharge, not because the employee is guilty of wrongdoing but rather because the employment relationship is impaired.

[35] *See* Volz & Goggin, *Elkouri & Elkouri, How Arbitration Works* (Fifth Edition, BNA, 1997) at pages 524ff.

[36] 102 LA 612 (Dworkin, 1993).

[37] 91 LA 1272 (Alleyne, 1988).

[38] Austin State Hospital v. Kitchen, 5 AD Cases 1275 (1995).

[39] 228 F3d, 1105, 1112 (Ninth Cir. 2000).

[40] *See also* Taylor v. Phoenixville School District, 9 AD Cases 1187 (1999), which held that an employer with notice of employee's disability and desire for accommodation bears the burden of requesting whatever additional information that it needs concerning the disability as disabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal details of medical records as could be embarrassing or exacerbate work place prejudice. In Iowa Electric Light & Power Co., 100 LA 393 (Pelofsky, 1993), the arbitrator in upholding a nondisciplinary discharge thought that the employer had an obligation to determine the nature of the employee's learning disability and to tailor its instruction to that disability.

[41] Hankins v. Gap, 5 AD Cases 924 (1996).

[42] Arneson v. Hecckler, 1 AD Cases 1497 (1989).

The Continuing Public Policy Exception Conundrum

Nancy Hungerford

In the aftermath of the 1995 legislative session, the sponsors and proponents of SB 750 anticipated that its passage would restore some balance to the Public Employee Collective Bargaining Act (PECBA). The final version of SB 750 had been hammered out between sponsoring senators Neil Bryant and Gene Derfler, and Henry Drummonds, representing the governor. The sponsors had compromised on numerous points in order to produce a bill that the governor would sign, but the final version contained some provisions that guaranteed a definite change in direction from previous Employment Relations Board (ERB) decisions.[1]

One of the most important of these changes was an enlargement of ORS 243.706(1) to impose limits on arbitrators' remedial authority.

Initially, SB 750 had contained language prohibiting arbitration of provisions of collective bargaining agreements governing school districts that related to just cause, evaluation procedures, or procedures for resolving student or staff complaints. The final version of SB 750 substituted new language, which places conditions on the enforcement by ERB of reinstatement of any public employee or reversal of other disciplinary action ordered by an arbitrator if certain public policies were not observed.

The specific policy statement reflected legislators' concern over several much-publicized arbitration awards in the months immediately prior and during the 1995 session. These including awards reinstating state police officers who were dismissed after engaging in sexual activity in patrol cars during their work shifts and another award reinstating a Portland police officer who was dismissed after the police chief determined he had used excessive and unreasonable force when he fired two dozen shots at a fleeing suspect.

The sponsors of SB 750 stated several times that their objective was to retain public sector collective bargaining, but to modify those portions of the statute that threatened public support for the system. A critical part of increasing public confidence in their public servants was reigning in the discretion of arbitrators to reinstate public

employees who had engaged in reprehensible conduct.

The final version of the bill changed the PECBA. Previously, this subsection had read:

> A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties.[2]

After June, 1995, that sentence was joined by several others:

> As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work. In addition, with respect to claims that a grievant should be reinstated or otherwise relieved of responsibility for misconduct based upon the public employer's alleged previous differential treatment of employees for the same or similar conduct, the arbitration award must conform to the following principles:
>
> (a) Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.
>
> (b) Public managers have a right to change disciplinary policies at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.[3]

In the wake of SB 750, public employers anticipated that they could continue to include binding grievance arbitration provisions in their collective bargaining agreements with the assurance that arbitrators would observe those public policy considerations. And employers anticipated that if an arbitrator did not, the school district or city or county or state agency would not be required to adhere to the remedy imposed by the arbitrator. Employers looked to ERB to examine the basis for a reinstatement award, and to determine whether the award conformed to the legislature's mandated "principles."

In fact, ERB recognized the new "accountablity standards" for arbitrators when it decided the first case under ORS 243.706(1). ERB refused to enforce an arbitration award countermanding four days of unpaid suspension for a corrections officer. The officer had used pepper spray, in violation of state and county law prohibiting excessive

use of force, to control an inmate. Arbitrator Gary Axon had overturned this discipline, although he specifically ruled that the grievant had used excessive force. Axon interpreted just cause requirements to limit the County to dismissing only based upon the charges originally found substantiated by an investigator. But ERB found Axon's award unenforceable. Given the substantial body of statutory and case law on excessive use of force, enforcing this award would have violated the policy as explicitly expressed in the ORS 243.706(1), ERB ruled.[4]

In deciding *Deschutes County*, ERB developed a three-part test, which first seeks to determine whether the arbitrator found the employee guilty of the misconduct for which dismissal was imposed. If that question is answered in the affirmative, the second question is whether the award reinstates or otherwise relieves the grievant of responsibility for that misconduct. The final question is whether there is clearly defined public policy that applies to the award.[5]

Although *Deschutes County* was a 3-0 decision, separate concurring opinions by Board members Whalen and Thomas indicated future questions about ORS 243.706(1) where there might not be unanimity. Whereas Whalen emphasized that the Board members "do not engage in right-wrong review of the award, [but] accept the facts as found by the arbitrator,"[6] Thomas argued that "the language in ORS 243.706 requires that it may be necessary for the Board to do a right-wrong analysis to assure that public sector bargaining unit employees are not relieved of their responsibility for misconduct."[7]

These questions were not directly answered by the Court of Appeals' decision in this case, which reversed the ERB. In finding that ORS 243.706 was erroneously applied, the court also determined that the question of whether the corrections officer had engaged in misconduct other than that for which he had been disciplined was beyond the arbitrator's authority. The court ruled that since the arbitrator determined that the only basis for the discipline was the second use of pepper spray (which the officer himself did not spray and for which he had no vicarious responsibility), the arbitrator's finding that the first and third uses of the spray constituted excessive use of force did not provide grounds for ERB to refuse to enforce the award under ORS 243.706.[8]

The Court noted in a footnote that it did not adopt or reject ERB's three-part test for application of ORS 243.706. It suggested that ERB

may have engaged in a "right/wrong analysis" by concluding that the arbitrator found the officer's conduct blameworthy and that the sheriff disciplined the officer for excessive use of force, thereby "substituting its findings for those of the arbitrator. However, that observation does not resolve the larger question concerning the applicability of ORS 243.706."[9] More disturbing, the Court of Appeals recognized no difference in the standards for ERB review of arbitration awards, pre- or post-1995.

ERB ordered enforcement of the arbitration award after the Oregon Supreme Court refused to review the case.[10] Board member Thomas concurred on remand, but noted that the Court of Appeals' decision that the legislature only intended to codify *Willamina* to be "disconcerting" and an "illogical conclusion," unfounded on the legislative record, which the Court refused to review.[11]

Public Policy Exception Cases Since *Deschutes*

Since *Deschutes*, the ERB has decided three more enforcement cases under ORS 243.706 in 2000 and 2001,[12] in each case refusing to apply ORS 243.706 in its intended manner:

• In *PAT/Hanna v. the City of Portland*, the ERB determined that the 1995 language governing enforceability in ORS 243.706(1) did not apply to an arbitration award reinstating a teacher because the teacher's conduct at issue was not of like character to the examples in the statute, including sexual harassment, sexual misconduct, excessive use of force, etc. Rather, the teacher was dismissed for insubordination, neglect of duty, and inadequate performance. Moreover, ERB noted that the arbitrator did not find the teacher guilty of the conduct for which dismissal was sought, thus implying that ERB sees its role as not applying a "right/wrong" analysis to the arbitrator's findings, but rather reviewing the award made by the arbitrator as to whether it violated public policy or reinstated the employee due to disparate treatment.[13] The Court of Appeals affirmed without opinion.

• In 2001, the ERB found that the Washington County Sheriff had violated (1)(g) by refusing to implement an award reinstating a deputy who had tested positive for drugs in the mandatory testing required because he held a commercial driver's license and transported prisoners for County. The arbitrator, noting that the deputy admitted to smoking marijuana for a month prior to the positive test, nevertheless ordered the deputy reinstated because of the collective bargaining

agreement's language, which provided that an employee may not be disciplined for the first instance of use of illegal drugs unless the employee refused to participate in counseling.

ERB found that ORS 243.706(1) did not bar enforcement of this award since the arbitrator did not "relieve the public employee of responsibility for misconduct," as the arbitrator did impose a seven-month unpaid suspension. (In a later opinion ERB modified this part of the decision, finding that the arbitrator did reinstate the employee, thus bringing the decision within potential jurisdiction of ORS 243.706.)[14]

Further, the arbitrator's award was not inconsistent with public policy, even though use of illegal drugs does violate public policies because reinstatement was consistent with policies favoring rehabilitation.[15]

In 2002 the Oregon Court of Appeals reversed the ERB's decision in *Washington County*. It did so on the narrow grounds that under ORS 181.662(3):

> conviction for unlawful possession of a controlled substance is among the only officer conduct that *requires* loss of certification. We take this statute, then, as a clear statement of public policy against the continued certification of public safety officers who use controlled substances, including marijuana.[16]

The Court acknowledged that the police officer did not receive notice or a hearing to determine whether he used marijuana, nor was he 'convicted' of anything. These facts "do not, however, mitigate the public policy statement embodied in the statute, that is, that public safety officers who use marijuana should not be certified." Since the officer admitted to use, the Court concluded that under ORS 243.706(1) the arbitration award is unenforceable, "despite the undisputed fact that the county violated the collective bargaining agreement it voluntarily joined."[17]

When the Oregon Supreme Court reviewed the case, it agreed with the Court of Appeals that "by its unambiguous terms that statute [ORS 243.706] 'dictate[s] that the public policy analysis be directed at the arbitration award itself, not the conduct for which the discipline was imposed.'"[18] However, the Supreme Court reversed the Court of Appeals because the statute regarding drug use that was cited by the lower appellate court does not state a public policy respecting reinstate-

ment (as opposed to certification), nor a clear public policy regarding officers who have not been *convicted* of any drug violation. Nor was the officer's conduct in using marijuana off the job "serious criminal misconduct, related to work." The quantity of marijuana amounted to only a violation, punishable by a fine. No one in Oregon had been or would likely be prosecuted for a similar offense, the Supreme Court noted. The case was remanded back to the Court of Appeals to determine whether reinstatement of the deputy would violate a public policy clearly stated in the statutes or court decisions regarding dishonesty.

• In the third public policy case since the statute was revised, ERB ordered a school district to implement an arbitrator's award reinstating an instructional assistant dismissed for shoplifting.[19] Ruling after the Court of Appeals' decision in *Deschutes County*, ERB stated that although the arbitrator found the employee guilty of misconduct, and although the arbitrator did order reinstatement, ORS 243.706(1) did not apply because the question was whether the *award* violated public policy—not whether the *employee's conduct* violated public policy. The Board admitted that under this interpretation, ORS 243.706(1) "only on rare occasions will an award be unenforceable on public policy grounds."[20]

Further, ERB found that the award was enforceable, despite school board policies and the State Department of Education's administrative rules governing ethical standards for instructional assistants, because to be unenforceable the award must violate public policy requirements found in statutes and judicial decisions. The Board went on to find the grievant's conduct not "related to work" because the arbitrator did not find the grievant's theft to so severely affect the district's business or interests or the grievant's fitness for duty that it warranted discharge.

On review, the Court of Appeals affirmed ERB, finding once again that the award must violate a statute or court decision. "Put another way, the award must order something that either the legislature or the courts have determined to be contrary to public policy."[21] Administrative rules governing ethical standards for instructional assistants are not relevant to the inquiry, nor is District policy. Since Theft II, for which the employee was charged, is not one of the crimes for which the statute forbids school districts from hiring an employee, and since

the employee was not convicted, this crime did not preclude the grievant from employment as an instructional assistant.

The Court of Appeals also upheld ERB's decision to disallow testimony by Sen. Neil Bryant, because post-enactment statements by legislators are assumed to represent only their personal views, even if they sponsored and negotiated the details of the legislation. Finally, said the Court, the testimony of other witnesses as to the nature of the employee's offense and the consequences for the employer was "entirely irrelevant," and therefore properly excluded by ERB.

Discussion

ERB's willingness to erase, for all practical purposes, the work of the 1995 legislature in modifying ORS 243.706(1), was perhaps understandable, given the Court of Appeals' reversal in *Deschutes County*. Given the subsequent Court of Appeals and Supreme Court decisions, it is clear that the courts will support ERB in limiting the applicability of the expanded ORS 243.706(1) so severely as to make it practically useless. ERB has frankly admitted that ORS 243.706(1) may apply only on "rare occasions." Indeed, it is hard to think of a single case where the statute, as interpreted, will make any difference. Had SB 750 never been adopted, employers could have refused to implement an arbitration award in cases where the award directly contradicted a legal requirement for continued employment.

The end result of the case law regarding ORS 243.706 since 1995 amounts to a blatant rewriting of the law. Ignoring the action of the 1995 legislators, the judicial branch has ensured the continuation of the abuses and excesses of the arbitration system that has undermined public confidence in public employees.

The Court of Appeals in *Salem-Keizer* and the Supreme Court in *Washington County* continues to rely upon the *Deschutes County* interpretation of the added statutory language in ORS 243.706(1), which maintains that the only effect of SB 750 was to restate the guidelines on enforceability in place prior to 1995.[22]

The conclusion that the language of ORS 243.706(1), post-1995, "unambiguously" states that "the public policy analysis be directed at the arbitration award itself, not the conduct for which discipline was imposed," amounts to a refusal to look at the legislative history of SB 750 and the reasons why ORS 243.706(1) was amended. It is non-

sensical to believe that the sponsors of SB 750, and the other legislators who passed SB 750, intended nothing more than the codification of the existing case law that they saw as ineffective in reigning in arbitrator discretion.

The Oregon appellate courts[23] and the ERB have, by their decisions, made a nullity of the language added to ORS 243.706(1) by the legislature in 1995. But general principles of statutory interpretation dictate that the addition of specific additional terms must be given meaning. Allowing ERB to refuse enforcement only if an arbitration award of reinstatement requires an illegal act makes ORS 243.706(1) a nullity, because in that case the award couldn't be enforced even without the new language added by SB 750.

Salem-Keizer presented the Court of Appeals with a "clean" case, with no procedural quirks to skew the results. But the Court of Appeals was unwilling to re-examine the *Deschutes County* conclusion that unless the arbitration award itself violates some statute or judicial decision, ORS 243.706(1) has no effect.[24]

A broader interpretation of ORS 243.706(1) is necessary because some of the very examples named in the statute as public policy requirements are not illegal conduct. Take the example of a dismissed employee who has been found—by the arbitrator as well as the employer—to have engaged in sexual harassment. If the arbitrator nevertheless orders reinstatement because he deems discharge too harsh a penalty, the reinstatement itself does not require the employer to commit an illegal act. There are no statutes or judicial decisions that make it unlawful for a public employer to continue to employ a worker who has engaged in sexual harassment.[25] Nevertheless, an employer has to be able to remove harassers from its work force in order to protect the public and co-workers.

ERB's *Salem-Keizer* ruling and the Court of Appeals decisions in *Deschutes Coun*ty and *Washington County* establish an ineffective, trivialized interpretation of ORS 243.706(1), considering it nothing but a codification of the law as it was defined twenty years earlier, in *Willamina School District*. Given the prominence this section of SB 750 in the legislative history, that interpretation is nonsensical.

As ERB Member Rita Thomas stated in her dissent:

> [t]o codify *Willamina*, the 1995 Legislature need only have enacted the following portion of the statute: '* * * As a condition of enforceability, any

> arbitration award [* * *] shall comply with public policy requirements as clearly defined in statues or judicial decisions.'[26]

The legislature did not stop there, however, but included additional significant language that demonstrated an intent to create a new standard of review rather than to merely continue what had been in effect. Thomas is obviously writing with the benefit of having served as legislative assistant in 1995 to Sen. Gene Derfler, one of the sponsors of SB 750.

Senator Neil Bryant, the other sponsor of SB 750, made comments during his Senate floor speech on the intent of the changes to the Public Employee Collective Bargaining Act (PECBA), mentioning the expansion of ORS 243.76(1):

> "Section six of Senate Bill 750 [ORS 243.706(1)] takes care of a problem that we've all become aware of from the press coverage of a couple years ago when Oregon State Police were required to reinstate two police officers, who admitted to having sex in their police cars while on duty. * * * I believe we all agree *that public employees must be accountable to a standard which is responsive to the expectations of the Oregon public. Immoral . . . immoral and illegal employee conduct, regardless of how it is handled on a case-by-case basis by the public employer, should not be adjusted by a standard that two wrongs make a right, but that is the* [*Willamina] standard in the current law*." (emphasis added).[27]

Sen. Bryant thus answered two questions about the 1995 language of ORS 243.706(1): First, the intent of the drafters of the new language was to change the standard then in place for determining whether an arbitrator award had violated public policy. Second, there was no intent to limit the application of the new statutory language to situations in which an employer would be forced to violate the law by adhering to an arbitrator's decision.

It is understandable that arbitrators will overturn dismissals when the facts relied upon by the employer are found not to be substantiated. It is understandable that arbitrators will overturn dismissals where the employer cannot demonstrate that the employee knew, or should have known, the rule or expectation set forth as the basis for the dismissal or discipline. But despite the legislative history of SB 750, the *Salem-Keizer* decision by ERB and the Court of Appeals leaves in place a practice in which arbitrators apparently give no deference to the decisions of boards or commissions elected by the public to run those institutions closest to the citizenry—its schools, police forces,

fire departments, city and county services.

In both the *Deschutes County* and *Salem-Keizer* arbitration cases, the arbitrators found evidence that the employee had violated standards of conduct set by the employer. In fact, the arbitrators discussed in each case the detriment to the employer of having employees who used excessive force, or, as in *Salem-Keizer*, did not model appropriate behavior for students. Nor did the arbitrators dispute the seriousness of the violation in each case. Rather, the arbitrators took it upon themselves to decide that, despite the employees' violations of rules and expectations that had important public policy backing, the penalty would not be enforced.

In the *Deschutes County* case, the arbitrator chose to rely upon a technicality—a conclusion that the Sheriff's charging letter seemed to rely on only the single charge found substantiated by the investigating retired police officer (which the arbitrator did not uphold because it was based on a faulty theory that the grievant was responsible for the acts of another corrections officer during the second use of pepper spray). However, the arbitrator himself found that a preponderance of evidence at the hearing established that the grievant violated policy and state law regarding the use of force in the first and third use of pepper spray on the same inmate during the same evening.

In the *Salem-Keizer* case, the arbitrator's decision to reinstate the employee, and replace dismissal with a one-week unpaid suspension, was an even clearer "second guessing" of the local school district's judgment. While the grievant could have gone to the local school board for a full post-termination hearing to obtain review of the "wisdom" or "harshness" of the penalty, she did not do so. The arbitrator felt free to substitute her judgment for that of the Salem-Keizer citizens elected to run the district.

Attempt to Clarify the Public Policy Exception—The 2001 Legislative Session

An attempt to clarify ERB's role in reviewing such an arbitration award occurred in the 2001 legislature, with the introduction of SB 830 by Sen. Derfler. Upon learning of the ALJ's decision in the *Salem-Keizer* case in January, 2001, Derfler told the *Salem Statesman-Journal*: "We pass legislation that says when people do egregious things, we expect them to be fired, and the Employment Relations Board has gone

around it."[28]

As originally introduced, SB 830 provided for enforcement of an award only if the arbitrator was appointed from a panel of state hearing officers.

The bill proposed that ORS 243.706 be changed to read:

> "A grievance arbitration award or an unfair labor practice decision under ORS 243.672(1)(g) may not be enforced if it orders the reinstatement of a public employee, reduces disciplinary penalties or provides any other remedy to a public employee who commits misconduct, including but not limited to sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force, conduct that would constitute a misdemeanor or felony, unlawful use or possession of a controlled substance, conduct that would subject the public employer to civil liability or any other misconduct of similar concern to the public employer. In addition, the award or decision may not be enforced if it orders the reinstatement of a public employee or relieves a public employee of responsibility for misconduct based upon the public employer's alleged previous differential treatment of employees of the same or similar conduct."[29]

SB 830 contained numerous other provisions covering interest arbitration and the Fair Dismissal Appeals Board. At least two hearings were held by the Senate Committee on Business, Labor, and Economic Development, and amendments were proposed to eliminate the requirement of a state hearings officer. However, the provisions amending ORS 243.706 did not pass the legislature, as it wrestled with numerous and thorny issues related to funding and taxation during the summer of 2001.

The amendment of ORS 243.706, as proposed in SB 830, would have squarely placed the focus of ERB's attention on the *conduct* of the public employee, and would have substituted a decision-making process perceived as more neutral by public employers. Further, the hope was that the use of a hearing officer from the state panel would have produced a more consistent set of case decisions that would serve as precedent in subsequent cases, making the standards and outcomes of such cases more predictable.

Clearly, public employers continue to believe that public confidence is undermined when employees are fired for misconduct, then ordered reinstated because an arbitrator determines that the penalty was too severe. The search for solutions will continue, at the bargaining table and in the legislature.

Alternative Processes for Resolving Discipline Case

The Oregon Fair Dismissal Appeal Board Model

One legislative solution would be to keep a system of grievance arbitration, but to place the same restrictions on the arbitrator as placed upon the Oregon Fair Dismissal Appeals Board in considering the dismissal of "contract" (formerly "permanent") school teachers under ORS 342.905. Under this system, if the FDAB panel finds the facts relied upon to support the dismissal are true and substantiated, and are adequate to justify one of the statutory grounds for dismissal, then:

> [t]he panel shall not reverse the dismissal . . . if it finds the facts relied upon are true and substantiated, unless it determines, in light of all the evidence and for reasons stated with specificity in its findings and order, that the dismissal . . . was unreasonable, arbitrary or clearly an excessive remedy.[30]

Of course, a FDAB award that found a dismissal "clearly an excessive remedy" or "unreasonable" or "arbitrary" could be appealed to the Court of Appeals, which could review that FDAB finding for legal error. A similar review mechanism, which allows for a review of an arbitrator's decision-making and analysis, is needed to maintain consistency and reliability in these cases involving public employee misconduct.

Using the ERB to Decide Just Cause Cases

Alternatively, by legislative action or by collective bargaining agreement revision, the Employment Relations Board could be made the decision-maker for all cases where violation of a CBA just cause clause is alleged. While public employer representatives do not necessarily believe that ERB would be a more pro-management decision-maker, this change would have at least these benefits: (1) It would result in the creation of a body of case law that would serve as precedent and thus increase the predictability of results. (2) It would allow for an appeal on the merits of the decision by the Oregon appellate courts. (3) It would substitute as a decision-maker a body, ERB, that is not affected by the current selection process, which pressures arbitrators to decide enough cases for labor and for management in order to survive the strike-off process.

Elimination of Contractual Just Cause Provisions

The final option—to bargain out established just cause clauses in collective bargaining agreements—is not likely to occur in most jurisdictions, given the many other priorities of public employers at the bargaining table. And, indeed, the representatives of public employees persist in the belief that there is no problem in the present system, in which firefighters and police officers and school teachers occasionally commit high-profile and egregious misconduct, are fired, and then inevitably ordered reinstated. The long-term deleterious effects on the public's perception of those public servants, and the public's willingness to support those public services with tax dollars, is ignored, but significant.

The current crisis in confidence about government, particularly state and local government, and the unwillingness of citizens to fund those governmental services, has many causes. But cynicism about the lack of professional ethics and lack of accountability fuels and appears to justify these negative perceptions of government. Though the cases may be isolated, they are high profile. The large majority of professional, hard-working public employees may want to examine whether a system that very publicly returns miscreants to public sector jobs is in the best interest of their blameless co-workers.

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[1] Henry Drummonds, "A Case Study in the Ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Public Employee Collective Bargaining Law," in *After SB 750* (LERC Monograph Series, Issue no. 14, Marcus Widenor ed., 1996).

[2] ORS 243.706(1).

[3] ORS 243.706(1).

[4] Deschutes County Sheriff's Assn. v. Deschutes County, 17 PECBR 845 (1998), remanded 169 Or App 445 (2000), rev. den. 332 Or 137 (2001), order on remand 19 PECBR 321 (2001).

[5] 17 PECBR at 845.

[6] 17 PECBR at 868, footnote.

[7] 17 PECBR at 870.

[8] 169 Or App at 454, 455.

[9] 169 Or. App at 452, footnote.

[10] 19 PECBR 321 (2001).

[11] 19 PECBR at 324.

[12] A fourth case involved an arbitration award made prior to the passage of SB 750, but heard on appeal by the ERB after the new statute was in effect. In Portland Firefighters Assn. v. City of Portland, (16 PECBR 724, 742 (1996)), ERB ordered the City of Portland to implement an arbitrator's award reinstating a firefighter who was fired after he pleaded no contest to criminal charges relating to an assault on two women in an off-duty incident. The City argued that the award violated public policy in a number of ways, including requiring the City to prove a nexus between the off-duty misconduct and the grievant's employment. ERB cited the amended version of ORS 243.706(1), but decided that "[T]he City point[ed] to no 'clearly defined * * * statutes or judicial decisions' concerning public policies related to the enumerated or similar topics that are 'related to work' and that the arbitration award does not 'comply with.' Under these circumstances, the statute provides no basis for refusing to enforce the award." The Board also noted that the Association had objected to the application of the amended ORS 243.706(1) to disputes arising out of agreements that were in effect when SB 750 became effective in 1995. ERB did not find it necessary to resolve this constitutional issue raised by the Association. 16 PECBR at 742, n. 3.

[13] Portland Assn. of Teachers and Jim Hanna v. Portland School District 1J, 18 PECBR 816 (2000).

[14] Washington County Police Officers' Assn. v. Washington County, 19 PECBR 100, 304 (2001).

[15] 19 PECBR at 122.

[16] Washington County Police Officers Assn. v. Washington County, 181 Or App 448 (2002). (emphasis in original).

[17] 181 Or App at 448.

[18] Washington County Police Officers' Assn. and Paul Cuff v. Washington County, 335 Or 198, 206 (Feb. 21, 2003).

[19] Salem-Keizer Assn. of Classified Employees v. Salem-Keizer School District, 19 PECBR 349 (2001) (on appeal).

[20] 19 PECBR at 375.

[21] Salem-Keizer Assn. of Classified Employees v. Salem-Keizer School District, 186 Or App 19, 24 (2003).

[22] 181 Or App 448. "Interpreting an *earlier* version of ORS 243.706, we acknowledged ERB's determination that an arbitration award would be unenforceable as violative of public policy if it 'requires the commission of an unlawful act' or if 'the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements.'," citing to Willamina Ed. Assn. v. Willamina Sch. Dist. 30J, 50 Or. App. 195, 202, n. 7 (1981).

[23] The Court of Appeals in the Washington County case also noted that "ORS 243.706(1) unambiguously defines what kinds of public policies count: those

which are 'clearly defined in statutes or judicial decisions.' Thus, federal cases such as Eastern Associated Coal Corp. v. UMW, 531 US 57, 121 S Ct 462, 148 Led 2d 354 (2000) are not instructive. In those cases, the Supreme Court applied its general supervisory authority to limit enforcement of contracts that are contrary to public policy. . . . Under Oregon law, the relevant policies are only those clearly defined in statutes or judicial decisions." 181 Or App at 448, 453.

[24] 19 PECBR at 375.

[25] Some forms of sexual harassment, of course, might constitute assault and/or battery if they involved unwelcome physical contact. But other forms of sexual harassment—crude, sexual language that has the effect of creating a hostile work environment—do not involve any criminal activity by the perpetrator, nor is the public employer committing an illegal act by reinstating such an employee.

[26] 19 PECBR at 379.

[27] 19 PECBR at 380, quoting Senator Neil Bryant.

[28] January 11, 2001, p. 3C.

[29] SB 830, introduced February 2, 2001, 71st Oregon Legislative Session.

[30] ORS 342,905 (6).

Public Opinion vs. Public Policy
ERB and the Courts are Gradually Eliminating Confusion Over the Meaning of "Public Policy" in ORS 243.706(1)

Sandra Smith Gangle

On August 7, 2001, an editorial appeared in the *Statesman-Journal* newspaper criticizing the order of the Oregon Employment Relations Board (ERB) in *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District 24J (SKACE)*.[1] In its order, ERB had required the district to implement an arbitrator's award reinstating a teacher's aide, who had been discharged two and one-half years earlier for shoplifting, and reducing her penalty to a one-week suspension. While acknowledging that ERB had followed "the letter of the law" in reaching its decision, the newspaper editor voiced strong disagreement with the Board's action, relying on a moralistic view of the message he believed the ERB order would convey to the local community. "Here's what it teaches," he wrote, "that adults, even adults who [sic] youngsters look up to, can stoop to petty crime and not be punished."[2] Since the aide had admitted to a misdemeanor offense, but had never been convicted or even charged in a criminal court for her transgression,[3] the editor indicated it was the district's prerogative, and perhaps its obligation, to fire her as punishment. The headline carried a defiant message: "District should not have to rehire aide."[4]

Not only did the editor ignore the arbitrator's just cause analysis regarding the aide's off-duty misconduct, but he failed to explain the statutory standard and case-law background on which ERB had based its decision to enforce the arbitrator's award. The editor even congratulated the District for having appealed the award to ERB, saying, "Someone ha[d] to declare that it's not acceptable for a school employee to break the law, even if the legal system fails to hold her accountable."[5]

The editorial evidences a common confusion regarding the standard that ERB must apply when it decides whether or not to enforce an arbitrator's award of reinstatement. The applicable statute, ORS 243.706(1), as amended by the Oregon legislature in 1995 by SB 750, has

been the source of the confusion. That statute provides in pertinent part as follows:

> **ORS 243.706(1). . . .** As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with *public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work.* (*emphasis added*)

A number of public employers have declined to implement arbitrators' awards in which the employees were determined to have been guilty of certain misconduct, but the arbitrators have ordered the employers to reinstate the employees on just cause grounds. In those cases, as will be seen, the employers believed the employees' misconduct had been egregious enough that the reinstatement awards must have been in violation of public policy as set forth in the statute. The employers have then defended against the unfair labor practice (ULP) complaints that the unions filed pursuant to ORS 243.672(1)(g)[6] to contest the employers' failure to comply with the awards.

The factual bases of the various cases, as well as the public policy arguments that were raised in each of them, have been quite diverse, as will be seen below. The outcomes of the cases at ERB and in the appellate courts have produced a rather complicated patchwork of legal analysis. Gradually, however, the confusion over the meaning of ORS 243.706(1) is being eliminated through the analysis in the case law.

Case Law History Interpreting ORS 243.706(1) After SB 750

The earliest public policy case to reach ERB and the appellate courts after SB 750 was passed was *Deschutes County v. Deschutes County Sheriff's Association (Deschutes)*.[7] The arbitration award in *Deschutes* contained a specific finding, based upon evidence offered at the arbitration hearing, that the grievant, a corrections officer, had used unjustified force against a prisoner by spraying Capstun (pepper spray) directly into the inmate's face. The grievant, who had special appointments as a firearms instructor and deputy reserve program officer, was not charged by the county with the specific misconduct that the arbitrator found to be proven. In fact, only one of the charges that were stated in the notice of discipline was found to be substantiated

at arbitration. That charge was that the grievant had been vicariously responsible for a fellow officer's spraying of Capstun into the inmate's cell. Yet that charge alone, said the arbitrator, was insufficient to support the disciplinary action under just cause principles. Therefore, the arbitrator rescinded the suspension and reinstated the grievant to the special appointments from which he had been removed in the disciplinary action.

The county refused to implement the arbitrator's award, and the union filed a ULP with ERB, seeking enforcement. Applying ORS 243.706(1), ERB determined that the grievant's conduct, as found by the arbitrator, had violated "a clearly defined public policy" concerning the use of excessive force and ruled in favor of the county.[8] ERB noted that a substantial body of judicial authority requires the protection of prisoners from the use of excessive physical force by jailers. Also, ORS 161.025(g) expressly requires law enforcement personnel "[t]o safeguard offenders against excessive, disproportionate or arbitrary punishment." The Board identified that language as a statutory expression of the applicable public policy.[9]

The Court of Appeals reversed ERB's decision in *Deschutes* and remanded the case to the Board. Acknowledging the long-standing labor-law principle that an arbitrator's award must draw its essence from the parties' collective bargaining agreement,[10] the court noted that the parties' submission agreement had not authorized the arbitrator to issue gratuitous findings regarding wrongdoing that had not been cited in the county's charges against the grievant. Therefore, the arbitrator's finding that the grievant had violated the law by spraying Capstun into an inmate's face was "beyond the scope of the parties' collective bargaining agreement [and] not part of the arbitration award."[11] Consequently, said the court, ERB had misapplied ORS 243.706(1) when it refused to enforce the arbitrator's award based on the gratuitous finding of misconduct.

The court clarified that ERB must find that the arbitration *award* itself, and *not* the employee's *conduct,* violates public policy, before the board may deny enforcement of the arbitrator's award under ORS 243.706(1). The arbitrator's award in *Deschutes* did not violate public policy, said the court, because the arbitrator had been properly selected to hear and decide the grievance and he had based his award properly on the parties' submission agreement. The Supreme Court denied

review of the Court of Appeals' decision.

After *Deschutes,* the next case to reach ERB and the appellate courts was *Washington County Police Officers' Association and Paul Cuff v. Washington County.*[12] The grievant was a corrections officer and bus driver who had tested positive on a drug test and eventually admitted to having used marijuana off-duty, after first lying to the employer during the investigation about his use of drugs. The arbitrator ordered the grievant reinstated without backpay, based on a provision in the parties' collective bargaining agreement that required a referral to an Employee Assistance Program or drug counseling, in lieu of discipline, for any officer who failed a drug test the first time.[13] The county declined to implement the award, on the basis that the grievant no longer qualified for certification as a public safety officer pursuant to ORS 181.662[14] because of his admitted drug use. The county also argued that the grievant's dishonesty mitigated against his reinstatement on public policy grounds.

ERB upheld the arbitrator's award on the basis that the arbitrator had properly balanced several competing public policies.[15] Those included laws prohibiting possession and use of illegal drugs by employees holding safety-sensitive positions, a federal prohibition of off-duty use of illegal drugs by employees who hold commercial drivers' licenses, and a federal policy encouraging the rehabilitation of employees who test positive for drugs. Since the parties' labor agreement had expressly provided for rehabilitation in lieu of discipline for first-time offenders, the board found that the rehabilitation policy outweighed the other policies. The board also concluded there was no public policy that prohibited the reinstatement of the grievant on dishonesty grounds.

On appeal, the Court of Appeals rejected ERB's balancing of the various public policies that the Board had recognized in its decision.[16] The court acknowledged that the county had agreed in its labor contract that counseling would be required in lieu of discipline for a first-time failure of a drug test. Ignoring that provision, however, and without referring to the *Deschutes* holding which had emphasized the importance of honoring collective bargaining agreements, the court relied on the fact that the grievant was a certified public safety officer and that he would be subject to mandatory revocation of his certification if he were convicted of unlawful possession of a controlled

substance, including marijuana, pursuant to ORS 181.662. The court acknowledged that the grievant had not been convicted of any crime, nor had he received any notice of hearing on a proposed revocation of his certification. Nevertheless, the court concluded that the arbitrator's award violated public policy as shown by the certification statute and reversed the Board.

During the same approximate time period that the *Washington County* case was proceeding through ERB and the Court of Appeals, a case involving a teacher, *Portland Association of Teachers and Jim Hanna v. Portland School District, (PAT)* [17] was proceeding through the same bodies, with a somewhat inconsistent outcome. The Employer in *PAT* had refused to implement an arbitrator's award in which the teacher, who had been discharged for insubordination, neglect of duty and inadequate performance, was reinstated. The arbitrator had determined that the teacher was not guilty of any of the charges alleged. At ERB, the employer contended that the teacher's conduct had violated the Fair Dismissal Law, ORS 342.905, and that the arbitrator had failed to apply the standards of that law properly. Therefore, the award violated public policy as shown by the licensing requirements for teachers, argued the employer, and, as a result, it was not enforceable under ORS 243.706(1).

ERB, however, relied on the Court of Appeals' analysis in *Deschutes,* as well as a standard it had enunciated in 1980 in *Willamina Education Association v. Willamina School District*[18] and found that the arbitrator's award was enforceable, because it was consistent with the parties' collective bargaining agreement. Citing a provision in the agreement that allowed the arbitrator to use a contractual standard, as opposed to the Fair Dismissal standard, when deciding grievances over performance issues, the Board determined that the parties had waived the statutory procedures that are available under the Fair Dismissal Law.

The Board analyzed the facts in *PAT* in a similar manner as in a 1996 case, *Portland Firefighters Association v. City of Portland (Firefighters).*[19] In *Firefighters,* the Board had rejected a claim that the discharged employee's reinstatement violated public policy, and upheld the arbitrator's award, even though the dismissed firefighter would no longer be able to meet certain licensure requirements for medical technicians as a result of the off-duty altercation and criminal conviction

that had led to his discharge. Even though the teacher in *PAT,* Hanna, might not meet the requirements of the Fair Dismissal Law *after* his reinstatement, said the court, the *award* did not contravene any statutory or judicial statements of public policy. It was, therefore, enforceable under ORS 243.706(1).[20]

The Court of Appeals affirmed ERB's decision in *PAT* without opinion and the Oregon Supreme Court declined to accept review.[21] Therefore, the appellate courts seemed to accept the Board's emphasis on abiding by a collective bargaining agreement's provisions, rather than complying with professional licensing standards, when those two sources appear to be in conflict.

In early 2003, two more appellate decisions were issued that further explained and applied the public policy exception language of ORS 243.706(1). Those decisions have eliminated the inconsistencies that had existed between the holdings of *Deschutes, Washington County,* and *Portland Association of Teachers.* The first of those was the decision of the Court of Appeals in the *SKACE*[22] shoplifting case. The second was the Supreme Court's decision in *Washington County*.[23] As a result of those two decisions, employers who are faced with reinstatement awards from arbitrators from now on should be better able to make an appropriate judgment as to whether or not the award violates public policy and is entitled to enforcement.

First, in its *SKACE* decision, the Court of Appeals cited with approval the *Deschutes* holding that it is the arbitrator's *award* that must comply with public policy, not the grievant's *conduct,* in order for a reinstatement award to be enforced. The court also pointed out that the public policy exception to enforceability of arbitrators' reinstatement awards in ORS 243.706(1) only applies to those policies that are "clearly defined in statutes and judicial decisions." The court then analyzed the statutes that relate to shoplifting and determined that the only ones that would apply in the case of reinstatement of a teacher were ORS 326.603(3)(a)[24] ORS 342.143(3)(a)(A).[25]

According to those statutes there are 46 specific crimes, the conviction of which makes a teacher subject to non-hire or termination in Oregon. The court found that the teacher's aide in *Salem-Keizer* had never been convicted, or even prosecuted, for *any* crime, however. And, even if she had been prosecuted and convicted for the shoplifting incident which she admitted, the most serious charge that could

have been made against the aide would have been Theft II and that is *not* one of the 46 crimes that are listed in the teacher non-hire and removal statutes.

The county had argued that, even though the teacher's aide had not been convicted of any crime, the misconduct of shoplifting, to which she had voluntarily admitted, constituted "serious criminal conduct, related to work," as that phrase in ORS 342.706(1) should be interpreted. The court disagreed, however, opining instead that the Oregon legislature would have included Theft II among the list of crimes for which a teacher could be discharged, if it had considered shoplifting to be serious enough misconduct to justify the discharge of a school employee.

The court soundly rejected the district's argument that ERB should have considered public opinion regarding the propriety of putting a teacher's aide back to work in a public school classroom after she admitted to shoplifting. Similar to the arguments that were raised by the newspaper reporter in the August 7, 2001 *Statesman-Journal* editorial, the district had contended that the arbitrator's award had the effect of excusing conduct that society deems unacceptable. The court also declined to accept the district's proffer of certain evidence, such as administrative rules governing the moral character of teachers and a school board policy that would have required termination of a teacher for any crime of moral turpitude, on the basis that those documents were not "statutes or judicial decisions." Therefore, they did not qualify as applicable statements of public policy under ORS 243.706(1).

The court rejected the district's attempts to admit into the record the testimony of a state legislator, as well as testimony by several witnesses who would have attempted to demonstrate the public policy implications of reinstating a teacher's aide who had admitted to shoplifting. The court found that the testimony of legislators was inappropriate as post-enactment "history" to prove the legislative intent. The testimony by witnesses regarding their personal opinion as to the effect a teacher's off-duty shoplifting incident might have on children in her classroom was deemed irrelevant. The court upheld ORS 243.706(1) as written and concluded that ERB had not erred in upholding the enforceability of the arbitrator's award.

Next, the Oregon Supreme Court issued its decision reversing and

remanding for further proceedings the Court of Appeals' decision in the *Washington County* case.[26] The Court first reiterated the fundamental principle of *Deschutes* that the arbitrator's *award*, not the grievant's *conduct,* must violate public policy before enforcement may be denied. Then, acknowledging that ORS 243.706(1) only accepts "statutes and judicial decisions" as sources of public policy on which an arbitrator's award may be denied enforcement, the Court expressly held that other statements of policy, such as administrative rules, employment manuals, office policies or proclamations by administrative officials, would not meet the statutory test. Further, the statutes or judicial decisions would have to be limited "in such a way as to leave no serious doubt or question respecting the content or import of th[e] policy,"[27] in order to justify non-enforceability of an arbitrator's award.

The Court recognized that the Court of Appeals had relied on ORS 181.662 as the statutory statement of public policy that would prohibit reinstatement of the grievant in *Washington County.* That statute mandated denial or revocation of the certification of a public safety officer who, after notice and hearing, had been convicted of unlawful use or possession of a controlled substance. The Court pointed out that the grievant had never been convicted of drug use or possession, however, nor had he received notice of any hearing regarding revocation of his public safety officer certification. Therefore, the revocation statute could not be relied upon as the statement of a clear public policy respecting the continued certification of a public safety officer who had *not* been convicted of *any* drug offense.

The Court then responded to the county's alternative argument that the grievant's conduct in purchasing and using marijuana off the job was "serious criminal conduct, related to work," and that ORS 243.706(1) would prohibit his reinstatement on that basis. Acknowledging that ERB had determined the quantity of marijuana was small enough to amount only to a violation punishable by a fine, and that there was no evidence in the record anyone in Oregon had been or likely would be prosecuted for a similar offense, the Court declined to find that the grievant's conduct met the definition of "serious criminal misconduct, related to work," as that phrase is used in ORS 342.706(1).

The Court remanded the case to the Court of Appeals for further

proceedings on two issues. The first is the county's contention that reinstatement of the grievant would violate public policy as clearly defined in statutes or judicial decisions regarding dishonesty. The other is the county's argument that the court erred in excluding certain testimony allegedly demonstrating the severity of the grievant's conduct in light of his status as a public safety officer.

What Have We Learned?

A review of recent cases at the Oregon Employment Relations Board and the Oregon appellate courts, in which arbitrators' awards have been challenged on public policy grounds, shows that the interpretation and application of ORS 243.706(1), the so-called "public policy exception" to the enforcement of arbitrators' awards, is still a developing area of the law. Much of the early confusion has been eliminated. However, the Supreme Court's remand of the *Washington County* case to the Oregon Court of Appeals means that the final word has not been spoken on this complex issue yet.

Here are the principles that can be gleaned from the case law to date:

(1) If the arbitrator was selected pursuant to the parties' collective bargaining agreement and the award was based on the parties' submission agreement, the arbitrator's findings regarding just cause will be respected and any express contract provisions that governed the arbitrator's award will be honored;

(2) In order to meet the requirements of ORS 243.706(1) regarding non-enforceability of an arbitrator's award, the public employer must show that the *award* itself, and not the grievant's *conduct*, violated public policy;

(3) In order to deny enforcement of an arbitrator's award of reinstatement of a public employee who has committed socially unacceptable misconduct, the employer must show that the award violates some *clear* statement of public policy that is found in *statutes or judicial decisions*. Policy statements that might be contained in administrative rules, employment manuals or other documents, as well as evidence of public opinion regarding society's expectations of the proper behavior of public employees, are not appropriate bases on which public employers may deny enforcement of arbitrators'

reinstatement awards; and

(4) In order to meet the definition of *"serious criminal conduct, related to work,"* in ORS 243.706(1), the specific behavior that is proven must be prohibited by the criminal laws of Oregon and punishable by more than a fine. In the case of school teachers, the wrongful behavior must meet the definition of one of the 46 crimes that are expressly listed in ORS 342.143(3)(a)(A) in order to preclude reinstatement.

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[1] 19 PECBR 349 (2001), *aff'd.* 186 Or App 19 (2003).

[2] Statesman-Journal, August 7, 1991, p. 4C.

[3] The total value of the goods the aide had taken was about $300. Due to budgetary constraints, the Marion County District Attorney had adopted a policy of not pursuing such minor charges.

[4] Statesman-Journal, *supra*, fn. 2.

[5] *Id.*

[6] ORS 243.672 (1). It is an unfair labor practice for a public employer or its designated representative to do any of the following: * * *

(g) Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

[7] 169 Or App 445, 9 P3d 742 (2000), *rev. den.* 332 Or 137 (2001), *order on remand,* 19 PECBR 321 (2001).

[8] 17 PECBR at 862.

[9] 17 PECBR at 861-2.

[10] *Citing,* Willamina Ed. Assn. v. Willamina Sch. Dist. 30J, 50 Or App 195, 202, n 7 *(Willamina I)* and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 US 593 (1960).

[11] 169 Or App at 450.

[12] 19 PECBR 100 (2001),*rev'd,* 181 Or App 448, 45 P3d 515 (2002), *reversed and remanded,* 335 OR 198, 63 P3d 1167 (February 21, 2003).

[13] The arbitrator did not relieve the employee of responsibility for the proven offenses. By reinstating the grievant without back pay, he effectively implemented a seven-month suspension.

[14] ORS 181.662 provides in pertinent part: "(3) The [Department of Public Safety Standards and Training] shall deny or revoke the certification of any public safety officer *** after written notice and hearing *** based on a finding that:

*** (c) The public safety officer *** has been convicted of violating any law of this state or any other jurisdiction involving the unlawful use, possession, delivery or manufacture of a controlled substance, narcotic or dangerous drug."

[15] The Board relied on federal precedent as authority for the balancing approach. *See,* Eastern Associated Coal Corp. v. UMW, 531 U.S. 57 (2000). The Court of Appeals stated clearly, however, that federal law was not applicable to cases arising under the Oregon PECBA.

[16] 181 Or App 448, 45 P3d 515 (2002).

[17] 18 PECBR 816 (2000), *aff'd without opinion,* 178 Or App 634 (2002), *rev. den.,* 334 Or 121 (May 9, 2002).

[18] 5 PECBR 4086 (1980). In that case, the Board had announced that it would enforce an arbitration award, unless "(1) the parties did not, in a written contract, agree to accept such an award as final and binding . . .; or (2) enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements)." 5 PECBR at 4100. The Court of Appeals had subsequently approved the Board's Willamina test in a second case involving the same parties. Willamina Education Association v. Willamina School District, 60 Or App 629 at 635 (1982).

[19] 16 PECBR 724 (1996).

[20] 18 PECBR at 838.

[21] 334 OR 121 (2002).

[22] 186 Or App 19 (2003).

[23] 335 OR 198 (2003).

[24] ORS 326.603(3)(a) If the Superintendent of Public Instruction informs the school district that the subject individual has been convicted of a crime listed in ORS 342.143 or has made a false statement as to the conviction of a crime, the superintendent shall notify the school district of the fact and the district shall not employ or contract with the individual. . . .

[25] ORS 342.143(3)(a)(A) No teaching, personnel service or administrative license or registration as a public charter school teacher shall be issued to any person who:

(A) Has been convicted of a crime listed in ORS 163.095, 163.115, 163.185, 163.235, 163.355, 163.365, 163.375, 163.385, 163.395, 163.405, 163.408, 163.411, 163.415, 163.425, 163.427, 163.435, 163.445, 163.465, 163.515, 163.525, 163.547, 163.575, 163.670, 163.675 (1985 Replacement Part), 163.680 (1993 Edition), 163.684, 163.686, 163.687, 163.688, 163.689, 164.325, 164.415, 166.005, 166.087, 167.007, 167.012, 167.017, 167.062, 167.065, 167.070, 167.075, 167.080, 167.087, 167.090, 475.995 or 475.999.

[26] 335 OR 198, 63 P3d 1167 (February 21, 2003).

[27] 335 OR at 205-206, 63 P3d 1171 (slip opinion at p. 4).

Interest Arbitration in Oregon's Public Sector

Marcus Widenor and Summer Stinson

Binding interest arbitration of public safety workers' collective bargaining impasses has been an integral part of Oregon's Public Employee Collective Bargaining Act (PECBA)[1] since its enactment in 1973. The architects of the statute believed the bargaining process did not work effectively unless employees had either a right to strike or an alternative process for permanently resolving impasses.[2] Accordingly, the PECBA included specific provisions to encourage the use of binding interest arbitration to solve bargaining impasses.[3] Since 1973, interest arbitrators have issued 287 awards involving police, firefighter, correction employee, and emergency telephone worker bargaining units.[4]

When first established, Oregon's interest arbitration process was a conventional one. The arbitrator had broad discretion in fashioning a contract using whatever proposals of the two parties, or his or her own formulations, that were appropriate, given statutory criteria and the weight of the evidence presented at the arbitration hearing. The process changed radically in 1995 when the legislature replaced the conventional interest arbitration process with a last best offer (LBO) system. Under the revised statute, arbitrators were barred from "splitting the baby," and were forced to choose between the total package of proposals offered by management or the union.

This article offers a historical overview of the interest arbitration process in Oregon since 1974. Then it reviews and analyzes the trends in interest arbitration since Senate Bill 750[5] (SB 750) was passed in 1995, which revised PECBA and introduced the LBO system.[6] Finally, the article reviews how the 1995 changes transformed the practice and outcomes of interest arbitration in Oregon.

Interest Arbitration In Historical Context

The use of binding arbitration to resolve interest disputes in labor relations dates to the turn of the twentieth century when the process was used in the mining and clothing industries.[7] The practice was institutionalized as an option for dispute resolution in the railroad industry by the Railway Labor Act of 1926.[8] However, interest arbitra-

tion has never been widely used in the private sector, except during wartime.[9] Instead, it grew with the explosion of collective bargaining activity among public employees during the 1960s and 1970s,[10] and the Postal Reorganization Act of 1970, which extended collective bargaining rights to employees of the U.S. Postal Service.[11] Early public sector collective bargaining statutes, such as the 1965 Wyoming and Maine laws, contained provisions for interest arbitration for police and firefighters because state legislatures wanted to offer safety employee unions a way, other than striking, to settle bargaining impasses.[12]

Interest arbitration has been a controversial method of dispute resolution since its inception. Early statutes were often challenged on constitutional grounds. Opponents of interest arbitration argued that the process violated the home rule rights of municipalities and unconstitutionally delegated legislative authority to arbitrators who were not responsible to the local constituency. [13] Several state courts applied this reasoning and invalidated their states' interest arbitration laws.[14]

Likewise, Oregon's statute was challenged as unconstitutional under the "home rule" provision in the Oregon Constitution. However, the Supreme Court of Oregon upheld the interest arbitration law in the landmark 1981 case, *City of Roseburg v. International of Fire Fighters, Local 1489*.[15] The court held that the PECBA was a general law addressing substantive social and economic objectives of the state; thus, it did not affect a local community's freedom to choose its own political form.[16] Therefore, PECBA's interest arbitration provision controlled over Roseburg's conflicting city ordinance.[17]

Labor relations scholars have also debated the merits of interest arbitration based on its effects on the bargaining behavior of labor and management.[18] The main issues are whether the process prevents the parties from engaging in real bargaining—the "chilling" effect—or whether labor and management become addicted to its use—the "narcotic" effect. The chilling effect occurs when the parties do not engage in serious bargaining because they expect to resolve their dispute through interest arbitration. Seeing no benefit in negotiating away proposals that an arbitrator might award, they do not engage in meaningful negotiations. The narcotic effect is the logical corollary to the chilling effect: the more the parties resort to the arbitration process,

the more reliant the parties become on interest arbitration. Empirical studies on the extent of the chilling and narcotic effects are inconclusive, some supporting and some refuting their legitimacy.[19] Even though research evidence is inconclusive, popularly held notions of the effects of interest arbitration have driven statutory reform efforts in many states, including Oregon.

Despite these controversies, interest arbitration is now firmly rooted in the public sector. Today more than twenty states use some form of the process for resolving contract negotiations impasses. Four of these states, Oregon, Nevada, Wisconsin, and Minnesota, use the last best offer form.[20]

Interest Arbitration In Oregon's Public Sector

Oregon's first experiment with interest arbitration occurred in 1971. After a successful public initiative campaign by members of the local firefighters' union, the City of Eugene enacted an ordinance establishing a new collective bargaining system for city employees.[21] Eugene's system offered a unique version of LBO arbitration.[22] Under the statute's provisions, each party submitted two proposals to the arbitrator: a final offer reflecting their position at impasse and a second alternate version.[23] The arbitrator was charged with choosing one of the four total packages offered by labor and management.[24] Police, firefighters, and even the general employee bargaining unit all used the system in the years immediately following its creation.[25]

When the PECBA was enacted in 1973, it was one of the most far-reaching statutes of its kind in the country. PECBA was universal in its coverage, including employees at the state, county, and municipal level,[26] rather than using the fragmentary approach contained in many public sector bargaining laws. It prohibited unfair labor practices by employers and employees,[27] and it established an administrative body, the Public Employment Relations Board (PERB), to enforce the law.[28] The statute also utilized a broad scope of bargaining standard, allowing labor and management to negotiate over a wide range of employment relations issues.[29] Finally, the PECBA permitted nonpublic safety employee bargaining units to strike[30] and authorized binding interest arbitration for public safety workers.[31]

Oregon's PECBA was a more comprehensive piece of public sector collective bargaining legislation than that of any other state's, with the possible exception of Hawaii's.[32] Opposition to the PECBA's enactment

from public employers was fierce in 1973. However, the right to strike and interest arbitration provisions themselves were not the most controversial parts of the bill, as they were in some other states during the era. The drafters of the law concluded that these options in impasse procedure were necessary to create the conditions needed for collective bargaining.[33]

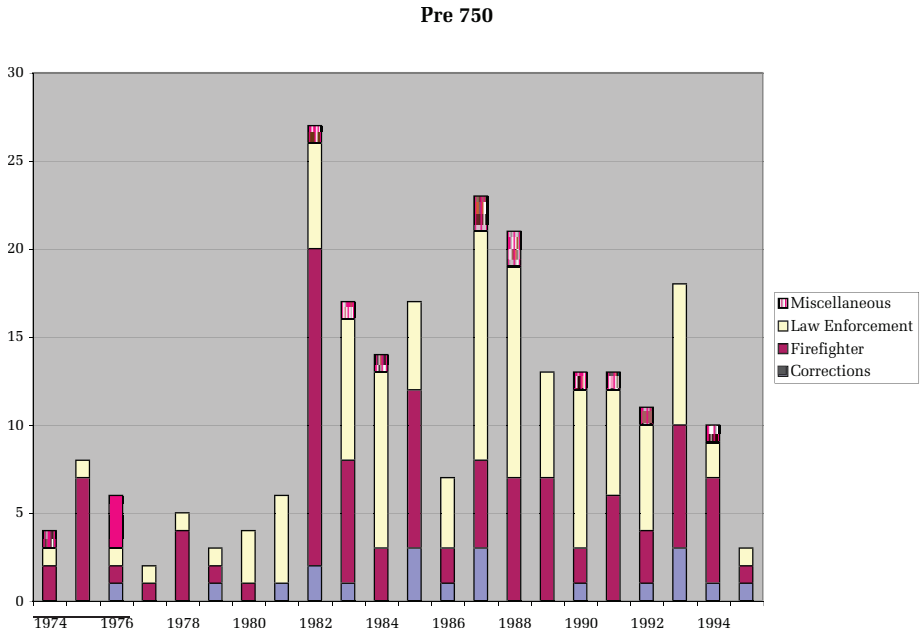
Conventional Interest Arbitration, 1973-1995

General Characteristics

Arbitrators heard 236 cases under the conventional arbitration process that existed between 1973 and 1995, an average of 11 arbitrations per year. Of these 236 arbitrations, 45% of the cases involved police, 40% involved firefighters, 8% involved corrections officers, and another 6% involved miscellaneous employees.[34]

There were very few interest arbitration cases heard in the years immediately following PECBA's passage. Between 1973 and 1982 only 39 cases were heard, an average of 5 per year. In 1982 alone, however, the number of cases exploded to 27, as unions that had suffered from the inflationary years of 1979 to 1982 sought to recoup the purchasing power of their wages.[35] Use of interest arbitration remained high throughout the 1980s and 1990s, as recession and the unfolding tax crisis of state and local governments frequently brought labor and management to impasse. From 1982 until 1995 an average of 14 disputes a year were resolved through interest arbitration in Oregon.

Table 1:
Oregon Interest Arbitration, 1973-1995



Relatively few arbitrators heard most cases during the 1974 to 1990 period; their names were drawn from a short list of neutrals authorized by the PERB to hear both arbitration and fact-finding cases.[36] From 1974 to 1990, five arbitrators heard 41% of all arbitration cases, and ten arbitrators heard nearly 60% of the cases.[37] In 1990, the Conciliator's office expanded the list of arbitrators from fifteen to fifty, and a larger group began hearing cases, including a significant cohort of women and out-of-state neutrals.

The number of issues taken to arbitration in the 1974 to 1995 era varied widely—from one to fifty-seven issues in an arbitration, with an average number of seven issues per arbitration. There were forty-three single-issue arbitration cases (18% of the total), often involving wages only, many times as part of a wage reopener agreement.

Statutory Criteria

Oregon's statute utilized eight criteria that neutrals were to apply in evaluating the proposals of labor and management in interest arbitration disputes:

1. the lawful authority of the employer;
2. stipulations of the parties;
3. the interest and welfare of the public and the financial ability of the unit of the government to pay;
4. comparisons of wages hours and working conditions in public and private employment in comparable communities;
5. the cost of living;
6. overall compensation received by employees;
7. changes in circumstances during the pendency of the arbitration proceedings; and
8. other factors normally taken into consideration.[38]

Because the criteria were not weighted in any particular way, arbitrators developed their own means of measuring and balancing the significance of evidence presented to them during a hearing. Summarizing the experience of Oregon neutrals during the first fifteen years of the process, veteran Arbitrator Thomas Levak concluded:

> The legislature and ERB have not given neutrals any directions as to the weight to be given the various criteria or how to apply them in any case, and the order of the criteria in the statute has no significance: no criterion has statutory precedence over the others. If the legislature had intended any criteria to have precedence, it would have created a procedure containing 2 or more specific steps. Neutrals have the discretion to apply those criteria they deem relevant in a particular case, to give the criteria the weight they deem appropriate, and to balance the criteria off as they see fit.[39]

Most state bargaining statutes did not weight or prioritize their criteria, which became a common source of complaints among advocates during the 1990s.[40] In Oregon, management frustration over the weighting of criteria would become a major issue in the debate over reforming the statute in 1995.

Under PECBA, Oregon public sector unions and management found that two of the criteria—ability to pay/welfare of the public, and comparisons of wages, hours, and working conditions—became the battleground on which most cases were fought.

Ability to Pay—Interest and Welfare of the Public

The criteria addressing ability to pay and the interest and welfare of the public involve inextricably intertwined principles. As a prominent group of Oregon's arbitrators observed in this monograph series in 1984: "Public interest and public welfare are intimately associated with the ability of a government unit to pay its employees wages relative to its revenues, or 'ability to pay.'"[41]

To evaluate the proposals of labor and management, arbitrators needed to adapt the ability to pay concept, which was drawn from the private sector bargaining context, and apply it in a public sector environment. Here, a measurement of what constituted adequate operating reserves, or how much money was held in a contingency fund, was used in lieu of measuring profitability. The law was silent on what constituted the "interest and welfare of the public;" thus, arbitrators were left to formulate their own analytical tools to make sense of the evidence before them. Arbitrator Levak noted: "The interest/welfare component was a legislative invention. In creating the combined criterion, the legislature was silent on its intended meaning, and left it to the neutrals to develop a common law public sector meaning on a case-by-case basis."[42]

According to analysis of 265 Oregon arbitration and fact-finding cases conducted in 1984, the ability-to-pay criterion was not discussed at all in 36% of the decisions. A positive ability of the government unit to pay was found in another 31% of the cases, a limited ability to pay in 26%, and an inability to pay in just 6% of the cases.[43] Not surprisingly, the use of an inability-to-pay argument by management increased during the 1980 to 1984 period, when the state lingered in a deep recession.[44]

A complete inability to pay a union's wage demands does not seem to have been a strong argument at any time in PECBA's history. Rather, the argument has been used selectively for extraordinary circumstances. Instead, the parties have usually contested the meaning of a "relative ability to pay," based on an examination of an extensive list of factors, including changes in the tax base, the size and availability of cash reserves and contingency funds, and the history of local levy success at the ballot box.[45]

A look at the pre-1995 cases indicates that the ability-to-pay/in-

terest-and-welfare of-the-public criteria were of less importance in determining the outcome of cases than was the question of comparative wages and benefits. As Arbitrator Levak noted in his summary of cases: "Other criteria—and particularly the comparability criteria—are normally more important than an established ability to pay. In fact [9]the comparability criterion is generally viewed as more important, or at least as the *de facto* starting point, in establishing an appropriate wage."[46]

COMPARABILITY

The PECBA's original language on the comparison of wages, hours, and conditions of employment specifies that comparators should be drawn from public and private employment in "comparable communities."[47] Because comparable communities was not defined in the statute, definitions of what constituted appropriate "comparators," or "comparables," quickly became a key point of contention between labor and management. The interest arbitration process in Oregon has developed as a contest between competing lists of comparable jurisdictions.

Determining appropriate comparables is an exercise in labor market analysis. This analysis starts with identifying the other labor markets that most closely resemble the labor market housing the unit under dispute. The simplest tools for this comparison have been population and geographic proximity. However, as the interest arbitration system matured, advocates became much more specific in the demographic characteristics they compared. On the revenue side, these factors include the variables that determine a community's economic base and tax structure: overall economic conditions, property valuation, per capita income, types of industries, budgeting process, and taxing authority. On the demand side, comparables typically include data on the use of services: crime rates, number of fire calls, and demand for ambulance services.

As one union advocate noted, disputes over comparables in the interest arbitration process are matters of both principles and polemics:

> Comparability analyses provide the broadest operating room for creative advocacy, the content of which departs dramatically from bargaining table polemics. The presentation of these cases must always appeal to principles first, with the methodology yielding the results. But in the real world, parties

preparing for interest arbitration and factfinding will often work backwards, from identifying the jurisdictions with desirable compensation schemes, to determining the methodology that fits those results.[48]

Summary of Oregon's Conventional Interest Arbitration Prior to 1995

From 1973 to 1995, arbitrators had a great amount of flexibility in applying the criteria and crafting the final awards. The criteria all held equal weight under the statute and many of the criteria were not closely defined. Additionally, arbitrators were able to apply the criteria to each individual issue of each party's offer to determine which party's issue should be selected. Finally, arbitrators could formulate an award that was different from any of the proposals made by each party. In large part, the 1995 changes to the statute were imposed to curtail arbitrators' flexibility in fashioning awards.

Background To The 1995 Changes

Attempts to change Oregon's interest arbitration system began in the early 1990s in the wake of the property tax rollbacks represented by Ballot Measure 5,[49] which limited the ability of local government to increase revenues through the property tax.[50] This difficult fiscal environment heightened a contentious debate in the Portland area over the effects of interest arbitration on local government. Portland Mayor Bud Clark asserted that the existing interest arbitration system was tilted toward unions.[51] He said the unions could not "miss when they have the labor laws in their favor."[52] Stan Peters, president of the Portland Police Association, responded by defending PECBA's provisions, denying that police were overpaid and pointing out that the Portland police had used interest arbitration only once in twenty years.[53]

Statewide, public debate heated up quickly, with some management proposals calling for radical transformation of the PECBA by eliminating interest arbitration altogether and giving public safety workers the right to strike, narrowing the criteria used, or changing to a LBO system. The drafted legislation for revision was withdrawn from consideration before the Oregon House of Representatives when it became apparent there were not enough votes to pass the measure.[54]

Republican legislators renewed attempts to revise the law during the 1995 Legislative session and introduced sweeping reforms to all of

PECBA. The proposed changes focused on three predominant issues: (1) the scope of bargaining, (2) the finality of grievance arbitration, and (3) interest arbitration procedures. Different constituent groups pursued different priorities in the revision attempt. Some, like the Oregon School Boards Association, were particularly committed to narrowing the scope of bargaining permitted by the PECBA. Certain legislators and public sector managers were determined to limit the authority of arbitrators to reinstate workers guilty of gross misconduct that violated public policy. Finally, there were those who were particularly concerned about revising the interest arbitration process.[55]

The first proposed version of SB 750 made interest arbitration optional for the parties and allowed public safety employees the right to strike if arbitration was not invoked.[56] In the final version, mandatory arbitration was reinstated, with two notable changes: (1) the form of arbitration was changed from conventional to final offer package (or LBO), and (2) the criteria that arbitrators were to use in evaluating the party's proposals were revised.[57] The final bill was passed on June 5, 1995, after extensive negotiations between the governor's office and Senators Gene Derfler and Neil Bryant, under the threat of a veto.[58]

The Theory Behind Last Best Offer Arbitration

In a final offer package interest arbitration system, management and the union declare an impasse and submit a final offer package to the arbitrator, who must choose the entire package of one of the parties. The arbitrator does not have discretion to make an award on an issue-by-issue basis as the arbitrator does in a conventional arbitration.[59] Nor does the arbitrator in a LBO interest arbitration have the authority to change, modify, or eliminate any portion of the parties' last best offers.

LBO interest arbitration is based on the theory that the binding arbitration process must generate enough risk for labor and management to encourage both sides to engage in serious bargaining rather than taking extravagant proposals to LBO interest arbitration. If the risk of losing the entire package is sufficiently high, the parties are then expected to bargain closer to their real "bottom lines," resulting in more settlements at the bargaining table and more modest awards when interest arbitration is invoked.[60] In other words, "final offer arbitration is structured so as to maximize the anxiety of the parties about the outcome of the process."[61] Proponents of LBO interest arbitration believed

that merely having an LBO system would push parties to settle and obviate its own use.[62] Additionally, the theory was that even if the threat of LBO interest arbitration did not force the parties to settle, then the LBO system would bring the parties' offers close enough together that the arbitrator's selection of one of the offers would not severely harm either party.[63]

Public sector labor practitioners who were critical of the conventional form of interest arbitration believed it discouraged the parties from real bargaining because there was no risk in taking an inflated economic package before an arbitrator.[64] This characterization was often combined with a belief that arbitrators merely split the difference between the two parties' packages in a conventional interest arbitration. An inflated initial offer supposedly led to an inflated final interest arbitration award. As one City of Portland labor relations official colorfully suggested in the early 1990s, the unions "know if they go to binding arbitration, they can throw a whole bunch of stuff on the wall and maybe some of it will stick."[65]

The New Interest Arbitration Criteria

Under SB 750 an arbitrator must pick either the employer's final offer package or the union's final offer package, using the criteria outlined in the statute. Arbitrators must base their findings, opinions, and decisions on the following eight criteria:

1. the interest and welfare of the public;
2. the ability of the government to pay;
3. the ability of the government to attract and retain qualified personnel;
4. the overall compensation presently received by employees;
5. the comparison of the overall compensation of other employees performing similar work in other similar-sized communities in Oregon;
6. the CPI-All Cities index;
7. stipulations of the parties; and
8. other factors.

Furthermore, arbitrators are required to give first priority to the interest-and-welfare-of-the-public criterion and give secondary priority to all the remaining criteria.[66]

The new statutory criteria were intended to limit arbitrator discretion, but the interest-and-welfare-of-the-public criterion is vague, and the provisions on comparability are ambiguous. In practice, arbitrators still have broad discretion to interpret the meaning of the criteria.

The Interest and Welfare of the Public

The interest-and-welfare-of-the-public is the only criterion designated by the statute to receive priority consideration by the arbitrator. However, the statute neither defines nor explains this criterion, nor sheds any light on how the arbitrators are to evaluate the public's interest. Most arbitrators have agreed that making an independent assessment of the public's interest and the welfare is usually impossible. As Arbitrator William Bethke noted:

> [In] the pure language of the bill, the phrase "interest and welfare of the public" is almost wholly uninformative. The problem is not that the concept of "interest and welfare of the public" is unimportant. To the contrary, it is vitally important. It is also extremely general and inherently debatable. [Footnote omitted.] Defining the "interest and welfare of the public" is much like defining the term "liberty;" reasonable people are bound to disagree about its meaning.[67]

Moreover, arbitrators have not found the legislative history of the statute to provide much help in determining the exact meaning of this criterion.[68]

Until SB 750, arbitrators usually viewed the interest-and-welfare-of-the-public criterion to mean the public's *economic* interest and welfare because the term was used in conjunction with "financial ability to pay" in the original statute. In the post-SB 750 era, arbitrators have been forced to reexamine the meaning of the interest-and-welfare-of-the-public criterion. Arbitrators have determined that the Oregon Legislature intended to require arbitrators to consider the interest-and-welfare-of-the-public criterion independent from the arbitrator's review of economic aspects of the proposals. As Arbitrator Carlton Snow reasoned:

> An argument can also be made that the legislature intended the meaning of "the interest and welfare of the public" to include more than economic considerations. The earlier law listed as a factor to be considered by an interest arbitrator "the interest and welfare of the public and the financial ability of the unit of government to meet those costs." (See ORS 243.746(4)(c)). Grouping "the interest and welfare of the public" with "the financial ability" of the employer suggested a close relationship between public interest and an

> employer's ability to pay.
>
> The new law made the "interest and welfare of the public" and "financial ability" two separate and distinct criteria. While retaining essentially the same language as the earlier law, SB 750 unhinged the two criteria and, additionally, instructed interest arbitrators to give "the interest and welfare of the public" first priority. (See ORS 243.746(4)(a) and (b)). Making "the reasonable financial ability of the unit of government to meet the cost" a secondary priority suggested that "the interest and welfare of the public" means considering something more than only economic matters. The dilemma, of course, is pouring content into the "something more" implicit in the reorganization of the statutory criteria.[69]

This opinion has also been reinforced by the Employment Relations Board (ERB) in a review of the enforcement of a post-SB 750 interest arbitration award. The ERB reasoned that:

> Before the law was amended in 1995, the "interest and welfare of the public" factor was an economic factor as part and parcel of the employer's ability to pay. That connection was severed by the SB 750 amendments and "interest and welfare of the public" now stands on its own as the foremost priority. The obvious inference to be drawn from that legislative action is that there is more to the public's interest and welfare than merely financial concerns.[70]

One clearly identifiable situation where arbitrators have applied the interest-and-welfare-of-the-public criterion in an independent fashion has been where one of the parties' last best offer contains an illegal provision. In these cases, arbitrators have turned to the primary criterion and concluded that it is in the public's interest to reject last best offers that contain illegal provisions. The arbitrators reason that the suspect provisions are not in the public's interest because the courts are likely to vacate the decision or nullify the illegal portion of the award and resulting collective bargaining agreement. There have been two such cases since the passage of SB 750.

In *City of Portland v. Portland Firefighters' Ass'n, Local 43*, Arbitrator Norman Brand ruled that the Association's overtime proposal violated the U.S. Fair Labor and Standards Act, and decided that the public's interest and welfare dictated that the Association's proposal be rejected.[71] Another example is *City of Springfield v. Springfield Police Ass'n,* where Arbitrator Ross Runkel found that the City's last best offer was likely to be vacated because it was unconstitutional, and accordingly, the City's offer was not in the public's interest.[72] After ERB's remand of *Springfield Police Ass'n* to the arbitrator, he explained his view that the Oregon courts would find it unconstitutional to enforce

the City's last best offer:

> The original Award expresses the view that the Oregon Supreme Court would find it unconstitutional for an interest arbitrator, who exercises the authority of the State, to impose the City's proposal. With that change in the City's characterization of the original Award, it is accurate to say that but for the constitutional issue I otherwise favored the City's proposal. Therefore, my view on the constitutional issue, and its relationship to the statutory standard of the "interest and welfare of the public," was the significant factor, which led to the original Award being to adopt the Association's package.[73]

Illegal proposals are not taken to arbitration very often, and it is likely the practice will become even more rare after *Portland Firefighters' Ass'n, Local 43* and *Springfield Police Ass'n*.

In other situations, arbitrators have concluded that the only way to define the interest-and-welfare-of-the-public criterion is by examining the secondary criteria—especially ability-to-pay, ability-to-attract-and-retain, and comparables. Arbitrator Howell L. Lankford articulated this position in an early LBO case:

> [T]he "interest and welfare of the public" can hardly be discussed at all except in terms of the factors listed in (b) through (f). It is hard to imagine what an argument about the interest and welfare of the public would look like in the context of a dispute over employee compensation without any reference to the factors which the legislature specifies are to be given "secondary priority."[74]

Since 1995, use of the secondary criteria to illuminate the meaning of the primary criterion has become the practice of a majority of arbitrators. As Arbitrator Levak noted in 2000, "It is now well established . . . that the primary criterion is inextricably linked to the secondary criteria."[75]

Arbitrators have lamented that the legislative history, the statute, and the ERB rules provide an inadequate definition of the interest-and-welfare criterion.[76] One noted, "Given two proposals that are each within the broad range of what may be called reasonable, it is not clear that the 'interest and welfare of the public' will typically yield any basis for picking one proposal over another."[77]

Government's Ability to Pay

Arbitrators often look first to a public employer's budget obligations and priorities other than personnel costs to determine whether the governmental unit has the ability to pay.[78] Since government has a

strong need to forecast real annual personnel costs to develop accurate budgets, potentially open-ended costs are discouraged by arbitrators.[79] Moreover, one arbitrator has reasoned that the statute requires arbitrators to compare the total cost of increases to the employer's budget.[80] However, an inability-to-pay argument will not necessarily override comparability factors.[81] When the government is claiming an inability to pay the union's package and the government's compensation package is significantly lower than the compensation paid in comparable jurisdictions, the governmental entity must clearly prove its inability to pay.[82] This approach is consistent with the way the ability-to-pay criterion was interpreted in the pre-SB 750 era.[83]

In some cases, an arbitrator's award may require a parity increase for un-represented employees if the government has a policy of providing the same increases to all workers. Arbitrator Bethke considered such a policy when determining the resulting cost of raising all salaries.[84] However, because the parity principle is not explicitly included in the criterion, arbitrators have creatively considered the "me too" consideration under the ability-to-pay criterion.[85] Arbitrator Bethke explained that he "remains concerned that Senate Bill 750 did not adequately address issues of internal comparison, internal consistency and equity among State employees. For political officials to make a difficult decision to equalize salaries is not unreasonable and might take place in the face of considerable financial strain."[86]

The timing of proposed economic changes is also a consideration. The ability-to-pay and overall cost criteria favor pay increases that are back loaded, because back loaded increases are less costly. An increase at the start of the contract year is twice as expensive as the same increase implemented at the beginning of the second six months of the contract. In *City of Ashland v. Ashland Firefighters Ass'n,* the employer's LBO was front loaded; thus, the employer's LBO would likely have cost more than the union's back loaded proposal.[87] Moreover, the City based its proposed wage increase on the unknown future CPI increase, and the arbitrator determined that the ability-to-pay criterion required the arbitrator to consider the highest potential wage increase.[88] The City admitted that depending on the CPI increase, its proposal could actually cost the City and taxpayers significantly more than the union's package.[89] Due to all these reasons, the arbitrator

selected the Association's final package.[90]

COMPARABLES

Despite the priority of the interest-and-welfare-of-the-public criterion in the statute, interest arbitration in Oregon remains largely a battle of "dueling comparables." Although the 1995 statutory language more specifically defined the comparable jurisdiction criterion, there is still a good deal of ambiguity in the application of this criterion, especially as it applies to fire departments and fire districts.

The concept seems simple: compare the compensation of employees doing similar work in similar-sized communities. One challenge arises when the parties and the arbitrator begin comparing jurisdictions that provide their own services with jurisdictions that are serviced by a fire district. The statute references comparable *communities*, not *districts*. Oregon Revised Statutes Section 243.746(4)(e) directs the arbitrator to compare the two proposals with the overall compensation of employees performing similar work *in* "comparable communities," not *of.* The statute defines *comparable* as "limited to communities of the same or nearest population range within Oregon."[91] Employers have sometimes ignored the relative populations of cities and argued that the proper comparators are the jurisdictions that have a similar number of employees. Interest arbitrators have rejected this argument and have determined that fire districts are creatures of statute and are not true Oregon communities. Arbitrators have reasoned that the Oregon Legislature wanted the arbitrators to focus their comparability analysis on the community, not on the type of firefighter service each community receives, because the 1995 Legislature was aware that some cities are serviced by fire districts, not by their own city fire-fighting force.

Arbitrators define *community* slightly differently from arbitration to arbitration, depending on the type and size of the public employer. However, "This variance does not change the general mandate of the statute that a city should be compared to other Oregon cities of roughly the same population."[92] In *Ashland Firefighters Ass'n*, the union asserted that comparable communities are those within a population range of 20% more than and 20% less than Ashland's population.[93] The employer maintained that a city that provides its own fire protection is not comparable to similarly sized cities that rely on larger fire districts for their fire protection.[94] The employer further argued that

those cities that rely on fire districts for their fire protection are not communities for the purpose of the Act.[95] Rather, the City contended that "those cities [relying on fire districts] have been subsumed into larger 'communities'—those of their fire districts."[96] Arbitrator Katrina Boedecker rejected this analysis, stating:

> In recent years other employers have argued that a city that provides its own fire protection is not comparable to similarly sized cities that rely on larger fire districts for their fire protection. . . . This argument ignores the relative populations of CITIES, to base comparators on the relative size of the ENTITY providing the fire service. Interest arbitrators have rejected this argument.[97]

An employer's argument that cities are not able to compete with fire districts, because of the city's other financial commitments, should be considered under the ability-to-pay analysis,[98] because that argument does not have a statutory foothold in analyzing the comparables criterion. In *North Bend Professional Firefighters*, Arbitrator Lankford offered his reasoning on why an arbitrator should consider the financial aspects of the city versus fire district issue only when applying the ability-to-pay criterion:

> The City argues that a fire protection district does not face the same conflicting demands for limited financial resources that a city must deal with. There is, of course, no getting around that fact. But the statute specifically reflects the legislature's instruction to consider "other services, provided by, and other priorities of, the unit of government" under the heading of ability to pay (subsection (4)(b)), but not under the heading of comparability (subsection (4)(c)). That distinction certainly makes sense on its face, because if exact congruence of services were to be a requirement for comparability, then Oregon—with its notorious proliferation of special service districts—would present an impossibly tangled skein indeed. Cities of the same size could not be compared, for example, if one included fire suppression services and the other did not or sewerage, or water, etc.[99]

Although the statute no longer allows for broad labor market comparisons, arbitrators may still use this type of analysis as an additional consideration when the State is the employer. In *International Ass'n of Fire Fighters, Local 1660*, the arbitrator determined that it was appropriate to compare Oregon-employed air base firefighters with other firefighters employed in the Portland area because it was the same community.[100] The arbitrator explained that the provision requiring an arbitrator to compare State employees to out-of-state employees is not exclusive.[101] Thus, an arbitrator must start by comparing State employees with out-of-state employees, but the arbitrator may next compare

State employees with other employees within the State that are employed by public entities other than the State.[102]

Trends in Interest Arbitration, 1995-2002

Overall Characteristics of the Cases

Since the 1995 amendments to the PECBA, 51 interest arbitration cases have been decided using the LBO process. Initially, management won most of the cases, 70% of the first 20. Since then, however, the parties have been more evenly matched. Of all the cases heard since enactment of the LBO system management won 27 cases (53%) and the unions won 24 (47%).

Police cases represent the largest number of interest arbitration awards since 1995 (61% of ERB's total interest arbitration cases). Of the 31 police contracts in interest arbitration, management won 17 awards (55% of the police cases), and the police unions won 14 (45% of the police cases). The firefighters took their disputes to interest arbitration 13 times (25% of the total cases). Management prevailed in 7 arbitrations (54% of the firefighter cases), and the firefighters' unions prevailed in 6 cases (46% of the firefighter cases). Finally, corrections contracts ended up in interest arbitration only 7 times (14% of the total cases). Corrections' unions won 4 disputes (57% of the corrections cases), and management won 3 (43% of the corrections cases).

Table 2: Interest Arbitration Cases, Post-SB 750

Type of Public Safety Work	Number of Cases	% of Total Arbitrations	# Won by Management	% Won by Management	# Cases Won by Union	%Won by Union
ALL	51	100%	27	53%	24	47%
POLICE	31	61%	17	55%	14	45%
FIREFIGHTERS	13	25%	7	54%	6	46%
CORRECTIONS	7	14%	3	43%	4	57%

Arbitrators

Thirty-two arbitrators have decided the 51 cases requiring final offer packages. Only two arbitrators, Katrina Boedecker and Howell Lankford, have decided 4 cases. Four arbitrators—Norman Brand,

Nancy Brown, Thomas Levak, and Carlton Snow—each have decided 3 cases. Six arbitrators have decided 2 cases each. Finally, the remaining twenty arbitrators have each decided only 1 case each. Accordingly, relatively few arbitrators have heard more than 1 or 2 cases, making this a more diverse group of neutrals than the initial group that heard the cases immediately following passage of the PECBA in 1973.

Characteristics of the Issues

The average number of issues presented to the arbitrator in the post-SB 750 cases was 2.9 per case, considerably less than the average number heard under the conventional arbitration system. Most often, the parties had failed to agree in negotiations on a general wage increase. General wage increases proposals were submitted to arbitration 37 times (73% of the total cases). Health insurance continues to be an important and divisive issue between the parties, and was a point of contention in 23 of the interest arbitration cases (45% of the total cases). Other issues brought to arbitration under the 1995 amendments were: premium pay (11 times), contract duration (9 times), vacation (9 times), overtime pay (8 times), retirement (8 times), incentive pay (7 times), and bidding systems (5 times). Issues brought in less than 10% of the cases included: employee rights, layoffs, legal fees, new position classifications, uniform allowances, parking, payday, length of contract negotiations, sick leave, seniority, holidays, workers' compensation, life insurance, association rights, zipper clause language, review committee formation, training, employee coverage, and drug testing. (See Table 3 in the Appendix for a summary of the issues presented in the post-SB 750 cases.)

In studying the 51 awards, we attempted to address two basic questions:

1. What are the bargaining issues that appear to be paramount in the arbitrators' selection of one LBO?
2. Which statutory criteria were utilized by the arbitrator in making those determinations?

Determinative Issues

The result is that most cases ultimately turned on two core issues: a general wage increase and health care benefits. An arbitrator's decision regarding the general wage increase tended to determine his or her se-

lection of the final offer package in 30 cases (59% of the total cases). In 7 of these cases, the wage increase was the only issue on the table. In 23 cases of these 30 cases, the parties' proposals included additional issues, but the general wage increase analysis controlled the arbitrator's decision, in effect subsuming the other issues. In other words, the arbitrator's choice of wage increase proposals resulted in the adoption of other proposals in the prevailing party's LBO.

Health insurance issues played a role secondary to wage increases in the 51 cases. The health insurance issue was determinative in 7 cases (14% of the total cases). In 5 of those cases, health insurance was not the only issue in the parties' LBOs. Therefore, in 10% of the total post-SB 750 cases, health insurance determined the outcome of the arbitration and contract terms. Since healthcare cost escalation reemerged as a national issue, it has become a weighty driving force in Oregon's interest arbitration cases.

Other determinative issues in the cases include: overtime pay, premium pay, and seniority. However, these pale in number to the more frequent determinative issues of the general wage increase and health insurance and coverage.

Finally, there were 17 single-issue interest arbitration cases (33% of the total). Most often, the single issue brought to the arbitration was economic: general wage increases, health insurance costs, overtime pay, callback pay, and premium pay. In 3 cases, the parties took a noneconomic issue to the interest arbitration: (1) bidding systems, (2) layoffs, and (3) new position classification. (See Table 4 set out in the Appendix for a summary of the determinative issues in Oregon's post-SB 750 cases.)

Determinative Criteria

The study of post-SB 750 cases indicates that arbitrators' first attempt to judge the parties' packages using the primary criterion—the interest-and-welfare-of-the-public—before looking to secondary criterion. They attempt to examine all of the relevant criteria and to look at them discretely. In most instances, however, they are forced to look beyond the primary criterion, often at multiple secondary criteria. Our analysis showed that three criteria—interest-and-welfare-of-the-public, comparability, and ability-to-pay—were ultimately decisive in the outcome of 43 of the 51 cases (84% of the total cases). (See Table 5

set out in the Appendix for a summary of the determinative criteria in Oregon's post-SB 750 cases.)

Interest and Welfare of the Public

Arbitrators used the interest-and-welfare-of-the-public criterion independent of any examination of the secondary criteria in determining 13 cases (25% of the total cases). Eight of these cases awarded the management final package, and the union won its LBO in 5 of these arbitrations. In 4 of the 13 cases decided based on this criterion, the arbitrators concluded that the interest and welfare of the public was best served by the efficient and effective operation of the employer, and awarded the management LBO. In another 4 cases, the arbitrators determined that the public interest included adherence to the principles underlying collective negotiations and bargaining. In 3 of these cases, the arbitrator selected the union's package. In the final case, the arbitrator held that the "party proposing the change has the burden to prove" the "compelling need" for the change, as a means of determining whether it served the interest and welfare of the public.[103]

As previously mentioned, constitutional and legal concerns motivated arbitrators in 2 cases to choose a package based on the public's interest. One time a union prevailed under this reasoning, and another time management won its package. In another case, an arbitrator defined the interest-and-welfare-of-the-public criterion as allowing the arbitrator to defer to a public official's determination of the public's interest, and that arbitrator selected the management LBO.[104]

Other cases decided by the interest-and-welfare criterion identified health insurance as being within the public's interest[105] and rejected tying wage increases to the Consumer Price Index (CPI).[106] The latter is the only post-SB 750 case where an arbitrator declared a preference for a fixed increase over one tied to the CPI.[107]

Comparability

The majority opinion among arbitrators is that the neutral must often look to the secondary criteria to decide which LBO better serves the interest and welfare of the public. Usually this analysis utilizes a statistical evaluation of comparability to award a final offer package. A third of all the 51 cases (17) were decided on this basis. Of these 17 cases, the union prevailed in 12 and the management won 5. Unions

appear to have been very successful using this as a primary strategy in their arguments before the arbitrator, winning 71% of the cases where comparability determined the outcome.

Ability to Pay

Arbitrators selected 13 LBOs (25% of the total cases) based on the financial ability of the governmental unit to pay for the respective offers. Management prevailed in 12 of these cases, and the union won 1 of the 13 cases.

Arbitrators usually start by reviewing the government employer's budget when considering the government's ability to pay either proposal. If the employer raises its inability to pay as a defense to the union's proposal, one arbitrator ruled that the employer must carry the burden to establish its relative inability to pay.[108] In one case, the arbitrator interpreted SB 750 to require arbitrators to consider the *relative inability* of the government to pay rather than *the absolute inability* of the government to pay for the union's proposal.[109] However, "arbitrators typically consider claims of inability to pay with healthy skepticism."[110] Arbitrator Snow reasoned that an arbitrator should not place too much emphasis on internal budgeting factors that can be controlled by the employer: "A fixed budget does not provide an impossible barrier to funding economic proposals. Otherwise an employer's self-imposed budget would be able to eviscerate statutorily mandated collective bargaining."[111]

If the government can show significant fiscal problems, the arbitrator is more likely to accept the government's argument that it cannot afford the union's package.[112] Where the government's financial picture shows no sign of improvement over the next couple of years, an arbitrator may find that the inability to pay supercedes the importance of the overall compensation paid by the comparables.[113] In some cases, the arbitrator will choose one package over another if one proposal's final cost is uncertain due to either the lack of predictability of a wage increase tied to the CPI or the lack of predictability of increases in health costs.[114]

Finally, one arbitrator has interpreted the ability-to-pay criterion to encompass the "me too" effect of an award on those outside the bargaining unit.[115] In *City of Grants Pass v. International Ass'n of Fire Fighters, Local 3564*, Arbitrator Nancy E. Brown gave weight to man-

agement's argument, that if the union's package were awarded, the City would have to bring other employees up to parity using its general and reserve funds.[116] The union argued that costs to other represented and unrepresented employees should not be considered by the arbitrator because the statutory criteria do not mention that the arbitrator must consider the costs of increasing other employees' wages.[117] However, Arbitrator Brown was not persuaded by that argument:

> The criteria, ORS 243.746(4)(b), mandates that the arbitrator take into consideration and weigh the other services and priorities of the City as determined by the governing body. The arbitrator reads the wording of this criteria to mean that she must consider the cost of the final offers in context and consider their impact on the other services and priorities of the Employer. In other words, she cannot turn a blind eye to the City's other legitimate needs.[118]

Ability to Attract and Retain Personnel

The public employer's ability to attract and retain qualified personnel was the determinative criterion in 5 cases (10% of the total). Originally seen as a stronger argument for management (especially when unemployment was high), the ability-to-attract-and-retain criterion seems to have been used more successfully by unions since 1995. Unions won all 5 cases in which attraction or retention was determinative.

In 2 of these 5 cases, the arbitrator used the data on *both attraction and retention* in reaching a decision.[119] Arbitrators selected the union's package in 2 cases where the union proved that the government employer was struggling to *retain* employees, even though the government was able to show that many applicants were *attracted* to the positions.[120] Finally, the union won a case in which the arbitrator found that many factors combined to show that the employer was experiencing great difficulty in recruiting qualified applicants.[121] The factors the arbitrator found relevant were: (1) the County experienced a significant drop in qualified applicants, (2) qualified corrections officers were in great demand in the Northwest, (3) the County was forced to recruit from outside Oregon, and (4) the applicants the County was attracting were often unqualified.[122]

CPI and Other Factors

Finally, there were 2 cases where statutory criteria other than the public's interest and welfare, comparability, ability to pay, and ability

to attract and retain, determined the outcome. In one case, the arbitrator awarded the management proposal based upon CPI information.[123] In another, the arbitrator upheld management's status quo position on a contract provision because the party proposing the change in language (the union) did not carry its burden to prove the change was warranted.[124]

Challenges To Interest Arbitration Awards

Since implementation of the new interest arbitration statute, three awards have been challenged based on issues related to the new statutory language, prompting the ERB to examine the application of the new arbitration criteria.[125]

ERB review of interest arbitration enforcement cases involve two issues: (1) whether the arbitrator's decision was supported by substantial evidence, and (2) whether the award was appropriately based on the statute. In all three cases, the ERB dismissed the challenges to the awards, refusing to make "right or wrong" judgments on how the arbitrator applied the statutes. As the ERB ruled in the first case, *Eugene Police Officers v. City of Eugene*:

> It is not the role of this Board to police interest arbitrators' various interpretations for correctness. . . . Our role is to determine whether the arbitrator applied the statutory factors, not whether he or she did so in the manner we would have.[126]

Conclusion

There are several clear differences in Oregon's experience under conventional and LBO interest arbitration.

The Parties Go to Arbitration Less Frequently

Thus far it appears that the higher stakes environment of LBO arbitration is resulting in fewer cases taken to arbitration. Since inception of the new system, the average number of cases per year has fallen from 11 to 7. The parties may be reducing the risks of LBO arbitration by attempting to resolve more issues at the bargaining table. On the other hand, the smaller number of cases may simply be a reflection of the parties' caution as they become familiar with the new arbitration system. Another explanation might be that the lower arbitration rate is directly related to the business cycle, and the continuing fiscal crisis the State of Oregon finds itself in.

The Parties Take Fewer Issues to LBO Arbitration Than They Took to Conventional Arbitration

The average number of issues per case arbitrated since SB 750 is 2.9, compared to 7 under the conventional system. This certainly seems to indicate that the parties are cutting less significant "rider" issues that formerly were thrown into the mix in the conventional arbitration system. Furthermore, in keeping with some scholars' observations about LBO, economic issues drive the process; few noneconomic proposals are arbitrated under the LBO system. Whether the parties' will start taking more issues to arbitration as they become more familiar with the LBO arbitration system remains to be seen.

Despite Changes in the Arbitration Criteria, Comparables Are Still Decisive

Arbitrator Ronald L. Miller observed that after a few years under the LBO system, "The discretionary authority of interest arbitrators to determine appropriate comparables remains substantial."[127] A majority of arbitrators have determined that the primary criterion, the interest-and-welfare-of-the-public, must generally be identified with consideration of secondary criteria. Comparability continues to be the most compelling criterion, absent a very strong ability-to-pay argument.

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[1] 1973 Or. Laws 536 (now codified at Or. Rev. Stat. § 243.650-.795 (2001)).

[2] Marcus Widenor, *Public Sector Bargaining in Oregon: The Enactment of the PECBA,* 8 *LERC Monograph Ser.* 5, 5 (1988). For a systematic review of the Act as first passed, *see* generally Don Brodie, *Public Sector Collective Bargaining in Oregon*, 54 Or. L. Rev. 337 (1975).

[3] Brodie, *supra* note 2, at 342.

[4] Statistics on arbitration cases from 1973 to 1995 have been drawn from the files of Oregon's Employment Relation Board (ERB). This information is sometimes supplemented with the analysis provided in Thomas Levak, *Handbook of Oregon Interest Arbitration and Fact-finding* (1989) (on file with author), which covers the period from 1976 to 1989. Arbitration cases from 1995 to 2002 are available on the ERB website at http://www.erb.state.or.us/ia750.htm (last visited Oct. 24, 2002).

[5] The Derfler-Bryant Act, SB 750, 68th Leg., 1995 Or. Laws 286 (generally amending Or. Rev. Stat. §§ 243.650 *et. seq.* and several other statutes).

[6] A truly comparative study of the characteristics of awards under the two sys-

tems—conventional and last best offer—will have to await a detailed study of all 236 pre-SB 750 awards. That task is beyond the scope of this study.

[7] Homer C. LaRue, *An Historical Overview of Interest Arbitration in the United States*, 42 ARB. J. 13, 14 (1987) (providing a historical overview of the development of interest arbitration in both the public and private spheres); J. Joseph Loewenberg, *Interest Arbitration: Past, Present, and Future*, *in* LABOR ARBITRATION UNDER FIRE 114 (James L. Stern & Joyce M. Najita, eds., 1997).

[8] 45 U.S.C. §§ 151-188 (2002).

[9] Loewenberg, *supra* note 7*, in* LABOR ARBITRATION UNDER FIRE 114 (James L. Stern & Joyce M. Najita, eds., 1997). One notable instance of private sector interest arbitration was the Experimental Negotiating Agreement (ENA) adopted by the United Steelworkers and the major steel producers between 1974 and 1983. *Id.*

[10] *LaRue*, *supra* note 7, at 18.

[11] Postal Reorganization Act, as amended, Pub. L. No. 91-375, 84 Stat. 720, 737 (codified at 39 U.S.C. § 1209 (2002)).

[12] WALTER J. GERSHENFELD*, Interest Arbitration*, *in* ARBITRATION–1974: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 190, 191 (Barbara D. Dennis & Gerald G. Sommers eds., 1974).

[13] Richard Kearney, LABOR RELATIONS IN THE PUBLIC SECTOR 339-40 (2nd ed. 1992).

[14] *Id.* The Supreme Courts of South Dakota, Colorado, Utah, and Maryland ruled public employee interest arbitration statutes unconstitutional on these grounds. *Id.*

[15] 292 Or. 266, 281-282, 639 P.2d 90, 99-100 (1981) (finding also that PECBA makes no organic change to the political form of local government).

[16] *Id.* at 281-83, 639 P.2d at 99-100.

[17] *Id.*

[18] Robert Hebdon, *Public Sector Dispute Resolution, in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 85, 85-125 (Dale Belman et. al. eds., 1996) (summarizing the research literature on the chilling and narcotic effects).

[19] Loewenberg, *supra* note 7, at 122, *in* LABOR ARBITRATION UNDER FIRE 114 (James L. Stern & Joyce M. Najita, eds., ILR Press, 1997); *see also* Hebdon, *supra* note 18, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 85, 85-125 (Dale Belman et. al. eds., 1996) (summarizing the research literature on the chilling and narcotic effects); Craig A. Olson, *Dispute Resolution in the Public Sector, in* PUBLIC SECTOR BARGAINING 160-88 (Benjamin Aaron et. al. eds., 2d ed. 1988).

[20] New Jersey reverted to a conventional interest arbitration system in 1996 after an experiment with last best offer. N.J. STAT. ANN. § 34:13A-16 (2001). For a critique of the last best offer system, *see* Senator Robert J. Martin*, Fixing the Fiscal Police and Firetrap: A Critique of New Jersey's Compulsory Interest*

Arbitration Act, 18 SETON HALL LEGIS. J. 59, 72-74 (1993).

[21] KEARNEY, *supra* note 13, at 345. Eugene's system was also the nation's first experiment in the final offer package form of arbitration. *Id.* Gary Long & Peter Feuille, *Final-Offer Arbitration: 'Sudden Death' in Eugene*, 27 INDUS. & LAB. REL. REV.186-203 (1974). The authors argue that the final offer version of arbitration was in vogue during the early 1970s because President Nixon had proposed this type of system as a means of resolving national emergency strikes in the transportation industry. *Id.*

[22] Long & Feuille, *supra* note 21.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] OR. REV. STAT. § 243.650(18) (1973).

[27] OR. REV. STAT. § 243.672 (1973).

[28] OR. REV. STAT. § 243.766 (1973). The PECBA was originally administered by a three-member Public Employment Relations Board (PERB) composed of part-time citizens. Brodie, *supra* note 2, at 339. In 1975, the PERB was reconstituted as a five-member Employment Relations Board (ERB) with a full-time chairman. *Id.* In 1977, the ERB was again reorganized as a three-member full-time board.

[29] OR. REV. STAT. § 243.650 (7) (1973).

[30] OR. REV. STAT. § 243.726 (1973).

[31] OR. REV. STAT. § 243.742 (1973).

[32] Robert G. Valletta & Richard B. Freeman, *The NBER Public Sector Collective Bargaining Law Data Set*, *in* WHEN PUBLIC SECTOR WORKERS ORGANIZE 399, 416 (Richard B. Freeman & Casey Ichniowski eds., 1988). This "bargaining environment" rating is based on a composite weighting of collective bargaining rights, scope of bargaining, representation and election procedures, terms of recognition, union security provisions, impasse procedures, and right to strike. *Id.*

[33] Widenor, *supra* note 2.

[34] The miscellaneous category includes emergency phone workers, psychiatric security personnel, some mixed units of disparate city employees, and a small number of nonpublic safety workers, where the parties had agreed to submit interest disputes to arbitration.

[35] The national inflation rates for 1979 to 1982 were 11.3%, 13.5%, and 10.3%, per year, respectively. U.S. Department of Labor, Bureau of Labor Statistics, *CPI for All Urban Consumers* at http://www.bls.gov/cpi/home.htm. The inflation rate for Portland was even higher. *Id.*

[36] Factfinding for strike prohibited employees was made optional under the PECBA in 1987 and has not been used since.

[37] These data come from a survey of the arbitrations on file at the Employment Relations Board office. Among the busiest arbitrators in the early days of interest arbitration under the PECBA were John Abernathy, Gary Axon, George Lehleitner, Thomas Levak, and Tim Williams.

[38] OR. REV. STAT. § 243.746 (1973). The eight criteria were modeled on those in the Michigan public employee bargaining statute.

[39] Levak, *supra* note 4, at 96.

[40] Some states have experienced considerable litigation in situations where the parties have challenged the finality of awards based on assertions that the criteria have been misapplied. Hebdon, *supra* note 18, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 85, at 112-13 (Dale Belman et. al. eds., 1996). The New Jersey collective bargaining statute now requires that the arbitrator address each criterion directly in his or her award. *Id.* One study concluded that a lack of guidance in the weighting of criteria led arbitrators to ignore them altogether. Gregory G. Dell'Omo, *Wage Disputes in Interest Arbitration: Arbitrators Weight the Criteria*, 44 ARB. J., Vol. 11 (1989).

[41] Timothy D. W. Williams et. al., *Ability to Pay: A Search for Definitions and Standards in Factfinding and Arbitration*, 3 LERC MONOGRAPH SER. 1, 18 (1984).

[42] Levak, *supra* note 4, at 98.

[43] Williams et. al., *supra* note 41, at 28. The study utilized a sampling of cases from the ten-year period. *Id.* Of the 265 total cases (fact-finding and interest arbitration), 48 were interest arbitration awards, or roughly half of all the arbitration awards issued during the ten-year period. *Id.* The use of the inability to pay argument goes up slightly to 8% when arbitration cases only are examined. *Id.*

[44] *Id.* at 29.

[45] Levak, *supra* note 4, at 99-102 (including an extensive list of factors based on the arbitrator's experience); *see also* Williams et. al., *supra* note 43, at 76-78 (listing nine factors indicating an employer's inability to pay and six factors illuminating the union's ability-to-pay case).

[46] Levak, *supra* note 4, at 98-99.

[47] OR. REV. STAT. 243.746 (4)(d) (1973).

[48] Henry Kaplan, *Interest Arbitration and Factfinding: Some Principles and Perspectives*, 13 LERC MONOGRAPH SER. 19, 30 (1994); WILL AITCHISON, INTEREST ARBITRATION 31-107 (2d ed. 2000) (discussing comparables); Levak, *supra* note 4, at 104-110.

[49] Ballot Measure 5 was a tax limitation referendum that severely limited property taxes for schools. *See* OR. CONST. art. XI, §§ 11, 11b.

[50] Ed Ruttledge, *Fallout From Measure 5: The Effects of Ballot Measure 5 on School District Labor Relations*, 13 LERC MONOGRAPH SER. 89, 90 (1994); *see generally* Margaret Hallock, *Oregon's Tax System and the Impact of Measure 5*, 13 LERC MONOGRAPH SER. 75 (1994) (discussing the effects of Measure 5

on public sector bargaining in Oregon); Thomas S. Doig, *The Effects of Ballot Measure 5 on School District Labor Relations: A Union Perspective*, 13 LERC MONOGRAPH SER. 115 (1994); Kenneth Upton, *The Effects of Ballot Measure 5 on School District Labor Relations: A County Government Perspective*, 13 LERC MONOGRAPH SER. 123 (1994); Tim Nesbitt & Greg Schneider, *State and Local Government Bargaining Under Measure 5*, 13 LERC MONOGRAPH SER. 131 (1994).

[51] Barnes C. Ellis, *Arbitration System Boon to Public Safety Workers*, THE OREGONIAN, Mar. 10, 1991, at C1.

[52] *Id.*

[53] Stan Peters, *Union Chief Denies City's Police Wages Too High*, THE OREGONIAN, Mar. 29, 1991, at C7.

[54] Marijuana Possession Bill Takes First Step in House, THE OREGONIAN, Mar. 20, 1991, at B4.

[55] Henry H. Drummonds, *A Case Study in the ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 32 WILLAMETTE L. REV. 69, 74 (1996) (detailing the negotiations surrounding the final bill); *see* David W. Turner et. al., *The Changing Landscape of School District Negotiations: A Practitioner's Perspective on the 1995 Amendments to the Oregon PECBA*, 32 WILLAMETTE L. REV. 709, 755 (1996).

[56] Drummonds, *supra* note 55.

[57] John Abernathy & Tim Williams, *Last Best Offer—Total Package: Oregon's New Form of Interest Arbitration*, 14 LERC MONOGRAPH SER. 85, 85 (1999). The authors also outline a number of other procedural changes the statute made in conjunction with the switch to the LBO form of arbitration. *Id.* at 86.

[58] There were allegations that Governor Kitzhaber signed the bill under threat of the legislature turning down a $52 million funding package to finance a 5% wage increase for State of Oregon employees represented by the Oregon Public Employees Union. Ashbel S. Green, *Kitzhaber, GOP Brass Agree on Collective Bargaining Bill*, THE OREGONIAN, June 2, 1995 at C7. The interest arbitration issue was also highlighted during the week of the bill's final passage when an arbitrator awarded state employees a higher increase than what was being offered to OPEU-represented state employees, who had recently ended a week long strike. John Griffith, *In Public Life*, THE OREGONIAN, June 1, 1995, at D4.

[59] Drummonds, *supra* note 55; Abernathy & Williams, *supra* note 57, at 85-86.

[60] Research on whether final offer package arbitration alleviates the chilling and narcotics effects are just as mixed as those on conventional arbitration. Summarizing seventeen studies of prearbitration settlement rates under different dispute resolution mechanisms, one scholar found that where the final offer package form was utilized there was a higher rate of settling disputes short of

going to arbitration compared to the rate in jurisdictions using conventional arbitration (84% as opposed to 76%). Hebdon, *supra* note 18, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 85, 110-11 (Dale Belman et. al. eds., 1996). However, it was still lower than the settlement rate of some of the hybrid forms of final offer arbitration (issue-by-issue, combined, tri-offer). *Id.* All forms had lower settlement rates than that of right to strike scenarios (95%). *Id.*

[61] Abernathy & Williams, *supra* note 57, at 107.

[62] Charles M. Rehmus, *Varieties of Final Offer Arbitration*, 37 THE ARB. J 4, 4 (1982).

[63] *Id.*

[64] While management was the main proponent of LBO in Oregon, Michigan's transition to a final offer system in 1992 was championed by the Firefighters' union, which believed it would alleviate a management initiated chilling effect. JAMES L. STERN ET. AL, FINAL-OFFER ARBITRATION: THE EFFECTS ON PUBLIC SAFETY EMPLOYEE BARGAINING 79 (1975).

[65] Barnes C. Ellis, *supra* note 51.

[66] OR. REV. STAT. § 243.746(4) (2001).

[67] Oregon v. Ass'n of Oregon Corrections Employees, IA-13-95 (1996) (Bethke, Arb.) *available at* http://www.erb.state.or.us/awards/ia1395.htm.

[68] As Arbitrator Boedecker noted, "[t]he legislative history regarding the meaning of 'the interest and welfare of the public' is meager." City of Grants Pass v. Grants Pass Police Ass'n, IA-07-96 (1997) (Boedecker, Arb.) *available at* http://www.erb.state.or.us/awards/ia0796.htm.

[69] Oregon Public Employees Union, Local 503 v. Oregon State Correctional Inst., IA-11-95 (1996) (Snow, Arb.) *available at* http://www.erb.state.or.us/awards/ia1195.htm.

[70] City of Eugene v. Eugene Police Officers Ass'n, 18 PECBR 683, at 685 (Member Thomas, dissenting).

[71] IA-01-00 (2001) (Brand, Arb.) *available at* http://www.erb.state.or.us/awards/ia0100.htm.

[72] IA-02-96 (1997) (Runkel, Arb.) (affirmed on remand) *available at* http://www.erb.state.or.us/awards/ia0296.htm.

[73] *Id.*

[74] Deschutes County Sheriff Ass'n v. Deschutes County, IA-18-95 (1996) (Lankford, Arb.) *available at* http://www.erb.state.or.us/awards/ia1895.htm.

[75] Oregon Military Dep't v. Int'l Ass'n of Fire Fighters, Local 1660, IA-16-99 (2000) (Levak, Arb.) *available at* http://www.erb.state.or.us/awards/ia1699.htm.

[76] *E.g.*, City of Eugene v. Eugene Police Employees Ass'n, IA-12-99 (2000) (Keltner, Arb.) *available at* http://www.erb.state.or.us/awards/ia1299.htm.

[77] *Grants Pass*, IA-07-96.

[78] Marion County v. Marion County Law Enforcement Ass'n, IA-10-95 (1995) (Sorenson-Jolink, Arb.) *available at* http://www.erb.state.or.us/awards/ia1095.htm. Arbitrator Sorensen-Jolink reasoned that because a budget allows for only a limited number of expenditures, her decision would directly affect the ability of the county to fulfill its other public service goals. She wrote that,

"The County has persuaded the Arbitrator that it would not be able to pay the projected extra cost of the Association's LBO, over the term of the Agreement, and fund all the new County positions (or even the new Sheriff's Office positions) approved in that budget over the term of the Agreement. The County would be much more likely to be able to fund all those new positions over that term if its LBO is adopted. Consideration of this criterion, accordingly, favors adoption of the County's LBO."

[79] City of Portland v. Portland Police Commanding Officers Ass'n, IA-01-95 (1995) (Hayduke, 1995) *available at* http://www.erb.state.or.us/awards/ia0195.htm. Arbitrator Hayduke explained his reasoning for suggesting that, even though Portland could afford to pay the package, the broad and open-ended overtime provision tilted the ability-to-pay criterion in favor of the City. He wrote,

"[w]hile the City's financial position is sound, the ability to pay criteria [sic] still does not mitigate strongly in the [Association's] favor because of the open-ended potential cost of the particular overtime proposal in question. Given the extremely broad nature of the Association's proposal, reasonable ability to pay would still be a valid concern."

[80] Am. Fed. of State, County, & Municipal Employees v. City of Cornelius, IA-01-99 (1999) (Brown, Arb.) *available at* http://www.erb.state.or.us/awards/ia0199.htm.

[81] City of North Bend v. North Bend Prof'l Firefighters, IA-07-99 (1999) (Lankford, Arb.) *available at* http://www.erb.state.or.us/awards/ia0799.htm.

[82] *Id.*

[83] Williams et. al., *supra* note 41, at 74-77 (discussing "inability to pay" vs. "unwillingness to pay"); *see also* Levak, *supra* note 4, at 97-101.

[84] *E.g.*, Oregon State Police Officers Ass'n v. Oregon, IA-22-95 (1996) (Bethke, Arb.) *available at* http://www.erb.state.or.us/awards/ia2295.htm.

[85] *Id.*

[86] *Id.*

[87] IA-12-00 (2001) (Boedecker, Arb.) *available at* http://www.erb.state.or.us/awards/ia1200.htm.

[88] *Id.*

[89] *Id.*

[90] Ashland Firefighters Ass'n, IA-12-00.

[91] OR REV. STAT. § 243.746(4)(e) (2001).

[92] Ashland Fire Fighters Ass'n, IA-12-00.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* (emphasis in original).

[98] *Id.*

[99] IA-07-99.

[100] IA-16-99.

[101] *Id.*

[102] *Id.*

[103] Gladstone Police Ass'n v. City of Gladstone, IA-10-00 (2001) (Gaba, Arb.) *available at* http://www.erb.state.or.us/awards/ia1000.htm.

[104] Clackamas County v. Clackamas County Peace Officers Ass'n, IA-16-97 (1998) (Dorsey, Arb.) *available at* http://www.erb.state.or.us/awards/ia1697.htm.

[105] Oregon City v. Oregon City Firefighters Ass'n., Local 1159, IA-04-99 (1999) (Abernathy, Arb.) *available at* http://www.erb.state.or.us/awards/ia0499.htm.

[106] Ashland Firefighters Ass'n., IA-12-00.

[107] Arbitrator Boedecker noted that the decision was a unique one, and she explained that her conclusion was based only upon the specific facts of this case. *Id.* In fact, she stated that "[t]his award is NOT a death knell to cost of living 'corridor' wage increases based on minimums and maximums." *Id.*

[108] Ass'n of Oregon Corrections Employees v. Oregon Dept. of Corrections, IA-18-01 (2002) (Miller, Arb.) *available at* http://www.erb.state.or.us/awards/ia1801.htm.

[109] Lincoln City v. Lincoln City Police Employees Ass'n, IA-11-01 (2002) (Silver, Arb.) ("Financial ability to meet the costs of the proposed contract has been changed to reasonable financial ability to meet those costs. This changes the inability-to-pay defense from an absolute inability-to-pay defense to a relative inability to pay defense.") (quoting Arbitrators Abernathy and Williams) *available at* http://www.erb.state.or.us/awards/ia1101.htm.

[110] Ass'n of Oregon Corrections Employees, IA-18-01.

[111] Bend Firefighters Ass'n v. City of Bend, IA-09-95 (1996) (Snow, Arb.) *available at* http://www.erb.state.or.us/awards/ia0995.htm.

[112] *E.*g. Benton County Deputy Sheriff's Ass'n v. Benton County, IA-16-01 (2002) (Collins, Arb.) (finding that the County's poor fiscal situation is "consistent with national trends, particularly in the wake of the September 11 disaster.")

available at http://www.erb.state.or.us/awards/ia1601.htm; Clackamas County Fire Dist. No. 1 v. Int'l Ass'n of Fire Fighters, Local 1159, IA-06-01 (2001) (Levak, Arb.) (giving deference to the District's decision to continue to follow a conservative fiscal strategy because the District had experienced and would continue to experience a shortfall in revenues) *available at* http://www.erb.state.or.us/awards/ia0601.htm; *Ass'n of Oregon Corrections Employees*, IA-18-01 (finding that "for the State of Oregon, the wolf is really at the door. . . . Evidence of record clearly documents the dire condition of the State's economy and the State of Oregon's substantial revenue losses.); Lane County Peace Officer's Ass'n v. Lane County, IA-21-99 (2000) (Downing, Arb.) ("The County's cry of poverty is supported by credible evidence [of declining revenues and increasing costs].") *available at* http://www.erb.state.or.us/awards/ia2199.htm; *Lincoln City Police Employees Ass'n*, IA-11-01 ("The City is facing financial hardship, as demonstrated by fact that its general fund expenditures have exceeded its revenues since 1997.").

[113] E.g. Lane County Peace Officer's Ass'n, IA-21-99.

[114] Lincoln City v. Lincoln City Police Employees Ass'n, IA-02-97 (1997) (Silver, Arb.) *available at* http://www.erb.state.or.us/awards/ia0297.htm.

[115] Int'l Ass'n of Fire Fighters, Local 3564 v. City of Grants Pass, IA-02-00 (2000) (Brown, Arb.) *available at* http://www.erb.state.or.us/awards/ia0200.htm.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Am. Fed'n of State, County & Mun. Employees v. Oregon Dep't of Corrections, IA-03-99 (1999) (Brown, Arb.) *available at* http://www.erb.state.or.us/awards/ia0399.htm; Coos Bay Police Officers' Ass'n, IA-05-01.

[120] Int'l Ass'n of Fire Fighters, Local 1660, IA-16-99; City of Cornelius, IA-01-99.

[121] Multnomah County v. Multnomah County Corrections Officers Ass'n, IA-06-98 (1999) (Paull, Arb.) *available at* http://www.erb.state.or.us/awards/ia0698.htm.

[122] *Id.*

[123] Grants Pass Police Ass'n., IA-07-96.

[124] City of Gresham v. Gresham Police Officers Ass'n., IA-28-94 (1996) (Logan, Arb) *available at* http://www.erb.state.or.us/awards/ia2896.htm.

[125] Eugene Police Officers Ass'n v. City of Eugene, 18 PECBR 673 (2000) (determining that the arbitration was valid despite the fact that the arbitrator failed to give first priority to the interest and welfare criterion and used only one comparator); Lane County Peace Officers Ass'n v. Lane County, 18 PECBR 750 (2000) (upholding the arbitrator's decision against the argument that the arbitrator failed to comply with statute by not applying criteria to the entire LBO); Oregon State Police Ass'n v. Oregon, 18 PECBR 711 (2000) (holding that arbi-

trator did not misapply the following criteria: comparables, total compensation, and recruitment and retention).

[126] *Eugene Police Officers Ass'n*, 18 PECBR at 619 (2000) Member Thomas dissented, arguing that the award was not enforceable because the arbitrator used only one comparator and did not properly consider overall compensation. *Id.* at 702. She argued that the arbitrator's failure to make "proper findings of fact" rendered the award unenforceable because it was not supported by "competent, material and substantial evidence on the whole record," as required by the statute. *Id.*

[127] Ronald L. Miller, *High Risk Final Offer Interest Arbitration in Oregon*, 28 J. OF COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 265, 278 (1999).

Appendix

Table 3: Issue Characteristics of Oregon's Post-SB 750 Interest Arbitration Awards

Average number of issues presented in 51 cases: 2.9

Issues:	
General Wage Increase	37
Health Insurance	23
Premium Pay	11
Contract Duration	9
Vacation	9
Retirement/PERS Pick-up	8
Overtime Pay	8
Incentive Pay	7
Bidding Systems	5
Employee Rights	4
Layoffs	3
Uniform Allowance	3
Legal Fees	2
New Position Classification	2
Parking	2
Seniority	2
Sick Leave	2
Association Rights	1
Drug Testing	1
Employee Shift Coverage	1
Extended Illness Bank	1
Holidays	1
Length of Contract Negotiations	1
Life Insurance	1
Payday	1
Review Committee	1
Training	1
Workers Compensation	1
Zipper Clause	1

TABLE 4: DETERMINATIVE ISSUES OF OREGON'S POST- SB 750 INTEREST ARBITRATION CASES

General Wage Increase	30
Determinative over other issues:	23
General wage as only issue:	7
Health Insurance	7
Determinative over other issues:	5
Health insurance as only issue:	2
Overtime/Callback Pay	5
Determinative over other issues:	2
Overtime/callback pay as only issue:	3
Premium Pay	2
Determinative over other issues:	1
Premium pay as only issue:	1
Bidding Systems	1
Determinative over other issues:	0
Bidding systems as only issue:	1
Layoffs	1
Determinative over other issues:	0
Layoffs as only issue:	1
New Position Classification	1
Determinative over other issues:	0
New position classification as only issue:	1
Seniority	1
Determinative over other issues:	1
Seniority as only issue:	0

TABLE 5: DETERMINATIVE CRITERIA OF OREGON'S POST- SB 750 INTEREST ARBITRATION CASES

Comparability	17
Union prevailed:	12
Management prevailed:	5
Financial Ability of Management to Pay	13
Union prevailed:	1
Management prevailed:	12
Total Interest and Welfare of the Public:	13
Total union prevailed:	5
Total management prevailed:	8
Efficient and effective operation of organization	4
Union prevailed:	0
Management prevailed:	4
Collective negotiations and bargaining principles	4
Union prevailed:	3
Management prevailed:	1
Constitutional/Legal concerns	2
Union prevailed:	1
Management prevailed:	1
Deference given to public officials' determination of what is in public's interest	1
Union prevailed:	0
Management prevailed:	1
Providing employees with good medical coverage at a low cost	1
Union prevailed:	0
Management prevailed:	1
Knowledge of actual costs of labor settlement	1
Union prevailed:	1
Management prevailed:	0
Ability to Attract and Retain	5
Union prevailed:	5
Management prevailed:	0
CPI	2
Union prevailed:	0
Management Prevailed:	2
Other Factor:	
Union prevailed:	**0**
Management prevailed:	**1**

The Good, the Bad, and Oregon's Last Best Offer Interest Arbitration: A Recovering Neutral's View

Pat Mosey

This article will review what I believe are several of the settled, not so well settled, and downright unsettled questions confronting Last Best Offer (LBO) arbitrators in Oregon. It is not intended to be balanced, neutral in tone, or in any sense comprehensive, but rather to be a management representative's perspective and opinion.

In June 1995, the Oregon Legislature enacted a substantial makeover of the state's 1973 Public Employee Collective Bargaining Act (PECBA). As one might expect, legislation sired by the closed door coupling of a naïve Republican Senate and Democrat governor was so rhetorically vacuous that it has been left to practitioners, arbitrators, and reviewing authorities to make the decisions the lawmakers could not; to legislate, in other words. While that is to some extent always the case with "new" law, and sometimes is fleshed out by a reasonably coherent and predictable body of adjudicatory precedent, it is nonetheless a backwards approach and therefore inevitably contains the seeds of discordant, if not chaotic, interpretative awards and case law. Theoretically, at least in this instance, the ERB and appellate courts would be expected to exercise an oversight responsibility that would ensure some measure of consistency among arbitral opinion and law. Thus far, the ERB and therefore the courts really haven't been asked about interest arbitration award legal sufficiency. A fact that is difficult to reconcile with repeated efforts of the parties to convince the legislature that SB 750 amendments need fixing.

The absence of adjudicatory interpretation handicaps arbitrators and practitioners alike. Unlike contract "rights" arbitrators, interest arbitrators are statutory critters, agents of the state of Oregon. Their mandate comes directly from the legislature and, like all statutorily created decision-makers, their powers are limited to those expressly prescribed by the law. ORS 243.752 seems to contemplate that interest arbitration awards are reviewable on a substantial evidence basis and for errors of law by the ERB and ultimately by the courts of appeal. In practical effect, however, none of these reviewing bodies is the least

inclined to second-guess an arbitrator's factual determinations and even less willing to examine an arbitrator's application of the arbitral criteria for legal sufficiency. Free from ERB or court scrutiny, several dozen arbitrators have been turned loose on the 1995 LBO process with predictably unpredictable and occasionally muddily reasoned, if not downright incomprehensible, results.

Statutory Fluff: A First Priority

The primary statutory consideration, and the one the arbitrator is directed to give first priority, is set out in ORS 243.746 (4)(a) "the interest and welfare of the public." Understandably, all but a few arbitrators have simply accorded this criterion a paragraph of lip service, and sometimes only a passing conclusory nod by way of a protective tag line in the award conclusion. If there is a majority view, it is that the interest and welfare of the public can be expressed only in terms of hard data concerning the secondary factors, essentially reducing this guiding principle to a hollow redundancy. On occasion arbitrators have concluded that neither LBO is more (nor less) in the public interest than the other is and so candidly decide the case on one or more of the secondary criteria without pretense. It will probably forever remain a mystery just what supporters of SB750 thought they were getting with this language and what they paid for it in the ex ante veto negotiations. Arbitrator Lankford probably made as reasonable a run at discussing the issue as any, given the breadth of the statutory pronouncement.[1] I read him to say, in his usual diplomatic way, that the interest and welfare of the public is a fine guiding principle but, standing alone, is of little or no practical help in deciding interest disputes.

Tight Times vs. Ability to Pay

Now and then an employer will defend its LBO by contending that its ability to pay is nonexistent or at least severely limited. Although an employer's financial condition and outlook are almost always relevant in compensation disputes, a true inability to pay is an extremely difficult condition to prove. Without actual program and service reductions (or eliminations) and concomitant decreases in staff FTE, an inability to pay case won't get off the ground. Arbitrators seem to expect and tolerate some degree of employer "poor mouthing," but not to the extent it is the linchpin of the employer's case. Arbitrators know that more often than not the budget "truth" lies far short

of fiscal Armageddon. It is nonetheless true that with few exceptions, jurisdictions relying on general funded services are being challenged to do more with less and consequently finding it a challenge to operate from one tax year to the next without borrowing. Cities, counties, and taxing districts cannot hire Arthur Andersen to make things right, cannot look to disappearing reserves and ending balances as if they were steady revenue sources, and certainly cannot treat an additional percent or two of salary as if it were a budget nuisance. Labor organizations remain in denial, pursuing the same old bloated COLAs and 100% employer underwriting of health costs, or thereabouts.[2]

Greener Pastures and Inexorable Attrition

The recruit and retain statutory indicia, Section (4)(c), is, it seems, too often used as an arbitral make-weight for a union award, but it seldom finds its way onto the employer's side of the ledger. An arbitrator acquaintance of mine, an individual who is often guilty of the sin of candor, unapologetically allowed as how it was absolutely true that, to paraphrase, "recruit and retain numbers can't help an employer's case but can sure hurt it." And so it is. If 60 qualified applicants show up for each vacancy, it's a "so-what." If three or four firefighters or officers leave for another jurisdiction offering more money and better career opportunities, the employer has got a problem.

Common sense ought to tell us that some percentage of a workforce will always be moving on to a better job and one would hope better money. It also is the plight of small public safety jurisdictions to act as the trainers for the monied medium to megasized agencies. Small jurisdictions that can least afford to spend the tens of thousands of dollars necessary to train a recruit repeatedly lose that investment before any real return is realized. There is some solace in the fact that in times of general shortages of public safety personnel, large agencies are not reticent to cannibalize each other in statewide and even nationwide recruiting wars. A bit of justice in the justice industry.

Perhaps the phenomenon will balance itself over time; a few of the old goats from the big city might migrate to Mayberry to help Barney Fife keep the peace. In any event, it would seem reasonable to discount the weight of this factor based on its empirically dubious causal relationship to inadequate salary and benefit level. Unless the

party relying on turnover can prove relatively high attrition and a concomitantly low applicant response to vacancies, and a *comparatively* low average tenure on the job, attrition evidence is really probative of nothing.[3]

Small Differences and the "Ah Shucks, Give It to the Union Syndrome"

There is a tactic employed by public safety unions in Oregon which, in a perverse way, could be good for the collective bargaining process. Not so elegantly phrased, it is this: Get what you can at the table and then arbitrate for a percent or two more, preferably backloaded or incrementally spread, so that you can argue, while still maintaining eye contact, that the difference in the parties' positions is so modest the employer ought to be ashamed to have forced the union to arbitration. At the risk of sounding cynical, the union that employes this tactic is doing its job. Arbitrators who accept the proposition at retail need to give the process a little more thought. Why should a relatively small difference in LBOs favor the union? Shouldn't an arguably de minimis difference in the LBOs be the best evidence that the employer's offer is per se reasonable and in the interest and welfare of the public? To resist this conclusion is to deny that the union is the moving party in interest arbitrations, whether over 10% or 1%, and that the compounding effect of a percent or two over several contracts is indeed substantial.

It is an extraordinary use of the arbitration process when a union drags an employer to arbitration contending that the employer's offer is an unacceptable percent or two low in a three-year wage package. Interest arbitration ostensibly was intended to be the statutory analogue of the right to strike, an anemic substitute for denying employees the right to self-help. Is that why strike-prohibited unions so frequently resort to arbitration compared to their strike-permitted counterparts exercising their right to strike?

Since the enactment of the PECBA in 1973, there have been 38 strikes, or about 1.3 per year. Presumably, the same table bargaining process has generated at least 260 interest arbitrations, almost 9 per year, in the significantly smaller group of strike-prohibited bargaining units. It would seem that a whole lot more bargaining went on in strike-permitted settings than in arbitration units. In the eight years since May 1995, there have been 6 strikes and 59 arbitrations. Thus,

while both strike and arbitration activity have dropped somewhat, compared to the incidence of strike, arbitration has become more prevalent in the LBO era. So much for the theory that LBO arbitration would make a meaningful difference in the way public safety unions approach negotiations.[4]

Comparability: Geography, Market, Tax Base, Average Rainfall

ORS 243.746 subsections (4)(a) and (4)(e) provide the pivotal considerations in the large majority of LBO interest arbitrations. Not infrequently the parties (including the arbitrator) differ significantly on what jurisdictions are comparable under the statute, and not so surprisingly disagree on what a given jurisdiction is actually paying in overall compensation for the subject employees' services.

Arbitration opinions are decidedly split on whether geographical or other considerations (e.g. tax base, assessed valuation, type of governmental unit) are legitimate indicia under the statutory comparability language. Because no side of the issue would ever be considered reversible error by the ERB or courts, practitioners are left to tailor their comparables to their arbitrator's view, unless, of course, the arbitrator has not had an opportunity to express an opinion on the issue. In that event, it makes sense to submit your case with two or three sets of comparables, each reflecting a slightly different emphasis on component affinity with one another and with your jurisdiction.

Tactics of parties from case to case are embarrassingly transparent. If you are a small Portland metropolitan/northern Willamette Valley employer, argue for statewide population comparables, which pulls in many chronically depressed eastern, southern, and some coastal jurisdictions. If you are a union located in a depressed jurisdiction, compare yourself to the fat cat bedroom suburb municipalities in the northern Willamette Valley. If you are an employer in one of the struggling areas, argue for local area comparables.

At this writing, there have been 59 LBO awards issued by 37 different arbitrators under the 1995 amended act. A bare majority appear to have been based upon statewide comparators using only the arbitrator's view of similarity in population size as the screening standard. This is admittedly a function of the fact that parties may more often submit on statewide comparables, more or less. In fact, some practitio-

ners appear to be tiring of manipulating comparable jurisdiction lists in order to nudge, if not bludgeon, compensation numbers. While it has its shortcomings, a statewide approach to comparability has the advantage of literal compliance with the statute. Further, it tends to dilute the skewing effect of regional differences and frustrate efforts of those who would "cook the books" by "cherry picking" comparables clearly not in the subject jurisdiction's labor market or economic environment.

Comparing Incomparables

At its core, comparability has to do with simple arithmetic. What does the statute mean when it says "communities of the same or nearest population range within Oregon"?[5] Arbitrators have virtually unreviewable discretion to decide which jurisdictions are too large or too small to be considered comparable to the subject employer. There may be instances in which it would be necessary, because of too few potential comparables, to consider even 50% larger populations as nearest to a subject employer.

That aside, and more importantly, the law is clear that this all-important factor in the arbitrator's analysis must be limited to comparison of *employer* "communities of the same or nearest population range," be they cities, counties or districts. Other than relying on a plain and commonsensical reading of the statute, it is impossible to provide direct evidence that would make the legislature's intent more obvious; that is, comparator community governments must be the actual employers of the employees providing the services.

Nevertheless, Unions and the IAFF in particular have sold many arbitrators a different view. In its simplest form, the Union's contention is that a "comparable community" need not itself employ anyone who performs "similar services" to those provided by the employees at issue in the arbitration. Thus, so the argument goes, a community as small as the City of Astoria with its population of 10,000 citizens, legitimately can be compared to a unit of government called Tualatin Valley Fire and Rescue (TVF&R), an employer serving 400,000 souls, simply because within TVF&R boundaries lie one or more "communities" (e.g. Wilsonville and Sherwood) of about the population of Astoria which contract with TVF&R for services. Ergo, these non-employer communities take on the character of their contracted service provider. Similarly, tiny North Bend was twice victimized by comparison to a

contract "employer" jurisdiction, TVF&R, as well as several other employers many times its size, including Jackson Co. F.D. No. 3 which contracts with the City of Central Point, thereby bootstrapping J.C. No. 3 to a comparable of North Bend.[6]

A variation of the theme entails the use of fire district jurisdictions much smaller than TVF&R, but which nonetheless may double, triple or even quadruple the population served by a city fire department. These "smaller" districts characteristically contain a city of roughly the same population within their service boundaries as the city at issue, and thus, asserts the Union, the districts can be compared to cities, notwithstanding vast differences in the size of populations served. Most arbitrators find such comparisons perfectly reasonable and apparently not deserving of explication.

A final observation about the arbitral view of statutory "comparables" is in order. Does it make sense that many employers within the Union's list of comparables would not be able to point to one another as comparables? Can TVF&R cite Mid-Columbia F & R as a comparable? Can it compare itself to Jackson County No. 3? Perhaps Hermiston? No, no, and no. How is it that these jurisdictions can be "comparable" to a city like Astoria but the reverse could never be true? Comparability clearly is not a two way street. There is something logically and mathematically troublesome about the Union's hypothesis that the population of governmental unit A can be comparable in size to units B, C, and D, while their populations in turn are not necessarily or even likely to be comparable to A's, nor to one another's. Yet arbitrators continue to embrace this sophistry, without a whisper of explanation or analysis.

Eventually and inevitably, the smallest of employers will be required by arbitrators to provide the same level of salary and benefits as the largest and wealthiest of service providers in the business. Whether that is good or bad or even fiscally sustainable may be argued, but one thing is clear: comparability is being written out of the law, one award at a time.

Back on the Record: Such as It Is

There may never have been a more neglected statutory mandate than that which requires LBO interest arbitration awards to be "supported by competent, material and substantial evidence on the whole record. . . ."[7] The fact that a half hour unemployment hearing is likely

to generate more tested and reliable evidence than an all day arbitration ought to concern those who consider collective bargaining disputes slightly more complex and challenging than a pro se battle between a separated employee and their employer. It's not as if labor practitioners are unfamiliar with the Administrative Procedures Act[8] and rights arbitration procedures, or view them as unduly burdensome. So what could be that difficult about following similar processes in the much higher stakes game of interest arbitration? Perhaps arbitrators fear being accused of interfering or taking sides in the case. If that's true, they need to get over it. If the statute itself does not provide enough evidence that arbitrators' obligation to the public is to require that the parties make a satisfactory record, ERB rule likewise places the interest arbitator in the position of record maker: "The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."[9]

More about the Evidence: Thin Soup Indeed

By far the most difficult task confronting an arbitrator under the statute is separating fact from fantasy in the numbers presented by the parties as representing the overall compensation of comparator jurisdictions. Because interest arbitrators are charged by statute—and thus serve as the agent, if not alter ego of the state—they arguably act not only as disinterested adjudicators but also as stewards of the interests of the principal party, the public. In the latter capacity, an arbitrator's first responsibility is to ensure that an adequate record is made, one sufficient to underpin an award by "competent, material and substantial evidence." The sad reality is that the overwhelming majority of interest arbitrators historically have been loath to become actively involved in making a record, no matter how hopelessly ambiguous, conflicting, or plain silent the evidence is concerning the statutory criteria upon which the award ultimately must be based. The arbitral neglect would make little difference to the outcome if the advocates put on a case, instead of the now traditional monologue-dominated presentation of unauthenticated pap delivered by the parties' lawyers.

Since the passage of the act in 1973, practitioners and arbitrators alike have largely ignored even the most relaxed administrative evidentiary principles. Instead, a sort of laisez faire approach has evolved, one in which the advocates themselves simply say it's

so, touring through page after page of overflowing three-ring binders whose heft would buckle the knees of a small burro. Hearing by ambush is the rule. Parties rarely disclose in advance the hard data, which purportedly underpins their LBO, preferring instead to shovel it at the arbitrator en masse with little or no reliance on witnesses for validation or explanation. The competent and the counterfeit flow into the record with equal ease. The resulting impenetrably confusing and undeveloped record is left to the arbitrator to untangle and make from it what little sense there is to be made.

Dribs And Drabs: Some Modest Proposals for Change

The LBO process could be made considerably more meaningful if arbitrators would accept their commission conditioned upon the parties' agreement to provide each other with their exhibit binders and witness lists several weeks in advance of hearing. This would enable each side to build a rebuttal case and to test the other's data with its own research and cross-examination. Just as important, arbitrators should require that someone other than a party's attorney or representative attest to the pedigree of the information offered and produce raw supporting data with authenticating testimony; in other words, require the parties to put on evidence in a manner more akin to an APA contested case, a procedure that has proven itself sufficiently sophisticated to manage even the most complex and voluminous of evidentiary and legal disputes. It's not asking much out of the ordinary to exclude attorneys and representatives from attesting to the validity of their client's evidence. The Bar even might have an interest in such advocate involvement in a case.

A passing and gratuitous observation on this subject needs airing. Too often arbitrators express themselves in the most conclusory prose. Advocates cannot explain to their clients what caused them to prevail (or not) because there is no semantic content in the award rationale. Perhaps if arbitrators required parties to put on a more reasonable and reasoned record, something more than arbitral spam could be cooked up.

Can't Get There from Here

Common sense tells advocates that the more issues a party brings before an arbitrator the more likely one of those proposals will be the poison pill that kills the whole package. So, logic would dictate a lean LBO comprising only proposals most likely to find favor. Wrong, more

or less. What appears to turn an arbitrator this way or that is an issue (occasionally two); the rest is extraneous. The issue could be salary, premium pay, health insurance premium cost sharing, whatever. Arbitrators typically will make an award based on an issue, one they apparently feel comfortable in analyzing and perceive to be at the heart of the dispute.

Thus, perceived lesser issues that may be very important to one or both parties will not get a clean discrete discussion from the arbitrator, regardless of their merits. A shame, but there it is. Maybe an issue-by-issue LBO approach would have made more sense. Maybe.

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[1] State of Oregon Police and Oregon State Police Officers' Association, IA-18-99 (Lankford, 2000).

[2] This inevitably creates tension among senior bargaining unit members and the youngsters. The internecine conflict does not serve labor peace. A union wage proposal that can be funded only by layoffs of junior employees may be convincing evidence of what some management types have always believed to be the natural order of things in a union shop; that is, in times of fiscal belt tightening "they eat their own."

[3] It is also true that nearly all professions take turns at being in short supply and, therefore, in high demand; nurses, engineers, teachers to name a recent few. The exception, of course, is the lawyer profession. Many folks view *one* as a glut.

[4] On the upside, the number of issues carried to arbitration has dropped substantially and the number of arbitrations post '95 (SB 750) per year has diminished from the 80's through mid 90's period by well over 50%. A good thing as Martha would say.

[5] ORS 243.746(4)(e).

[6] North Bend Firefighters Local 2406 and City of North Bend, IA-07-99. Apparently the legitimacy of comparing watermelons to a kiwi was never disputed by the City.

[7] ORS 243.752.

[8] ORS Chapter 183.

[9] OAR 1151-40-015(7)(n).

Comparables Under Senate Bill 750: Union Perspective

Daryl Garrettson

The passage of Senate Bill 750 by the 1995 Oregon Legislature brought changes—some real, some imagined—but mostly Senate Bill 750 brought uncertainty to the world of interest arbitration in Oregon. Would the old rules apply as they had evolved over twenty years under the Public Employees' Collective Bargaining Act? Or would new rules have to come into play? And if it is to be new rules, what would they be?

The obvious changes under Senate Bill 750 were the "winner-take-all requirement" and the elevation of "interest and welfare of the public" to primary status. But what about the secondary criteria? Were they to be interpreted differently?

The focus of this article is on the changes, if any, in how comparisons are to be made under Senate Bill 750. That is, has Senate Bill 750 changed how comparisons are made, who the comparators are, what is compared, and when are comparisons made?

Choosing Appropriate Comparators

The first question to address is who the appropriate comparator jurisdictions are. This is the question that tends to generate the greatest disagreement in the arbitration hearing itself. Often, the advocates have selected their comparators, not on the basis of objective criteria, but rather to justify their respective positions. As a result, arbitrators, over time, have attempted to develop their own objective standards for the selection of comparators.

> This Fact-Finder believes that ideally comparable communities ought to be located nearby in the same labor market . . . be of similar territorial size and population density, draw upon similar resources and tax bases, have a similar mix of commercial, industrial and residential properties with a similar need for police protection, and maintain similarly sized Police Departments.[1]

Among the factors historically utilized by arbitrators in selecting comparable jurisdictions have been population, physical proximity to the city or county under study, physical proximity to a major metropolitan area, assessed valuation of property, number of employees, per

capita income, median family income, poverty rates, physical area of the jurisdiction under study, crime rates, historical comparables, form of government, relative cost of living, existence or nonexistence of collective bargaining, and the existence and nonexistence of labor organization representation.[2]

Did Senate Bill 750 change the standards or otherwise require arbitrators to utilize different criteria in the selection of comparable jurisdictions? Since these various standards were routinely applied in the pre-Senate Bill 750 arbitrations, the first place to start is with the language of the statute itself.

Pre-Senate Bill 750 ORS 243.746 (4) (d) provided, in relevant part, as follows:

> (d) Comparisons of the wages, hours and conditions of employment of other employees performing similar services with other employees generally:
>
> (A) In public employment in comparable communities.
>
> (B) In private employment in comparable communities.[3]

Post-Senate Bill 750 ORS 243.746 (4) (d) and (e) provide, in relevant part, as follows:

> (d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.
>
> (e) Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities.
>
> As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:
>
> (A) For any city with a population of more than 325,000, "comparable" includes comparison of out-of-state counties of the same or similar size;
>
> (B) For counties with a population of more than 400,000, "comparable" includes comparison to out-of-state counties of the same or similar size; and
>
> (C) For the State of Oregon, "comparable" includes comparison to other states.[4]

The obvious changes are the specification that comparison involves

overall compensation and the provision that "comparable" is limited to communities of the same or nearest population range within Oregon. Was the second change really a change? That is, by adding this language specifying population, did the Legislature intend to limit the selection of comparables to population only, to the exclusion of any other factors, or did the Legislature intend only to limit the selection of comparables to a population range but not preclude an arbitrator from using other criteria to select among the various comparables within a population range in order to determine whether a comparable was appropriate to use?

Pre-Senate Bill 750 arbitrations had included decisions by some arbitrators utilizing jurisdictions as comparators, even though the populations were not similar. For example, Marion County was found to be a comparator of Polk County, and Portland was found to be a comparator of Salem. Was this the evil the Legislature wished to fix, or did it intend to further restrict the arbitrator's discretion by limiting the selection criteria solely to population?

Majority Position

The majority of arbitrators who have addressed the question, beginning with George Lehleitner, in *IAFF, Local 2091 and Winston-Dillard Fire District #5*,[5] the first award issued under the post-SB 750 guidelines. These arbitrators have found that the Legislature did not intend to bar consideration of other factors, while a minority have found that population is the sole factor in the selection of comparables. One arbitrator has chosen not to be restrained by
population at all:

> The Arbitrator also agrees that while Multnomah County (population 636,000) is too large to be considered in the same population range with Clackamas County, nevertheless because the parties have traditionally compared the wages paid by Multnomah County to its law enforcement personnel with the wages paid by the County to members of the bargaining unit, that county can properly be considered a "comparable county" in this case.[6]

Before reviewing the arbitration decisions illustrating the majority and minority positions, two caveats need to be kept in mind. First, an arbitrator is often limited to the position and evidence presented by the parties. Thus, Arbitrator Norman Brand, in *Coos Bay Police Officers' Association and City of Coos Bay*,[7] was presented only with the question of whether comparables should be selected from all Oregon

cities between 10,000 and 20,000 in population, or should be an equal number of comparable jurisdictions higher and lower in population. The second caveat is that because "interest and welfare of the public" has been made an overriding criterion, and because arbitrators have to choose one or the other of the parties' proposals, they may not decide a dispute based on an assessment of comparability.[8] All told, there have been 23 post-Senate Bill 750 arbitrations where comparables were not an issue, or if comparables were an issue, the arbitrator did not decide the question.

As noted above, the majority rule was first enunciated by Arbitrator George Lehleitner in *Winston-Dillard*:

> In my view, the District's interpretation is only partially correct. It is true that comparability criterion, as amended by SB 750, limits an arbitrator's analysis to departments located in "comparable communities within the same population range." However, while the arbitrator is not permitted to look beyond the State of Oregon, except for cities of more than 325,000 or counties of more than 400,000, I see nothing in the statutory language expressly stating or even implying that an arbitrator cannot limit his/her comparisons to departments within the same geographical area. Indeed, if sufficient comparable departments within the same population range exist in the same geographic area, I believe such departments are the most appropriate comparables.[9]

Arbitrator Catherine Harris expanded on this view in the *Lincoln City* decision:

> To be sure, the comparability criteria limit the comparison to police departments located in "comparable communities within the same population range within the State of Oregon." However, the language of the statute does not provide that similarity of population is the only factor to be determined in determining comparability of communities. To the contrary, once the appropriate range has been identified, nothing precludes the Arbitrator from determining that one or the other of the sets of comparators is more appropriate due to geographical proximity or other factors. In other words, population is only a threshold limitation. If a community is within the population range, other factors may be considered; if not in the appropriate range, then it does not matter how similar geographically or economically the community may be, it is not an appropriate comparator.[10]

Arbitrator Hein noted the same in the *City of Woodburn* case:

> As is common in these cases, the parties differ as to which departments are comparable under the terms of the statute. The City contends that the statute expressly requires as comparators all communities in Oregon with the same or nearest population range. The Association argues that it is more appropriate to use as comparators those communities in the same population

> range as Woodburn that are also in the same geographical area. I agree with the Association. I read the second sentence of (e) as expressing a limitation rather than a prescription—that is, it limits consideration of those communities in the same population range but does not require consideration of all cities with that characteristic. Especially considering the statutes discretion in criterion (c) to consider recruitment and retention of employees, it seems logical to favor comparisons to those public employers that will be competing with the City for the same employees; in this case, those that are in the same geographic area and that have other similarities, such as being incorporated cities within proximity to the state's major city, Portland.[11]

Minority Position

The minority view was expressed by Arbitrator Howell Lankford in *Yamhill County* as follows:

> What the plain language does not allow, on its face, is expanding "population range" as necessary to make sense of the resulting comparables when analyzed in terms of geographic proximity, economic and population trends, and the like. Such an interpretation, it seems to me, would read "limited to . . . the nearest population range" out of the statute entirely.[12]

The Firefighter Exception

Coupled to the majority and minority rule, is the firefighter exception. In several cases, it has been argued by employers that cities covered by a fire district are not comparable or otherwise similar to cities that provide their own fire-fighting service. The arbitrators have routinely held that the term "similar community" relates to the nature of the community itself, and not the service provided, and that it therefore rejected employers' efforts to exclude similarly sized communities that are serviced by a fire district. The cases in questions include arbitration awards in North Bend, Astoria, and Ashland. In each of those cases, the employees' representative sought to include cities in the Portland metropolitan area serviced by Tualatin Valley Fire and Rescue or Clackamas County Fire District #1. It does not appear from the decisions that any of the parties argued factors such as geographic proximity, but rather the argument is based solely on whether a community had to provide the same services in order to be similar. The fire district exception was summarized by Arbitrator Katrina Boedecker in the *City of Ashland* arbitration as follows:

> Although the meaning of "community" will vary from arbitration to arbitration, depending on the public employer involved—city, county or state—this does not change the general mandate of the statute that a city like Ashland should be compared to other Oregon cities of roughly the same population. The

> employer argues that Tualatin, West Linn and Milwaukie are not "communities" because they provide fire service through association with fire districts. However, Tualatin, West Linn and Milwaukie did not vanish simply because they provide fire service through fire districts. Nothing in the statute suggests that "community" should be defined as "entity that provides fire service." The statute expresses only one criteria to determine comparable communities, population range. The statute does not allow arbitrators to determine comparability base on HOW a community provides fire service.[13]

The general rule, then, applying to the selection of comparable jurisdictions recognized by a majority of arbitrators in Oregon can be summarized as one where population range is only the basis to make the first cut at determining who appropriate comparators are. After that first cut is made, it is appropriate to utilize other factors that have historically been relied upon by arbitrators, such as geographical location, per capita income, and crime rates, in making a final determination on who the appropriate comparator jurisdictions should be. The one caveat would be, however, that to the extent a "dissimilarity in services provided" is asserted as a basis for distinguishing comparators, the majority rule of arbitrators (at least for firefighters) under Senate Bill 750 would be that it is not an appropriate factor to take into consideration.

What is Compared? The Overall Compensation Standard

Now that we know who the comparators should be, the next question is, what is to be compared? As noted above, Senate Bill 750 requires a consideration of overall compensation. Overall compensation as defined in the statute includes direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.[14] These are the factors the arbitrator must examine when comparing the employer's and the union's packages.

The key word to be found in the statute is "received." The word is repeated twice in subsection (d) and requires that the comparison be specifically related to compensation received. To the extent that pre-Senate Bill 750 arbitrators considered employer costs, and not compensation received, it would appear that Senate Bill 750 has changed that rule. As noted by Arbitrator Lankford in the interest arbitration for the *Oregon State Police Officers' Association*:

> Second, the statute clearly and expressly requires a comparability analysis in

> terms of "the overall compensation" received by the employees being compared, rather than an analysis in terms of costs to the employers. "Overall compensation" is defined in the prior subsection; and the Legislature changed the language of the comparability provision to echo that term exactly, lest there be room for doubt. Suppose, for example, that an employer pays ten dollars per hour and is subject to a twenty percent payroll tax which does not enure to the benefit of the employees. Regardless of whether those employees were the ones at issue in an interest arbitration proceeding or were proposed as comparables, their "overall compensation" would be ten dollars an hour and not twelve dollars. In the real world, of course, it is unusual to find a cost to the employer which indisputably "does not enure to the benefit of the employee;" but not all employer costs automatically translate dollar for dollar as compensation received by the employees.[15]

If what is to be compared is compensation received, what, then, does that mean in regard to the real world as it relates to determining total compensation? Or to utilize the statutory term, overall compensation received? This issue has arisen in three contexts: first, whether the employer's PERS contribution should be considered, second in determining how to value an insurance benefit, that is, employer premium costs or employee out-of-pocket costs; and finally, in the *Oregon State Police Officers' Association* arbitration noted above, in how to deal with Social Security in a comparator jurisdiction that is not in the Social Security system.

PERS Contribution: Employer Cost

As it relates to the question of the employer's PERS contribution, the PERS question was answered by Arbitrator Mark Downing in the *Lane County* arbitration as follows:

> [H]owever, the statute requires consideration only of the compensation presently received "by the employees." Thus, overall compensation must be viewed from an employee perspective. An employee receives certain benefits through the County's PERS contributions. Although the County's PERS contributions are higher than those paid by the comparables, employees in all of these jurisdictions receive the same pension benefits. It is not appropriate to include the County's PERS contributions in calculating the overall compensation received by employees. The Arbitrator adopts the Association's methodology for determining overall compensation.[16]

Health Insurance: Whose Cost?

The same question arises as it relates to insurance contributions. That is, how are insurance contributions to be determined? Is it the

employer's cost for the policy, or is it the out-of-pocket to the employee? Arbitrators who have directly addressed the question have found that it is the benefit received by the employee, and not the premium paid by the employer:

> The benefit received by the employee is not the amount of the premium the employer pays for insurance coverage but the coverage itself, if the premium therefore is fully paid by the employer. To the extent that percentage is evidenced on the record, coverages for all kinds of insurance is fully paid by the employer in all comparative jurisdictions, except that Washington County provides no vision insurance. Since the County only pays for vision coverage if the employee chooses a medical plan including it, and since the Washington County information is as of June 30, 1994, and this record does not evidence whether the tentative agreements would change this figure, the Arbitrator will not consider vision insurance in the comparison. Accordingly the Arbitrator will view insurance benefits received as equal in all jurisdictions, because from what the record evidences, employees in both the County and all comparator jurisdictions receive one-hundred percent employer-paid coverage for insurance available to every employee in the jurisdiction.[17]

In another case:

> As indicated previously, the comparability issue as it relates to insurance is slightly different. At present bargaining unit employees are paying $45.12 out of pocket for full family coverage. The Union contends that firefighters in Winston-Dillard pay more out of pocket than any comparators proposed by either side. On the other side of the coin, the District argues that it is already paying more for insurance than most of the comparator departments . . . . As indicated previously, for the purpose of comparability, the emphasis should be on benefit received not the cost of the benefit.[18]

Social Security: Is It Relevant?

Finally, in regard to the question of Social Security and whether Social Security taxes were properly included in a total compensation analysis, Arbitrator Lankford found that they were not properly included.[19]

The issue of Social Security is likely to arise only when one of the few Oregon cities such as Keizer, which is not a Social Security employer, is used as a comparator, or in the state of Oregon arbitrations where other states are used. The Social Security tax is both an employer cost and a reduction in net compensation. The only arbitrator to consider the question, Lankford found it to not be a part of the total compensation.

Paid Leave

The last question to be addressed in this article is the manner in which arbitrators consider questions of paid leave. Subsection (d) requires, as consideration of overall compensation, consideration of "vacations, holidays and other paid excused time." To date, arbitrators appear not to have developed a consensus on the manner or means by which this time should be calculated. Many arbitrators take the view that because it is merely paid time off, there is no additional monetary benefit received. Other arbitrators segregated and considered time off as a separate comparison with no monetary value assigned. And at least one arbitrator has suggested that the preferred methodology would be to deduct paid time off from total hours worked and to use that adjusted figure to determine an adjusted hourly rate.

The latter method was suggested by Arbitrator Lankford and utilized by him in the State Police arbitration:

> As the Association's Post-hearing Brief points out, the State's analysis essentially backed out the leave numbers it had added in an attempt to reflect those factors. The State's numbers are still useful, however. It makes sense to adjust for the differences in total hours of leave—as the statute expressly requires—by subtracting all such leaves from annual hours of work: because the employee does not have to work during his or her leave hours, the annual salary actually results from work during a period determined by the annual hours less the total hours of leave.[20]

The contrary view was expressed by Arbitrator Leslie Sorensen-Jolink as follows:

> The Arbitrator will consider the number of hours earned per month, rather than their monetary value (i.e., hours times hourly wage). This is because as far as the record reveals, the employee does not receive that value; the employer receives the time.[21]

As can be seen from the divergent views above, it appears that as of this writing, no clear consensus has been developed on the manner in which paid leave is to be treated as part of an overall compensation analysis.

Implications for the Advocate

In summary, under Senate Bill 750, comparators are selected by first determining an appropriate population range and then applying those factors determined by the arbitrator to be relevant in selecting

jurisdictions within that population range as a comparator. The comparison, then, is compensation received, and not employer costs. Thus it appears that, although the rules have changed under Senate Bill 750, they have not changed to the degree some parties believe.

What does appear to have changed significantly is that, because the arbitrator must choose the total package of one party or the other, one portion of a last best offer may be contrary to the weight of the comparables and still be awarded. It even may be disreputable.[22]

Prior to Senate Bill 750, an arbitrator could amend or modify a proposal to alleviate a problem. However, now the importance of comparability has diminished as a result of the requirement that the arbitrator find one package or the other in the "interest and welfare of the public." For example, in *City of Portland and Portland Firefighters' Assn., Local 43,* the arbitrator found the union's last best offer to violate, in one part, the Fair Labor Standards Act, as it related to overtime.[23] The arbitrator then found that it would not be in the "interest and welfare of the public" to award a last best offer that violated the law. In *City of Bend and Bend Police Officers' Assn*. the arbitrator found that to award the city's last best offer would be rewarding what the arbitrator found to be bad faith bargaining by the city. In both these decisions, the status of comparators was not a deciding factor.[24]

Thus while the change in the statute made little, if any, change in the selection of comparators, the statute has made a significant change in the role that comparators play in the final decision by the arbitrator. Because the arbitrator may not change or amend the last best offers, and because the arbitrator must select one of the last best offers, comparison becomes secondary to the "interest and welfare of the public" and, as noted above, may become irrelevant to the decision making process.

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[1] Ruben Goggin, *Elkouri & Elkouri, How Arbitration Works,* Fifth Ed., 1999 Supplement, P. 223, quoting from City of Willowick, 110 LA 1146 (Ruben, 1997).

[2] Atchison, *Interest Arbitration*, Second Ed., PP. 37-55 (Portland, 2000).

[3] ORS 243.746(4), pre-1996.

[4] ORS 243.746(4), post-1996.

[5] IA 07-95.

[6] Clackamas County Peace Officers' Association and Clackamas County, IA 16-97, (Dorsey, 1998).

[7] IA 05-01 (Brand, 2001).

[8] *See, for example*, City of Oregon City and Oregon City Firefighters' Assn., Local No. 1159, IA 04-99 (Abernathy, 1999); and Multnomah County and Multnomah County Corrections Officers' Association, IA 06-98 (Paull, 1999). Some arbitrators simply choose not to discuss their reasoning because there is an alternative basis for their decision based on some other factor. *See, for example*, City of Portland and Portland Firefighters' Assn., Local 43, IA 01-00 (Brand, 2001) (illegality of proposal), and City of McMinnville and McMinnville Police Officers' Association, IA 20-99 (Wollett, 2000) (change in the status quo).

[9] IA-07-95.

[10] City of Lincoln City and Lincoln City Police Employees' Association, IA 02-97 (Harris, 1997).

[11] City of Woodburn and Woodburn Police Association, IA 09-97 (Hein, 1998). *See also* Jackson County and Jackson County Sheriff's Employees' Association, IA 10-99 (Lang, 2000), State of Oregon (Portland Air Base) and IAFF, Local 1660, IA 16-99 (Levak, 2000), City of Eugene and Eugene Police Employees' Association, IA 12-99 (Keltner, 2000), Klamath County and Klamath County Peace Officers' Association, IA 07-97 (Torosian, 1998), Clackamas County and Clackamas County Peace Officers' Association, IA 16-97 (Dorsey, 1998), City of Bend and Bend Firefighters' Association, IA 09-95 (Snow, 1996), State of Oregon and Association of Oregon Corrections Employees, IA 13-95 (Bethke, 1996).

[12] Yamhill County and Teamsters Local 670, IA 04-96 (Lankford, 1997). *See also* Lane County and Lane County Peace Officers' Association, IA 21-99 (Downing, 1999) and Malheur County and OPEU, IA 06-96 (Williams, 1997).

[13] City of Ashland and IAFF Local 1289, IA-12-00 (Boedecker, 2000). *See also,* City of Astoria and IAFF Local 696, IA-14099 (Lindauer, 2000) and City of North Bend and IAFF 2406, IAIA-07-99 (Lankford, 1999).

[14] ORS 243.746 (4) (e).

[15] State of Oregon and Oregon State Police Officers' Association, IA 18-99 (Lankford, 2000). *See also* Marion County and Marion County Law Enforcement Association, IA 10-95 (Sorensen-Jolink, 1995) and Winston-Dillard Fire District #5 and IAFF, Local 2091, IA 07-95 (Lehleitner, 1995).

[16] Lane County and Lane County Peace Officers' Association, IA 21-99 (Downing, 2000). *See also* State of Oregon and Oregon State Police Officers' Association, IA 18-99 (Lankford, 2000) and Yamhill County and Teamsters Local 670, IA 04-96 (Lankford, 1997).

[17] Marion County and Marion County Law Enforcement Association, IA 10-95 (Sorensen-Jolink, 1995).

[18] Winston-Dillard Fire District #5 and IAFF, Local 2091, IA 07-95 (Lehleitner, 1995).

[19] State of Oregon and Oregon State Police Officers' Association, IA 18-99 (Lankford, 2000).

[20] State of Oregon and Oregon State Police Officers' Association, IA 18-99 (Lankford, 2000).

[21] Marion County and Marion County Law Enforcement Association, IA 10-95 (Sorensen-Jolink, 1995).

[22] State of Oregon and Oregon State Police Officers' Association, IA 18-99 (Lankford, 2000).

[23] IA-01-00 (Brand, 2001).

[24] IA-07-00 (Wollett, 2000).

Comparables Under Senate Bill 750: Management Perspective

Sharon Rudnick

The question of what "evil the Legislature wished to fix" by amending the language of ORS 243.746(4) is one that is difficult to answer. No legislative history helps to interpret this section of the statute. The arbitration decisions since Senate Bill 750 have struggled with this same lack of history.[1] ("Neither the statute nor the legislative history of SB 750 provide interest arbitrators any guidance on this issue and as a result it has been the subject of considerable discussion by interest arbitrators.")[2] This lack of direction from the Legislature has left the statute open to the interpretation of those charged with enforcement of the provision, the arbitrators.

Who Decides What is a Comparable Community under ORS 243.746(4)(e)?

The arbitrator determines how to interpret the factors listed in ORS 243.746(4) with little oversight from the Employment Relations Board. As the Board itself noted, by 2000, 39 interest arbitration awards had been issued since the amendments in Senate Bill 750 went into effect and "[i]t would not be much of an exaggeration to say that there have been 39 different interpretations of the ORS 243.746(4) factors."[3] Nevertheless, the Board went on to state, "[i]t is not the role of this Board to police interest arbitrators' various interpretations for correctness."[4] The Board's role is to "determine if the arbitration award is (a) supported by substantial evidence and (b) based upon the statutory factors." [5] The Board refuses to broaden that "review to encompass the correctness of the arbitrator's legal and factual determinations,"[6] and has emphasized that the "statute properly leaves it to the arbitrator's discretion to determine the appropriate relationship to comparables, and we leave it there as well."[7]

As long as the interest arbitrator bases his decision on the statutory factors, the Board will not disturb his interpretation of the scope and reach of the particular criteria.[8] And as the Board points out, there is no consensus among the arbitrators as to what is the "correct" interpretation of what is a comparable community, which has resulted in

disagreement among arbitrators and inconsistencies among interest arbitration decisions.

What is a Comparable Community under ORS 243.746(4)(e) According to Interest Arbitrators?

Every arbitrator has agreed that the language "limited to communities of the same or nearest population range within Oregon" sets an absolute limit on the comparators. While it may or may not be allowable to consider other factors (discussed below) to eliminate some of the comparably sized communities, the plain language of the statute makes population the main consideration for determining comparators.[9]

Agreement among arbitrators, however, ends there. Arbitrators have divided over the correct interpretation of the statute based on the Legislature's use of the words "limited to." One group of arbitrators has opined that the Legislature meant to confine comparators only to those communities of the same or nearest population range without regard to any other factor. As one arbitrator put it: "[T]he fact of the matter is that the language of Senate Bill 750 clearly provides that population range must be the factor used in selecting comparator communities" and does not provide for consideration of other factors such as geographic proximity, urban environment versus rural environment, or any other criteria.[10]

The majority of arbitrators use population to establish the permissible range of comparable communities, but also consider additional factors such as geographic proximity or per capita income, to identify the "most comparable" communities within the nearest population range.[11] This group of arbitrators continues to require all comparable communities to fall within an appropriate population range when compared to the subject employer; otherwise, "it does not matter how similar geographically or economically the community may be, it is not an appropriate comparator."[12]

For example, based on this rationale, Arbitrator Lehleitner excluded from the group of similarly-sized communities those located in larger population areas and those outside the geographic area as not the most comparable.[13]

If the purpose of ORS 243.746(4)(e) is to ensure competitive compensation among similarly situated communities, the majority's ap-

proach makes sense. While population is a legitimate starting point for comparison, population alone does not capture the full picture of the communities being compared, which can be fleshed out by consideration of other factors like geography and socio-economic conditions. The creation of the "firefighter exception" to this logical approach to comparables, however, distorts the purpose of this criterion. Requiring a community which provides fire service to pay wages comparable to those paid by large fire districts, simply because the fire districts serve a community similar in size to the subject employer, throws this market-based system out of whack. The result is that the cost to small, rural communities of providing fire service continues to escalate to keep pace with the compensation offered by large, urban fire districts, who employ many more employees and have significantly more resources. This result could not have been the intent of the Legislature but the majority of arbitrators seem to disagree.[14]

What is to be Compared? The Overall Compensation Standard

The statute expressly lists insurance as one of the items to be compared in the overall compensation calculation. Assuming, as some arbitrators have, that insurance coverages received by employees in various communities are essentially of equal benefit to employees as long as the premium is fully paid by the employer, is inaccurate, and ignores the statutory requirement that the value of insurance benefits be included in the calculation of total compensation. While it is true that the appropriate yardstick for measuring the value of insurance coverage is the benefit received by the employee,[15] the most accurate monetary measure of that benefit is the premium paid by the employer on behalf of the employee. The premium reflects the market value of coverage enjoyed by the employee, given the levels of coverage provided, the costs of obtaining that coverage in the employee's geographic market, and other relevant factors. Rather than a fixed cost to the employer, the insurance premium increases or decreases as a direct result of the level of benefit provided to the employee—the more comprehensive the coverage, the higher the premium. The premium is a direct measure of what the employee would have to incur himself to replace the benefit provided by the employer. As such, it is a reliable measure of the benefit received by employees as a result of employer-provided insurance coverage.

The Final Analysis

The lack of guidance from the Legislature or the Employment Relations Board on the appropriate interpretation and application of ORS 243.746(4) has left interest arbitrators with the difficult task of interpreting the statute in the first instance. Because interest arbitrations turn on the particulars of each situation, the result is a series of arbitration decisions that adopt conflicting interpretations and applications of the statute, and leave public employers and their representatives without a clear roadmap for navigating post-SB 750 public safety collective bargaining and interest arbitration. Given the lack of guidance, perhaps the most fruitful course is to argue for a common sense application of the statute, that results in sustainable, market-based compensation for public safety employees that are within the resources of each community to provide. The other course of action is to convince the Legislature to amend ORS 243.746(4) to provide a clearer picture of the intended meaning of "comparable community" within the context of the interest arbitration.

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[1] City of Astoria/IAFF, IA-14-00 (Lindauer, 2000).

[2] City of Bend/Bend FF Assoc., IA-09-95 (Snow, 1995) (There "is a dearth of useful legislative history . . . .").

[3] Lane Co. Peace Officers' Assoc. v. Lane Co., 18 PECBR 750, 760 (2000).

[4] *Id.*

[5] Oregon State Police Officers' Assoc. v. Dept. of State Police, 18 PECBR 771, 789 (2000).

[6] *Id.* at 790-91.

[7] *Id.* at 793.

[8] *Id.* at 796.

[9] Yamhill Co./Teamsters, IA-04-96 (Lankford, 1996).

[10] Malheur Co./OPEU, IA-06-96 (Williams, 1996).

[11] *See* Yamhill Co./Teamsters, IA-04-96; City of Bend/Bend FF Assoc., IA-09-95.

[12] Lincoln City/Lincoln City Police, IA-02-97 (Harris, 1997).

[13] Winston-Dillard Fire Dist./IAFF, IA-07-95 (Lehleitner, 1995); *see also*, Polk Co./Polk Co. Deputy Sheriffs' Assoc., IA-11-00 (Krebs, 2000) (arbitrator can further narrow list based on geographic proximity and natural division of state between east and west to determine the most appropriate comparators within the communities within the same or nearest population range); Lincoln City/Lin-

coln City Police, IA-02-97 (Harris, 1997) ("once the appropriate range has been identified, nothing precludes the Arbitrator from determining that one or the other sets of comparators is more appropriate due to geographical proximity or other factors").

[14] City of Astoria/IAFF, IA-14-00 (Lindauer, 2000) (statute clear that only those communities that are of the same or nearest population range are to be compared, "irrespective of whether they are served by a separate fire district"); Grants Pass/IAFF, IA-02-00 (Brown, 2000) (since fire districts had traditionally been included in comparators, there was no reason to believe this practice had been legislatively overturned based on the language in the statute); City of Ashland/IAFF, IA-12-00 (Boedecker, 2000) (by not mentioning fire districts anywhere, the legislature must have intended arbitrators to continue to use similarly populated communities including those served by fire districts).

[15] *See* ORS 243.746(d).