

## HIGH RISK FINAL OFFER INTEREST ARBITRATION IN OREGON

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### ABSTRACT

Dissatisfied with conventional interest arbitration for public safety employees, the Oregon legislature set about to diminish the use of interest arbitration and to limit the discretionary authority of arbitrators. Under Oregon's new procedure, the arbitrator is limited to selecting either the union's or the employer's last-best offers, total package-by-total package. In this high-risk form of interest arbitration, a party wins all or loses all. In selecting between the total packages, the arbitrator must use decision criteria specified in the law. Comparing use-rate of interest arbitration in the two years before the revisions and the two years after the revisions, the number of cases was cut in half and the number of issues per case was also substantially reduced. However, the objective to reduce arbitrator's discretionary authority has been only partially achieved. Overall, the legislature created an interest arbitration procedure that contains substantial strike-like risks for the parties that use it.

In 1995, a newly elected Republican-dominated legislature negotiated with a popular Democratic governor to change Oregon's public sector collective bargaining law. One of the chief sponsors of Senate Bill 750 (SB 750), Senator Neil Bryant, identified the purposes of the proposed legislation as a means:

... to rebalance the system that has fallen out of balance in favor of labor . . . to restore management rights in the collective bargaining system, and to respond to Oregon taxpayer demands for accountability and efficiency from government [1].

These legislative ambitions had to contend with the Governor's veto threat that the majority did not have the votes to override. The final bill that emerged from veto negotiations among legislative leaders and the governor struck a balance between a major overhaul of public sector collective bargaining and the maintenance of the status quo. Among the more significant changes brought about by SB 750 were 1) the conversion of interest arbitration from a conventional procedure to a high-risk procedure based on last best offer packages, and 2) the prioritizing of decision-making criteria for arbitrators. These revisions were intended to diminish the use of interest arbitration and to limit the discretionary authority of interest arbitrators.

Public sector collective bargaining legislation for Oregon was first enacted in 1973. In reaction to a strike by police officers in the city of Klamath Falls, that occurred at the same time the legislation was being drafted, work stoppages by law enforcement officers, firefighters, correction officers, and guards at mental hospitals were prohibited, and conventional interest arbitration was provided to settle impasses in contract negotiations. In 1985, emergency telephone workers (911 operators) were added to the list of strike-prohibited employees. Since 1973, there have been no strikes among these public employees, and prior to 1995, about 75 percent of all public safety contracts were resolved without the parties going to interest arbitration. Nevertheless, perceptions among many Republican lawmakers that arbitration awards for public safety employees set patterns for city, county, and state employment and that arbitrators give too little attention to budget allocation decisions of elected officials fueled calls for reform. The lawmakers acted from deep-seated beliefs that the existence of conventional interest arbitration discouraged meaningful negotiations, and encouraged unions and employers to repeatedly use the process to obtain a collective bargaining agreement. There is ample research in industrial relations literature both to support and to refute these beliefs.

### LAST-BEST-OFFER PROCEDURE

The revised interest arbitration procedure was designed to maximize strike-like risks, to encourage settlements prior to arbitration and to reduce the number of issues submitted to arbitration when bargaining fails. A major objective of SB 750 was to eliminate the authority that former conventional arbitrators had to formulate an award from the array of issues presented by the parties. Under Oregon's new procedure, the arbitrator is limited to selecting either the union's or the employer's last-best offers, total package-by-total package. In this high-risk form of interest arbitration, a party wins all or loses all. Partial victories are no longer possible in Oregon. Prior to SB 750, in the vast majority of decisions, each party came away with something of value.

In summary, the revised interest arbitration procedure provides:

- Following declaration of a bargaining impasse by the union and/or employer, the parties petition the Oregon Employment Relations Board (ERB) to initiate the arbitration process. The ERB provides the parties with a list of seven arbitrators, from which the arbitrator is selected by alternatively striking names. The fee and expenses of the arbitrator are shared equally and paid by the parties.
- At least fourteen calendar days prior to the date of the arbitration hearing, the parties submit their last-best offers on all unsettled issues to each other. The legislative intent is to create a situation in which the high risk associated with win-all or lose-all awards induce parties to compromise and avoid arbitration, or at least to minimize the number of issues they bring before the arbitrator.
- During the hearing, the arbitrator receives evidence and testimony from each party on the merits of its last-best offers. Post-hearing briefs may be submitted at the arbitrator's discretion. The award must be issued by the arbitrator within thirty calendar days after the record of the hearing is closed.
- The arbitrator must select either the union's total package or the employer's total package. In the analysis that accompanies an award, the arbitrator is expected to explain how the statutory decision-making criteria are used in selecting between the last-best-offer packages presented by the parties.

The legislature considered other forms of final offer interest arbitration, including: selection of final offers issue-by-issue; selection among final offer packages including a package composed by a neutral fact finder; and selection among multiple packages composed by each party. However, acting from its primary motivation to discourage the use of arbitration and encourage reliance on hard bargaining to resolve disputes, the legislature specified a high risk procedure in which the arbitrator has no authority to change, modify, or eliminate any part of a last-best-offer package. Noted later in this analysis, arbitrators have commented that under this highly restrictive procedure, an issue that deserves implementation could be lost in a rejected package.

### DECISION-MAKING CRITERIA

For the advocates, as they prepare and present their case, and for the arbitrator, as s/he selects between two last-offer packages, the new set of mandated decision-making criteria compounds the risks associated with the revised procedure. In particular, arbitrators select a package and explain their reasons with an eye to the potential of administrative review by the ERB. In the first instance, any challenge to an award would come to the ERB as an unfair labor practice case.

SB 750 requires arbitrators to promulgate written findings along with an opinion and order based on the following criteria:

Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to subsections (b) to (h) of this subsection as follows:

- (a) The interest and welfare of the public.
- (b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.
- (c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.
- (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 to out-of-state cities 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;
  - (C) For the State of Oregon, "comparable" includes comparison to other states.
- (f) The CPI-All Cities Index, commonly known as the cost of living.
- (g) The stipulations of the parties.
- (h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award [2].

As first proposed, the 1995 amendments would have made each succeeding criterion in the statute a lower priority. The compromise reached through veto negotiations established three priorities: first, the interest and welfare of the public; second, criteria b through g with no one of these superior to the others (weight and importance to be assigned by the arbitrator); and third, other relevant factors only if criteria a through g do not provide sufficient evidence for an award. Subsequently, arbitrators have reasoned, most notably Arbitrator Howell Lankford in *Deschutes County Sheriff Association and Deschutes County* [3], that

criteria b through g are relevant primarily to economic disputes. Those criteria may not provide sufficient basis for an award—especially in disputes over language, such as vacation scheduling. Therefore, arbitrators would likely have greater latitude to introduce and use other decision-making criteria provided for in h, if the dispute concerns a non-economic issue. There has been no litigation on this matter.

### INTEREST AND WELFARE OF THE PUBLIC

Interest and welfare of the public has been a statutory criterion since the original public sector collective bargaining legislation was enacted in 1973. However, prior to SB 750, this criterion was combined with “the financial ability of the unit of government to meet those costs” in a single sentence. The pre-SB 750 decisions of arbitrators devoted little attention to the interest and welfare factor. Most often, arbitrators typically noted that their awards were in the interest and welfare of the public and reflected balanced interests of public employees and the tax paying public. SB 750 separated interest and welfare from financial ability, and assigned interest and welfare first priority. The logical inference is that the legislature intended to call an arbitrator’s attention to the point that the interest and welfare of the public is not to be defined solely in economic terms.

In *Association of Oregon Corrections Employees and State of Oregon*, Arbitrator William Bethke commented, “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” [4, p. 10]. In an early draft of SB 750, legislators proposed to make the governing body of the public employees the sole determiner of the public’s interest and welfare. Central to this reasoning was the belief that elected officials, not an appointed arbitrator, should give operational meaning to “interest and welfare” in a particular case. Nevertheless, when SB 750 emerged from veto negotiations, arbitrators were given the authority to determine the public’s interest and welfare. Ultimately, the legislature accepted the premise that to do otherwise would make interest arbitration a meaningless process, and would call into question the viability of interest arbitration as a substitute for work stoppages. Interest arbitration is not a substitute for the institutions of representative government. Rather, the procedure was created through a political process and serves as one of the state’s decision-making and allocating mechanisms.

Since 1995, a majority of interest arbitrators have held that the interest and welfare of the public is not a stand alone criterion and can be determined only in the context of objective evidence and findings associated with the secondary criteria. Arbitrator Timothy Williams wrote for many arbitrators when he stated in *Malheur County and Oregon Public Employees Union*, “The Arbitrator will evaluate the interest and welfare of the public criterion only after the secondary criteria have been considered” [5, p. 16]. Arbitrator Carlton Snow was more emphatic in *Oregon Public Employees Union and State of Oregon* when he

stated, “It is impossible to find meaning in the phrase ‘the interest and welfare of the public.’ The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case” [6, p. 10]. Unlike the other criteria, interest and welfare is not rooted in objectively measurable data. Moreover, interest arbitrators typically are not inclined to enter the controversial waters of socioeconomic ideals. Therefore, it seems that while arbitrators must give first priority to the interest and welfare of the public, awards are largely predicated on findings made concerning the secondary criteria (reasonable financial ability, overall compensation, comparability, etc.). This linkage between the interest and welfare of the public and the secondary criteria led Arbitrator George Lehleitner in *International Association of Firefighter, Local 2091 and Winston-Dillard Fire District #5* to conclude, “Finally, it can be stated as a general proposition that it is in the interest and welfare of the public to pay a competitive wage unless the District’s finances are such that to do so would create unreasonable financial obligation” [7, p. 18].

While arbitrators are disposed to use objective evidence of secondary criteria to compose and justify an award, one cannot merely define interest and welfare by reference to matters the statute makes secondary. Interest and welfare must have some meaning and application beyond being an introduction to the use of the secondary criteria. Arbitrator Ross Runkel sounded an appropriate note of caution when he wrote in *City of Springfield and Springfield Police Association*, “The legislative Assembly quite clearly knew how to divide the list of criteria between ‘primary’ and ‘secondary,’ and it chose not to place any of the criteria in paragraphs (b) to (h) in the category of ‘primary’” [8, p. 8]. Arbitrator William Dorsey has gone a step further. In defining interest and welfare, he accepted the basic premise that deference should be given to policy choices made by public officials and by citizens through referenda [9]. In *Clackamas County Peace Officers Association and Clackamas County*, Arbitrator Dorsey held, “Accordingly, the Arbitrator’s analysis starts with the assumption that the county’s last best offer is in the interest and welfare of the public and his consideration of the secondary criteria will be limited to whether the association’s interpretation and application of any of these criteria must force him to a different conclusion” [9, p. 8]. Notwithstanding these calls to examine a case from the viewpoint of what is in the interest and welfare of the “public” rather than what is in the interest and welfare of the immediate parties, in the absence of an ERB or court decision that an award did not comply with statutory instructions, it is a safe bet that most interest arbitrators will continue to determine the interest and welfare of the public through an analysis of secondary criteria.

### REASONABLE FINANCIAL ABILITY

In assessing the “reasonable” financial ability of the public employer to cover costs of a proposed contract, the legislature instructed interest arbitrators to “give

due consideration and weight to the other services provided by, and other priorities of, the unit of government, *as determined by the governing body*” [emphasis added]. The revision of the criterion changes the inability-to-pay defense from an absolute inability to pay to a relative inability to pay. Although the arbitrator is charged to give consideration and weight to the services and priorities as determined by the governing body, the governing body does not have unfettered discretion regarding its financial priorities and services. The arbitrator must determine what is reasonable. As noted earlier, the legislature strove, but finally compromised in its efforts, to make the governing body the sole determiner of the public’s interests and welfare.

The words “giving due consideration and weight” provide arbitrators substantial maneuvering room. Arbitrator Carlton Snow in *Bend Firefighters’ Association and City of Bend* reasoned, “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” [10, p. 10]. Moreover, relative ability to pay is but one of a group of secondary criteria; the legislature did not designate it first among equals.

If raised as a defense, an employer has the burden to convincingly establish its relative inability to pay. The degree of confidence an employer can create for its financial projections has been a determining element in a number of cases. Given the experiences many interest arbitrators have had with scare tactics and forecasts of untoward consequences that never materialize, arbitrators typically consider claims of inability to pay with a healthy skepticism. However, for many Oregon public employers, the wolf is really at the door. Such factors as successful citizen initiatives for property tax reductions, rapidly rising health care, insurance, retirement costs, and the lagged impact of the Asian economic crisis are leading arbitrators to credit employer concerns about long-term ability to pay. For example, Arbitrator Catherine Harris in *Lincoln City and Lincoln City Police Employees Association* concluded, “In the Arbitrator’s view, the lack of predictability of the third year increase in the Union’s package and the lack of predictability of increases in health costs are the two issues that have the greatest potential for affecting the interest and welfare of the public” [11, p. 24]. Consequences of this mounting unpredictability may be the shortening of contract duration or a greater use of re-openers.

#### ATTRACT AND RETAIN QUALIFIED PERSONNEL

Before SB 750 amended the interest arbitration procedure, arbitrators often addressed recruitment and retention data as an “other factor.” The revised statute now lists this factor among the secondary criteria and specifically requires an interest arbitrator to consider the “ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided” [2, 243.746(4)]. Given the high level of interest in obtaining government

employment, especially in nonurban areas, the legislature saw an opportunity to inject labor market considerations as a counterbalance to the traditional emphasis on comparable compensation. Public sector union officials, especially those who represent law enforcement officers, complain this criterion is too advantageous for employers. Public employers generally are able to show that, at current wages and benefits, they have little difficulty attracting and retaining personnel. As these employers gain experience with the revised interest arbitration procedure, more aggressive use of this criterion can be anticipated.

Retention emerged in a unique way in *International Association of Firefighters, Local 2557 and Marion County Fire District #1* [12]. The sole issue at arbitration was the proposal of the district to replace a seniority-based layoff system with a system that would allow the employer to retain a junior employee if that person is demonstrably superior to a more senior employee. The district argued it is in the best interest and welfare of the public to retain the most qualified firefighters in the event of a layoff. The union argued it is not in the best interest of the public to use public funds to implement a layoff procedure contrary to the “industry standard” [12]. Arbitrator George Lehleitner concluded the district’s proposal would generate grievances and conflict within the bargaining unit, which would not be in the best interest and welfare of the public. He accepted the union’s position to retain seniority-based layoffs.

## OVERALL COMPENSATION

SB 750 explicitly requires that comparability analyses be carried out in terms of the “overall compensation” of the employees being compared; direct and indirect compensation are included as part of this criterion. The definition lists specific types of direct compensation (such as vacation pay, holiday pay, paid leave, insurance, etc.) and makes reference to “all other direct or indirect monetary benefits received” [2]. This criterion does not refer to compensation costs. Therefore, arbitrators must decide if the assessment of overall compensation is to be based upon what is received by the worker or what is paid by the employer. Clearly, it is to the advantage of the employer to calculate and include all its direct and indirect costs (various forms of pay, health insurance, social security, unemployment insurance, etc.). Unions argue it is not appropriate to include the cost of items, such as medical insurance, because the term “compensation” refers only to “monetary benefits received,” not potentially received.

Over the years, public employers have urged interest arbitrators to take a more inclusive view of compensation. When the political opportunity presented itself to convert these appeals into law in Oregon, the resulting language became deceptively complex. Although this criterion clearly instructs arbitrators to consider a wide range of direct and indirect forms of compensation, as we know, the devil is in the details.

Distinguishing between costs paid by the employer and monetary benefits received by employees is producing methodological challenges for all concerned. On the whole, arbitrators are focusing on pay and benefits received, rather than cost incurred. Determining the dollar value of vacation and holiday benefits is relatively simple to calculate. Determining the dollar value of benefits received under different types of health care insurance is especially troublesome. Nevertheless, this criterion creates opportunities for public employers to position themselves more favorably in comparative assessments by aggressively including direct and indirect compensation. This criterion provides employers another important advantage in that arbitrators can no longer consider wages separately and individually from benefits. Nevertheless, unions (and occasionally employers) continue to identify and justify individual wage and benefit changes, even though, ultimately, only “overall compensation” can be compared.

### COMPARISON OF OVERALL COMPENSATION

Critics often contend that comparative analysis of compensation is the aspect of interest arbitration most manipulated by arbitrators to support predetermined conclusions. In Oregon, public employer’s argued that the pre-SB 750 criterion provided arbitrators far too much discretion. The former statutory procedure permitted arbitrators to base their findings, opinions, and orders upon:

- (d) Comparison of the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
  - (A) in public employment in comparable communities;
  - (B) in private employment in comparable communities [13].

Responding to these concerns, the legislature limited comparisons to “communities of the same or nearest population range within Oregon” [2]. Special provisions for the two large population centers (Portland and Multnomah County) and the State of Oregon also were enacted [2].

The preference and practice of most interest arbitrators had been to base comparability conclusions primarily on considerations of labor markets. The language of SB 750 does not provide for this. The revised statute mandates that “comparable” is limited to communities of the same or nearest population range. In applying the criterion, an arbitrator may conclude that similarity of population, and only similarity of population, is to be considered in determining comparability. Alternatively, an arbitrator may allow the consideration of other factors to eliminate some communities as long as the remaining communities are within “the same or nearest population range” [2]. Arbitrator Howell Lankford in *Teamsters Local No 670 and Yamhill County* concluded, “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” [14, p. 12].

By and large, arbitrators have taken an approach in applying the comparability criterion that is not overly restrictive. Once the factor of population has been used to identify a group of similar-sized communities, arbitrators use other factors, such as geographic proximity, labor market, assessed valuation of property, etc. to create subsets for compensation comparison. Arbitrator Catherine Harris in *Lincoln City and Lincoln City Police Employees Association* wrote for many arbitrators, “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” [15, p. 21].

It is interesting to note how arbitrators have dealt with well-established past practices of parties that differ from the statutory criterion. In *Bend Firefighters' Association and City of Bend*, Arbitrator Carlton Snow set aside the practice of using the compensation standards of the top ten best cities in Oregon for purposes of comparison [16]. He ruled that the law mandated the use of communities of the same or similar size [16]. In sharp contrast, Arbitrator William Dorsey in *Clackamas County Peace Officers Association and Clackamas County* concluded that while Multnomah County is too large to be considered in the same population range with Clackamas County, the past practice of making compensation comparisons between the two counties should continue while also including other counties of similar size [17].

For cities with a population of more than 325,000 (currently, only Portland), and counties with a population of more than 400,000 (currently, only Multnomah County), the revised statute permits comparisons with out-of-state cities and counties “of the same or similar size” [2]. The concept of similar size population as only a “threshold limitation” has also been applied by arbitrators in out-of-state comparisons. In *City of Portland and Portland Police Commanding Officers Association*, Arbitrator John Hayduke concluded, “Once initial comparability on the basis of population is established, however, one must be aware of other factors that may make direct comparisons less appropriate (e.g., grossly different economics, standards of living, etc.). The arbitrator does not believe that SB 750’s limitation of ‘comparables’ jurisdiction to communities and cities of similar population size precludes further rational analysis regarding which similarly sized communities are most appropriate for comparison” [18, p. 15]. He indicated a preference for a sub-set of out-of-state cities that share regional economic factors and labor market features.

It is interesting to note that Arbitrator Hayduke was not persuaded by either party’s list of comparable cities. Rather, for a large and complex city, he found comparators within the city (such as pay and benefit levels among police officer and firefighters) to be of “substantial significance” [18, p. 15]. This matter has been vexing for many interest arbitrators who believe the legislature gave

inadequate attention to compensation relationships and pay practices internal to units of government. There is prudent reluctance among arbitrators to upset traditions of parity among public sector employees. At the state level of government, where units of an agency are most likely to be located throughout the state, this matter of prioritizing internal, intrastate, and out-of-state comparators is especially controversial.

Unlike local governments (cities and counties), SB 750 does not specify a population size threshold for the state of Oregon. Based upon the attention to the crafting of language during veto negotiations, one must conclude that the absence of a population size threshold for state government was intentional. Moreover, with local interests primarily at work in drafting the legislation, it is apparent that the focus of attention was on local units of government: (cities and counties). Although SB 750 specifies that “comparable includes comparison to other states,” an interest arbitrator retains discretion to consider other factors in selecting between the last-best offer packages, including intrastate comparators, local labor markets, in-agency comparators, etc. The priority assigned by an arbitrator to comparator factors in a state agency case depends on the operational characteristics of that agency, and the centralized or dispersed nature of that agency’s employment. Additionally, the distinctive characteristics among state agencies determines how comparative data for the four border states is used by arbitrators, such as consideration given to the leveling of compensation data (data adjusted for variations in cost of living), regional labor markets at state borders, averages weighted by number of employees, etc.

Correctional systems offer insight into the difficulties of determining appropriate compensation comparators at the state level. Oregon, as with many states, has a combination of correctional facilities in or near its urban centers and facilities in relatively low-population areas, remote from urban centers. Moreover, corrections employees tend to be drawn from local-to-regional markets. Compounding the situation in Oregon, different unions represent different bargaining units at the correctional facilities. In this context of multibargaining units and multifacilities, the state’s primary objective has been similar pay for similar jobs throughout its correctional system. Unions, on the other hand, look for pay equity with correctional officers employed by city and county governments, especially in urban, higher-pay labor markets. In *Association of Oregon Corrections Employees and State of Oregon*, Arbitrator William Bethke noted that SB 750 requires comparison with other employees performing similar services with the same or other employees in comparable communities. He acknowledged the validity of the state’s concerns about fragmenting compensation within the correctional system, but nevertheless found the statute to support a regional definition of communities. Arbitrator Bethke concluded, “it would be torturing the statutory text to find all of Oregon a single ‘community’ for purposes of corrections employment. Once this extreme construction is rejected, dividing Eastern Oregon from the West is inevitable” [19, p. 28]. In his analysis,

compensation comparisons focused primarily on intrastate, regional labor markets; secondary consideration was given to interstate comparisons.

#### COMMENTARY

The legislature revised Oregon's interest arbitration procedure with the objectives of reducing the use of arbitration, focusing dispute resolution on negotiations, diminishing the discretionary authority of interest arbitrators, and "leveling the playing field" (from the public employers' perspective). The high-risk, winner-take-all, final-offer arbitration procedure established by the legislature has accomplished many of these objectives. By comparing the use rates of interest arbitration in the two years before the revisions (1993 and 1994) and in the two years after the revision (1996 and 1997), it can be seen that the number of cases was cut in half, from forty-four to twenty-one. The number of issues per case was also substantially reduced from an average of eleven prior to 1995, to an average of four after the revisions. Of the twenty-one awards since 1995, public employers won fifteen, for a win rate of 71 percent. It is difficult to determine a comparable win-rate prior to 1995, since in most of those awards each party came away from the arbitration process with something of value. Unions have not fared as poorly as the gross figure indicates; the union win rate is improving with experience under the revised procedure.

Oregon's compulsory interest arbitration law is arguably the most risky of its kind in the nation. Not only is the arbitrator limited to selecting one or the other of the parties' final offers, the selection is total-package by total-package. Positions on issues are specified two weeks before the hearing and there is very limited opportunity to modify a package prior to the hearing. Unlike conventional interest arbitration, partial victories (something-for-everyone) are no longer possible. By passing SB 750, the legislature created an interest arbitration procedure that contains substantial strike-like risks for the parties that use it. The risks extend beyond just "losing big" at arbitration. This form of interest arbitration raises issues concerning the ongoing behavior of persons who come away with nothing. Adverse impact on work performance, leadership effectiveness, and collective bargaining relationships could be substantial. Moreover, for advocates there is only a certain amount of mileage in blaming the arbitrator for losses.

Prior to 1995, it was common for the parties to bring to the hearing a shopping list of proposals to be sorted out by the arbitrator. That approach is now a strategy for disaster. Under the revised procedure, the arbitrator must select either the union's or the employer's package of offers using mandated decision-making criteria. Moreover, as noted earlier, two of the criteria, "attract and retain qualified personnel [2]" and "overall compensation [2]," appear to give advantages to public employers they did not enjoy under the prior system.

The following observations are based on the record to date of interest arbitration under the revised procedure.

Strategic planning is critical; this type of high-risk procedure is not one in which a party should attempt innovation or the breaking of new ground. While working to win, anticipating the short- and long-term impact of losing on all issues is prudent. Therefore, prioritizing and limiting proposals to a few key items are essential.

Under the former conventional interest arbitration procedure, arbitrators typically applied a “balancing test” to the issues raised by the parties. From the perspective of many public employers, that amounted to arbitrator-induced trade-offs. The revised interest arbitration procedure intentionally works against loading the process with demands, encourages deal making at the bargaining table, and makes bargaining teams and agents more outcome accountable.

State mediators report that since the passage of SB 750, there is less loading of negotiations with issues of minor importance, negotiations are not as lengthy, and when a bargaining impasse exists on core issues, the parties move more quickly to invoke arbitration.

Because a package is accepted or rejected in its entirety, an extreme or defective position on a major issue can doom the entire package. Moreover, a rejected package may take with it valid, worthwhile issues that are of lesser overall importance. This is especially troublesome for labor organizations; factions among members may consider particular issues with limited application to be very important.

Any proposed changes in the terms and conditions of employment should be for compelling or demonstrated need and be supported by substantial evidence. It is essential that any changes be linked with and justified in the context of statutory decision-making criteria. The revised and expanded criteria call for enhanced expertise by the parties and interest arbitrators to interpret and explain budget, compensation, and labor market data.

Under package-by-package selection, the mixing of economic and noneconomic issues is especially dangerous. In particular, language and procedural changes are best dealt with in negotiations.

Clearly, the legislature wants arbitrators to give primary consideration to the “interest and welfare of the public” [2]. In the absence of any statutory definition for this ambiguous phrase, arbitrators typically relied on the secondary criteria to define the primary criterion. As might be expected, interest arbitrators continue to emphasize the traditional factors of comparable compensation and ability to pay.

The intent of the legislature to limit the decision-making authority of interest arbitrators is most evident in the statutory changes associated with comparable compensation. Now, comparisons of “overall compensation” [2] must be confined to communities of approximately the same size in Oregon (special provisions exist for large cities and counties, and for the state). The objective to reduce arbitrators’ decision-making authority has been only partially achieved. On a case-by-case basis, arbitrators have determined what a community is, ruled on appropriate population ranges, and most important, created subsets of

similar-size communities based on such factors as assessed valuation of property and local labor markets. Overall, the discretionary authority of interest arbitrators to determine appropriate comparables remains substantial.

Given that the legislature set out to make the arbitration process more accommodating to the interests of public employers, it is interesting to note that the matter of compensation comparisons within a public agency was not addressed. Before SB 750, issues concerning parity among bargaining units and the application of policies agency-wide were routinely dealt with as part of a “balancing test” applied by many arbitrators. Now, it will take a creative and adventurous arbitrator to tackle internal comparisons under the revised, more stringent criteria.

Finally, interest arbitrators in Oregon typically place the burden of proof on the party seeking to change the status quo. The moving party is expected to: establish a compelling need for the proposed change; show how the proposed change addresses the need; explain how the statutory criteria support the proposed change, especially how the “interest and welfare of the public” are served; and relate the proposed change to any *quid pro quo* that might be part of their total package. Changes to the collective bargaining agreement at arbitration are expected to be for compelling and demonstrated need, or else left for the parties to deal with at the bargaining table.

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#### ENDNOTES

1. Conference Committee Hearing; June 1, 1995; 68th Oregon Legislature; cited by arbitrator Leslie Sorensen-Jolink in *Marion County Law Enforcement Association and Marion County*; issued November 29, 1995; OERB IA-10-95; page 5.
2. Oregon statutes: ORS 243.746(4).
3. H. Lankford, *Deschutes County Sheriff Association and Deschutes County*; issued April 28, 1996; OERB IA-18-95.
4. W. Bethke, *Association of Oregon Corrections Employees and State of Oregon*; issued February 5, 1996; OERB IA-13-95; page 10.
5. T. Williams, *Malheur County and Oregon Public Employees Union*; issued May 1, 1997; OERB IA-06-96; page 16.
6. C. Snow, *Oregon Public Employees Union and State of Oregon*; issued March 28, 1996; OERB IA-11-95; page 10.

7. G. Lehleitner, *International Association of Firefighters, Local 2091 and Winston-Dillard Fire District #5*; issued October 9, 1995; OERB IA-07-95; page 18.
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