INTEREST ARBITRATION OPINION AND AWARD

By

Richard L. Ahearn
Interest Arbitrator

Clark County v. Clark County Corrections Deputy Guild

PERC Nos. 131479-I-19 and 131124-M-18

Clark County,

Employer or County

and

Clark County Corrections
Deputy Guild

Union or Guild.

Appearances:

For the Employer:
Emily A. Sheldrick
Chief Civil Deputy Prosecuting Attorney
Vancouver, Washington

For the Guild:
Daryl S. Garrettson
Lafayette, Oregon

OPINION

I. Background

The County is located in southwest Washington State and is bordered by the Columbia River to its south. The County has 12 bargaining groups that represent employees in various branches and offices. Of those groups, three (3), including the Corrections Deputy Guild (Guild), are eligible for interest arbitration. Employees represented by the Guild provide custody, supervision and care of inmates in the County's jail facilities.

As of the date of the hearing, the County employed approximately 127 bargaining unit correction deputies and 17 sergeants who work in either the main facility, that generally contains over 500 inmates, or the Jail Work Center, a minimum-security facility with an average population of approximately 50 individuals. The correction deputies and sergeants generally work one of three schedules:

- Five 8 ½ hour days with a work cycle of five days on followed by two days off,
- Four 10 ½ hour days with a work cycle of four days on followed by three days off, or
- Four 12- hour days with a work cycle of four days on followed by four days off.

Their schedules often include overtime, some of which is involuntary. The shifts include day, swing, and graveyard. Corrections responsibilities fall under the purview of the County's Sheriff's Office.

Pursuant to the statutory authority of RCW 41.56.450 and in accord with the procedures set forth in WAC 391-55-200 through -255, on August 19, 2019, in Ridgefield, Washington, I conducted an interest arbitration hearing involving all regular full-time and regular part-time corrections deputies and corrections sergeants of the Clark County Sheriff's Office. Prior to the hearing, the Parties jointly selected me as the sole arbitrator for this matter instead of a 3-person panel. At the hearing the Parties had full opportunity to call witnesses, to make arguments and to enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. With the filing of the Parties' comprehensive post-hearing

briefs on October 4, 2019, and the subsequent filing of the County's supplemental post-hearing brief on October 21, 2019, the matter closed.[1]

II. Relevant Statutory Authority

I recognize that I must exercise my analysis in support of the public policy expressed below.

RCW 41.56.430- Uniformed personnel – Legislative declaration

The state of Washington has adopted a public policy against strikes by uniformed personnel as a means of settling their labor disputes. The policy recognizes that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of its citizens. Thus, in order to promote such critical services, interest arbitration exists as an effective and adequate alternative means of settling disputes. In light of the foregoing, arbitrators are directed to apply the criteria set forth below in RCW 41.56.465 below.

RCW 41.56.465- Uniformed personnel-Interest arbitration panel-Determinations-Factors to be considered

(1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, the panel shall consider:

(a) The constitutional and statutory authority of the employer;
(b) Stipulations of the parties;
(c) The average consumer prices for goods and services, commonly known as the cost of living;
(d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and
(e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment….
(2) For employees listed in RCW (41.56.030 (7) (a) through (d), the panel shall also consider a comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours and conditions of employment of like personnel of like employers of similar size on the west coast of the United States.

[1] The Guild graciously consented to the County's request to file its supplemental brief.

Appreciating that interest arbitration is widely understood as an extension of the collective bargaining process that seeks to resolve the outstanding issues with an outcome that would approximate what the parties would have reached as a result of good faith negotiations, I will apply the various criteria arbitrators must consider in light of the foregoing statutory factors. I also recognize that the statute provides no guidance as to the weight to be attached to any of the specific factors and that factors that are often considered pursuant to RCW 41.56.465 (2) (e) above include economic conditions, financial considerations of the employer, and internal equity. I further understand that a party that proposes language differing from existing contractual language bears the burden of demonstrating that a change is appropriate.

On May 1, 2019, the State of Washington Public Employment Relations Commission (PERC), by its Executive Director Michael Sellers, upon concluding the Parties were at impasse, certified numerous issues for certification. Prior to the commencement of the hearing, the Parties withdrew three (3) of the certified issues from interest arbitration. The remaining issues that I am required to resolve include:

Employer's Issue:

- **WA State Paid Family Medical Leave (new)**

Guild's Issues:

- **Article 10.1.3** Temporary Shift Changes.
- **Article 10.4.4** Overtime rate for Mandated overtime.[2]
- **Article 11.5.2** Shift Differential.
- **Article 11.7** Longevity Program.
- **Article 14. 13** Ballistic Vests.

The Parties also jointly submitted the following issues for certification:

- **Article 11.1** Salary Schedule.
- **Article 19** Grievance Procedure.
- **Article 21.3** Duration

[2] As this Article was initially listed by error as Article 10.1.4, the Parties stipulated to the proper number, 10.4.4.

- **Appendix A**. Salary Tables.

My analysis and conclusions regarding the above Articles follow below.

III. Analysis

Precedent

In a recent interest arbitration proceeding between the Parties, Arbitrator Alan Krebs addressed numerous issues that were in dispute regarding the current CBA that expired by its terms on December 31, 2018.[3] As both Parties have relied extensively on the rationale of Arbitrator Krebs in fashioning their proposals, and as I consider his Opinion well-reasoned, I will refer to relevant portions of his Opinion in addressing the Parties' competing positions here.

Comparable Jurisdictions

Consistent with both the statutory imperative to "consider a comparison of the wages, hours, and conditions of employment…[with those] of like personnel of like employers of similar size on the West Coast of the United States," and with the 2015 determination by Arbitrator Krebs, the Parties agreed that the following counties would be used as comparators for purposes of this proceeding:

Kitsap, Spokane and Thurston In Washington state and Clackamas, Washington and Lane in Oregon. In light of the foregoing, I will use the above six counties as the settled set of comparators.

A. Wages

Although the Parties agreed on the comparator jurisdictions, they diverged sharply regarding the methodologies and evidence that should provide informative and persuasive evidence regarding their respective economic proposals.

[3] PERC Case No: 26409-I-14-0641 (April 30, 2015)

Compensation Comparisons of Comparators

The County

The County contends that its wage proposal of 2.2% for 2019; 2.2% for 2020 and 2.5% for 2021 is fully supported by reference to the agreed-upon comparators and reasonably anticipated economic circumstances. In support, the County notes that its wage proposal is more generous than what has been provided to other internal groups. Significantly, it contends that the wage proposal of the Guild lacks justification, either by the economic data or in relation to the County's lower cost of living. In that regard the County asserts that even based on the Guild's information, the base wage for employees represented by the Guild, with the addition of the County's proposed 2.2% wage increase, would leave the County ranked fifth among the 7 comparator employers (including Clark County) at the five-year mark. At 10 and 15 years, the 2.2% wage increase would leave the County ranked third and fourth respectively. Moreover, at both the 10 and 15-year steps, the County would exceed the average of all the comparator jurisdictions. Finally, the above comparisons were based on the Guild's assumption of 2,080 annual working hours for the Guild. However, in contrast to the other jurisdictions the County's deputies work 2190 regular hours annually, thereby receiving regular income even higher than that set forth in the Guild's chart.

The County contends that the Guild's data is flawed because it incorporated deferred compensation/VEBA, health insurance and PERS "pickup," thereby improperly inflating the compensation in other jurisdictions. For example, Oregon law specifically allows employers to agree to pay a portion of an employee's contribution to PERS. By contrast, in Washington state employers are obligated to pay both the employee and employer contribution rate and to then deduct the amount attributed to the employee from the individual's compensation.

The County also contends that it is inappropriate to include for comparison purposes any compensation based on "intermediate certificate and/or Associates Degree," as any such incentives in Oregon rely on state law. With no similar statutory provision in the state of Washington, and with only Thurston County among the Washington jurisdictions providing

education incentive pay, it would not be appropriate to incorporate any such provision in Clark County's pay rate through interest arbitration.

The County further asserts it properly included annual paid leave in its calculations, as all jurisdictions offer paid leave to its deputies. Particular noteworthy is that Clark County provides the most generous paid leave, at each level of seniority, in comparison to all the other comparators. In light of the foregoing, the County contends that paid leave should be considered in developing a wage award, but that the other add-ons urged by the Guild are inappropriate.

In conclusion, the County urges adherence to the award of Arbitrator Alan Krebs in which he provided a wage increase that would maintain the County's standing "close to" the average of the comparators following a review of the wage increases provided by those jurisdictions. Based on the County's review of the increases from the other jurisdictions, the comparators adopted increases between 2 to 3%. In light of the foregoing, the County argues that its wage proposals would maintain the County's position "close to" the average.

The Guild

The Guild counters with a several pronged argument in support of its proposal for wage increases of 4%, 4% and 4%. As a threshold matter, the Guild argues that their 4/12 shift schedule results in an annual total of 2190 scheduled hours per year, an additional 110 hours beyond that of the deputies in the other jurisdictions. Accordingly, only by compensating for that disparity can a meaningful comparison be made. Moreover, total compensation rather than a simple wage base comparison is much more meaningful. In that regard the Guild observes that Arbitrator Krebs reached a similar conclusion.

"I find that a total compensation comparison as proposed by the Guild is preferable to the base wage comparison proposed by the County. …It is the method preferred by most respected arbitrators when applying the statute…. A total compensation comparison takes into

account pay premiums, benefits, and hours worked, inherently more meaningful than a focus on base wages alone."[4]

Arbitrator Krebs further concluded that benefits such as an employer's contributions to the employees' pension fund directly affect take-home pay and thus are appropriate subjects for comparison. Based on these considerations, Arbitrator Krebs used benchmarks that included a base wage for Clark County based on 2080 hours of annual scheduled work and that incorporated longevity pay, employees' insurance contribution, the value of total leave deferred and VEBA credit for intermediate certificates and PERS pickup.[5]

I agree with the "total compensation" methodology adopted by Arbitrator Krebs, as it provides a significantly more complete basis of comparison for purposes of compensation than mere wages. Accordingly, a summary of the outcome of the Guild's comparison, using the same benchmarks as did Arbitrator Krebs, follows.

The Guild's charts revealed the following:

1. <u>10 YEARS WITH INTERMEDIATE CERTIFICATE AND/ OR ASSOCIATES DEGREE</u>
    A. The average base wage for the comparators was $6,010.56.
       Clark County's average base wage of $5,727.56 was 4.9% behind.
    B. The average total compensation for the comparators was $6,339.34.
       Clark County's average total compensation of $5,955.07 was 6.5% behind.

2. <u>15 YEARS WITH ADVANCED CERTIFICATE AND/OR BACHELOR DEGREE</u>
    A. The average base wage the for the comparators was $6,010.56.
       Clark County's average base wage of $5,727.56 was 4.9% behind.
    B. The average total compensation for the comparators was $6,014.16.
       Clark County's average total compensation of $6,014.16 was 8.3% behind.

[4] *Krebs,* supra at 10.
[5] Id. at 11.

3. 20 YEARS WITH ADVANCED CERTIFICATE AND/OR BACHELOR DEGREE

A. The average base wage for the comparators was $6,010.56.

Clark County's average base wage of $5,727.56 was 4.9% behind.

B. The average total compensation for the comparators was $6,556.00.

Clark County's average total compensation of $6,079.84 was 7.8% behind.[6]

The Guild further contends that, within the Portland labor market, Clark County is 27.7% behind. However, that calculation ignores the other agreed-upon jurisdictions in Washington state and includes Multnomah County, that is not among the agreed-upon comparators. In light of the foregoing I will not incorporate the Guild's calculations based on the "Portland Labor Market."[7]

Cost of Living

RCW 41. 56. 465 (3) requires arbitrators to consider "the cost of living." According to the County, its wage proposal reflects the lower cost of living in comparison to other metro counties in the Portland area.

The County contends that residents of Clark County benefit from a less expensive cost of living than the neighboring counties in the Portland-Metro area. In particular, the cost of housing is significantly more affordable in Clark County. Further, Washington and Clackamas operate in a more competitive job market and have experienced more meaningful and more sustained economic gains. Clark's 5.3% unemployment rate as of June 2019, contrasted with the substantially lower 3.7% in Clackamas and 3.4% in Washington, illustrates that important distinction. Indeed, based on 2018 data from the Bureau of Labor Statistics, Clark had the sixth

[6] I note, however, that the base wage portion of these charts temporarily inflates for Clackamas, Kitsap, Lane and Washington Counties, as they were calculated on July 2019 rates, rather than January 1,2019, the beginning date for the CBA at issue here. In that regard, Clackamas, Kitsap, Lane and Washington Counties all received varying increases effective July 1,2019. Consequently, a more accurate percentage difference as of January 2019 would be less than represented in the Guild's charts. On the other hand, figures presented by the Guild would be valid beginning the second half of 2019.

[7] I also find a practical reason to do so, as there is no evidence that members of the Guild have left Clark County for lateral positions in the Portland labor market.

lowest overall cost of living. Further, Clark's employment statistics reflect that over the last 4 years the County received roughly 15 to 20 applicants for every individual hired for positions with the Guild. For those same years, the number of voluntary separations has been fewer than the number of hires. Finally, according to the County, its proposed wage increases for the Guild are consistent with the increases in the consumer price index for the last 5 years, that have averaged 2.32%.

For its part, the Guild contends that the County improperly relied on the top step at 15 years in describing the Consumer Price Index. According to the Guild, a more meaningful measurement would consist of a comparison between the CPI increase during the last three years to the comparable years of the most recent CBA. Such a comparison reveals that for the West Region, the CPI increased by 2.5% in 2016, 3.1% in 2017 and 3.1% in 2018, for a total of 8.7%. By contrast, the CBA provided an increase of 2.5% beginning in 2016, 2.5% beginning January 2017 and 2.5% on January 2018. The total difference, 8.7% versus 7.5%, reflects that the employees represented by the Guild fell 1.2% behind the West Region CPI during the last three years of the CBA.

Although I found the Parties' above analyses helpful, I am unable to attach persuasive significance to either, in part because each Party relied on different measurements. Initially, I am able to agree with the County that the cost of living expenses are lower in Clark County than in the comparable counties in the Portland metro area. Further, the County's CPI comparison, based on base wages only, reflects that since 2005 the employees represented by the Guild have received wage increases at a rate that has exceeded the increases in the cost of living. On the other hand, the West Region CPI for the last three years has experienced cost of living increases that exceeded the CBA's wage increases. Perhaps most significantly, the employees represented by the Guild have continued to lag behind the average of the comparator employers.

Other Factors

Subsection (e) of RCW 41.56.465 requires arbitrators to also consider "[s]uch other factors, not confined to the factors under (a) through (d)…, that are normally or traditionally taken into

consideration in the determination of wages, hours and conditions of employment…." In light of the foregoing I will analyze various relevant factors below.

Ability to Pay

An employer's ability to pay potential wage and benefit increases is a factor commonly considered by interest arbitrators.[8] Typically, analysis of this issue involves consideration of the overall budgetary outlook of the jurisdiction, including the likely impact of the parties' proposals on its finances. In this regard I recognize the observation of a respected arbitrator:

"The projected cost of all of the worthwhile projects the State might wish to undertake for the public good is likely always to exceed forecasts of available revenues."[9]

According to Deputy County Manager Kathleen Otto (Otto), the County projects a budget deficit. Further, even with potential adjustments, she asserts that the long-term forecast is troubling. In that regard the General Fund (Fund) of the County, that supports the Sheriff's Office among other activities, is expected to experience expenses significantly outpacing revenue. Among the factors plaguing the County is the loss of sales tax revenue of between 2% to 4% every year to shoppers who cross the river into Oregon, which has no sales tax. Further, property tax revenue increases of 1 to 3% per year are insufficient to offset increases in labor and service expenses. Moreover, the County projects a drop in its fund balance by 2021 from the required $25,500,000 to $21,200,000. Projections for years into the future estimate that by 2024 the fund will show a $8,100,000 deficit. In addition, critical new funding for infrastructure technology improvements and major maintenance are expected to place greater stress on the County's budget. Significantly, the Guild's wage proposal alone would cost an additional $1,400,000 more than the County's proposal. Such increases are arguably not feasible given the economic realities of the County's finances.

[8] *Clark County* (Axon, 1996); *Clark County* (Krebs, 2015).
[9] *WSF and MM&P Interest Arbitration Award (Mates'* 2015-2017 CBA) at 8 (Cavanaugh, 2014).

The Union counters that the County's argument regarding ability to pay lacks supportive details. In particular, the Union asserts that the County's designated challenges are not supported by actual numbers and that the history of payroll costs contains no data concerning revenue. Further, the County's pie chart breaks down revenue by category, but without supporting numbers, and the County's forecast of negative balance by 2024, lacks sufficient detail.[10] Finally, the County did not produce as a witness the person who prepared the budget and did not present the actual budget.

Internal Comparisons

Internal comparability is another consideration under the umbrella of "other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter." The record reveals that, with the exception of the Sheriff's Administrators Association Guild, ten (10) employee bargaining groups in the County have reached agreement on 2.20% wage increases for 2019. Of that group, seven (7) have also agreed to 2.20% wage increases for 2020 and 2021. The other three (3) have not reached agreement for 2020 and 2021. Only the Sheriff's Administrators Association Guild, at 2.50 %, is receiving a higher increase in 2019.[11] By contrast three groups of non-represented employees are all receiving a 1.50% increase in 2019.[12]

B. The Individual Proposals Regarding Existing and New Articles

I will consider these in the order in which they were presented by the Parties.

[10] In that regard, I note that the forecast is described as "preliminary forecast only," and that the numbers are "subject to change as new information is received by the Budget Office." I further observe that it is based on an assumption that sales tax will grow at the rate of 4.2% per year and that anticipated increases in expenses include annual growth of 3.5% for payroll, 5% for benefits and 3% for various non-payroll costs.

[11] Notably, most of the bargaining groups and all the unrepresented employees have no recourse to binding interest arbitration. The Sheriff's Guild is an exception.

[12] I note that arbitrators are sharply divided on the weight to accord internal comparators, particularly those that have no collective bargaining rights or lack the opportunity to invoke interest arbitration.

I. ARTICLE 11 Compensation

In balancing a careful consideration of the statutory criteria, I place substantial weight on the Guild's position below the average compensation relative to its comparators. With respect to the internal comparisons, I recognize that arbitrators consider those comparisons less meaningful, particularly among the groups that lack access to interest arbitration bargaining, or even to collective bargaining.[13] I have also considered the County's relatively low cost of living and relatively tight fiscal restraints as material factors in determining fair and reasonable wage increases. Although I recognize the uncertainty about the accuracy of budgetary projections, particularly for years far ahead, I reject the Guild's proposal as too expensive for the County in its current fiscal condition. Rather, I award base wage increases of 2.50% in 2019, 2.50 % in 2020 and 2.75 % in 2021. I recognize that even these increases, that are only slightly above the County's proposals, will leave the Guild below the average of its comparators. However, I am satisfied that the increases will allow the Guild to maintain its position within the middle of the comparators in terms of total compensation, while allowing the County to control its expenditures. The award also takes account of the employees' share of the premium for the new Family Medical and Leave Act, discussed below.

CONCLUSION:

I award the following increases of 2.50%, 2.50% and 2.75% in Article 11 as set forth below.

ARTICLE 11. Compensation

11.1 Salary Schedule. Except as otherwise provided by this Agreement, the salary schedule for employees covered by this Agreement shall consist of a salary range of seven (7) steps with approximately five percent (5%) between steps. Salary schedule increases shall be applied to each step of the range. All employees are paid at one of the steps in the range.

11.1.1 Effective on and retroactive to January 1, 2019, the salary schedule shall be adjusted by two and one-half percent (2.50%) COLA. Based on wages as of December 31, 2018.

[13] I do note however that the Sheriff's Association Deputy Guild, that is entitled to invoke interest arbitration, received an increase of 2.50% in 2019. Its wage rates for 2020 and beyond have not been determined.

11.1.2 Effective January 1, 2020, the salary schedule shall be adjusted by two and one-half percent (2.50%) COLA. Based on wages as of December 31, 2019.

1.1.3. Effective January 1, 2021, the salary schedule shall be adjusted by two and three quarters percent (2.75%) COLA. Based on wages as of December 31, 2020.

II. ARTICLE 10. Hours, Overtime and Work Assignments.

The Guild proposes the following addition to Article 10.

ARTICLE 10.1.3 (Temporary changes to the Master Schedule). The Union proposes to add the following language at the end of current Article 10.1.3.

> "At the end of the temporary change the employee shall be returned to the shift and scheduled bid for the year unless the employee consents to the new schedule. No change to the master schedule as bid by the employees shall continue beyond the time periods set forth herein without the consent of the Guild."

According to the Guild, the purpose of the proposed language is to address a recent circumstance in which the County failed to return three (3) sergeants to their permanent schedule following temporary adjustments as required by the CBA. The Guild asserts that its proposed language merely clarifies in plain language the existing requirement of Article 10, that employees return to the regular shift as established by the master schedule after a temporary change of up to four weeks.

By contrast, the County asserts that current Article 10.1.3 allows for temporary changes based on "operational necessity," and that Article 10.1.4 allows employees or management "to propose alternative work schedules and such schedules may be established by mutual agreement." The Guild's proposal would prevent employees from agreeing to extend the temporary shift without the consent of the Guild. Such language would undermine the County's current management rights as established in Article 5.1.1.

Significantly, the incident on which the Guild relies to support the need for this change culminated with the involved employees consenting to the change. In light of the foregoing, I am

persuaded that this one incident, that was resolved through discussions between the parties, is insufficient to demonstrate that the current language is unworkable or that there is a compelling need for change.

CONCLUSION:

I do not award the Guild's proposed language in Article 10.1.3.

III. ARTICLE 10.4.4 Mandatory Overtime

The Guild proposes:

"Employees who have been mandated to work Overtime will be paid at 2.25 times their regular rate once they have been mandated to work twenty-four (24) hours of overtime in the calendar year."

The Guild concedes that its ultimate purpose in proposing this language is to provide a strong incentive to the County to increase the number of employees represented by the Guild, thereby alleviating the necessity for the large amount of mandatory overtime to which employees are currently subjected. In support of its position, the Guild highlighted a number of studies that concluded that sleep deprivation is frequently responsible for illness, depression and other negative impacts. Further, the concerns here are particularly acute as employees work a normal 12-hour shift and can be assigned up to four additional hours of mandatory overtime. The current practice of paying overtime at 1.5 times the normal rate has failed to sufficiently incentivize the County to increase employment at a level that would provide a more reasonable amount of required overtime.

The County contends that the proposal would create difficult administrative burdens and is unreasonable. In particular, mandatory overtime is common in part because a jail necessarily involves unpredictable adjustments caused by inmates' needs for medical transport, safety matters and employee absences for a number of understandable reasons. As a result, many years ago the Parties agreed to the present system of 12-hour workdays, with a maximum of four hours mandatory overtime. There is no evidence that the current system is producing unwelcome results. Moreover, the cost of the proposal, about $1,500,000 per year, would be

staggering. The higher rate would also discourage employees to volunteer for overtime, thereby increasing the necessity for mandatory overtime. The County further observed that other arbitrators have recognized that mandatory overtime is associated with recruitment, an issue faced by jails across the state of Washington.[14] Among the comparator jurisdictions, only Spokane provides an enhanced rate for mandatory overtime. Within Clark County, no other group has a mandatory overtime rate.

I am persuaded by the County's argument that raising the mandatory overtime rate will be exceptionally costly and will not necessarily achieve the Guild's goal of increasing the number of FTE positions. I also recognize that only one of the comparators offers this benefit. Although the personal hardships resulting from mandatory overtime deserve sympathetic consideration, I am not persuaded that the Guild has demonstrated inequities or a compelling need to change the long existing 1.5 premium for mandatory overtime.

CONCLUSION:

I do not award the Guild's proposed language in Article 10.4.4.

IV. 11.5.2 Shift Differential

The Guild proposes increasing the swing shift differential from $0.40 per hour to a $1.50 per hour and the graveyard shift differential from $0.50 per hour to $3.00 per hour. In support, the Guild relies on the fact that the amounts of the differentials have not changed since the early 1990's. Further, the employees who work those shifts suffer numerous negative consequences as a result of sleep deficit and the resulting fatigue. Thus, they should be properly compensated for those negative impacts.

The County opposes the Guild's proposal, contending that the increase sought is nearly 4 times the current rate for swing shift and six times the current rate for the graveyard shift. More

[14] See, *King County v. King County Corrections Guild,* PERC no. 130837-I-18 (Lankford, 2019).

significantly, the proposal lacks support from any statutory considerations. Thus, of the comparator jurisdictions, only Spokane offers a differential for swing shift.

I acknowledge the numerous wellness challenges that employees on swing shifts consistently encounter. However, I find the absence of evidence that a higher differential for swing shifts would address health-related concerns a persuasive argument. I also appreciate that only one of the comparators provides a premium for the swing or graveyard shifts. In light of the foregoing I am not persuaded that the record supports a compelling need to increase the shift differentials.

CONCLUSION:

I do not award the Guild's proposed change in Article 11.5.2.

V. 11.7 Longevity

The Guild proposes to add two additional steps to the salary schedule at 25 and 30 years. Each step would provide an additional 1% compensation to those at that level of seniority. One justification urged by the Guild is that correctional deputies, who face similar barriers to their long-term health as police officers, are not allowed to retire at the same age as the police. The new steps would arguably address this inequity by providing a reasonable premium for their longevity.

The County contends that there are no compelling reasons for two additional steps and that the statutory factors do not favor such a change. Thus, only two of the comparator counties offer any increased compensation at 25 and 30 years of service. Further, employees represented by the Guild receive an additional two (2) days paid off at 25 years of service.

Although experience and long service deserve the appreciation of the public and of the County, as only 2 other comparators offer any form of special compensation at the 25 and 30 year levels, and as the County presently provides a tangible benefit at 25 years, I fail to find a compelling need to change the long-standing, existing steps in the salary schedule.

CONCLUSION:

I do not award the Guild's proposed change in Article 11.7.

VI. ARTICLE 14. Ballistic Vests, Uniforms and Equipment

The Union proposes the following addition to Article 14.13.

Article 14.13 The County will provide each employee with a ballistic vest who is firearms qualified.

According to the Guild, although the County has provided personal vests to most employees who are firearms-qualified, approximately nineteen (19) employees must select a vest from existing stock that fails to provide the appropriate level of security necessary for the well-being of the deputies. Significantly, on two recent occasions at the hospital, a corrections deputy was required to use his/her firearms for his/her safety and that of others. Moreover, the cost of providing adequate protection would merely require the County to immediately purchase 19 additional vests at a cost of approximately only $25,000.

The County counters with an explanation that Article 5, Section 5.1.1 provides that management retains the exclusive right to determine the equipment necessary to carry out its operations. Further, even if firearms-qualified, only very specific assignments such as the Transportation Unit, compel a deputy to carry a firearm. Thus, according to the testimony of Chief Bishop, each year the County designates which employees will be assigned to carry a firearm while on duty. Further, unless the deputy is required to carry a firearm while on duty, the ballistic vest is unnecessary. The Union's proposal would require the County to spend nearly $85,000 every five years for replacement vest.

Although the County acknowledges the need to provide a high level of protection for the deputies while carrying firearms, I find that the record evidence does not establish that the currently available vests are less safe than those that are individually fitted. Moreover, the

record fails to establish how frequently deputies without fitted vests are required to wear a vest from the County's supply. In light of the foregoing I find insufficient evidence that the current system is unworkable or unsafe.

CONCLUSION

I do not award the change the Guild sought in Article 14.3.[15]

VII. ARTICLE 19. Grievance Procedure

In response to the recent United State Supreme Court decision, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), each Party offered separate positions regarding Article 19. In *Janus* the court overruled decades of public sector labor law by finding a First Amendment right of public employees to decline to pay union fees. Although a detailed critique of *Janus* is beyond the scope of my role here, I observe that the Court suggested that unions did not require a financial incentive to represent nonmembers, as the well-established duty of fair representation obligated unions to avoid discriminating against nonmembers in contract administration or collective bargaining.[16] However, in regard to discipline issues, the Court expressed that "whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated" by requiring them to pay for grievance handling or by the union denying them representation in the grievance proceeding.[17] As reflected in its proposals below, the Guild has elected to adopt the Court-offered option of representing only members regarding disciplinary grievances and allowing nonmembers to be self-represented with respect to disciplinary grievances.[18] In such circumstances the nonmember would have the individual right to grieve and arbitrate any discipline they may have received, and their interests would thereby be protected.

[15] In reaching my conclusion, I assume that the County will continue to be responsive to concerns raised by the Guild about the condition of the vests, as it did recently when it arranged to clean the vests following complaints from the Guild.
[16] Id. at 2468.
[17] Id. at 2468-69.
[18] Although other unions that represent public sector employees may choose to be responsible for representing employees for all purposes, I am persuaded that the choice is a matter of discretion to be exercised by each labor organization.

The County counters that the Guild's proposal contravenes uniformity and consistency in the grievance process and is contrary to the purpose of the Washington Public Employees Collective Bargaining Act that seeks to provide "a uniform basis for implementing the right of public employees to join labor organizations… and to be represented by such organizations in matters concerning their employment relations with public employers." The County further contends that *Janus* permits the Guild to seek financial reimbursement from a nonmember whom it represents in a grievance over discipline, and that the Guild's opposition to such an arrangement does not outweigh the numerous complications that would arise from employee self-representation at all stages of the grievance process.

I am persuaded that the *Janus* decision, that overrode decades of precedent, is precisely the type of compelling event that supports modification of existing contractual language. The Guild has chosen one of the paths offered by the Court. By contrast, the County is attempting to require the Guild to follow the other alternative. Although I recognize that other unions may adopt the option the County prefers, I am persuaded that unions are uniquely situated to choose either option. I am also persuaded that the Guild's approach does not interfere with its continuing duty of fair representation to represent both members and nonmembers in negotiations and even non-disciplinary grievances and that it should not contradict or undermine public policy or disrupt the Parties' harmonious bargaining relationship.

In light of the foregoing, I find that it is appropriate to add language to Article 19, consistent with the Guild's proposal.

CONCLUSION:

I award the changes sought by the Guild in Article 19 as set forth below in bold.

ARTICLE 19. Grievance Procedure

Article 19.2 A grievance may be brought under this procedure by one or more aggrieved employees, with or without a Guild representative; or by the Guild as a class grievance

(hereafter described as "the grievant"). No grievance shall be processed beyond Step 3 without Guild concurrence and representation **except for a disciplinary grievance brought by a non-member of the Guild.**

19.2.1. A grievance not brought within the time limits prescribed shall be considered settled on the basis of the last decision received by the employee, which shall not be subject to further appeal, nor shall the **Guild or a non-member of the Guild grieving discipline** be entitled to pursue the grievance further."

19.4.4 STEP 4. If the grievance is not resolved, the Guild**, a non-member of the Guild grieving discipline** or the County may submit the dispute to final and binding arbitration.

19.9 Except as provided in Section 1.3, it is understood that taking an issue to arbitration shall constitute a waiver of the right of the Guild, **or a non-member of the Guild grieving discipline** to litigate the subject matter in any other forum.

VIII. ARTICLE 21. Scope and Arbitrability

Both Parties agree that the CBA should have an effective date beginning January 1, 2019 and expiring December 31, 2022. The Guild further contends that, whatever retroactive wage increase results from the interest arbitration, the County will have enjoyed the benefit of accruing interest on the amount from the beginning of 2019 until actual payment. In order to incentivize the County to make full payment to the correction deputies and to avoid the significant delays previously encountered, the Guild proposes that the County will issue separate checks for the retroactive payments. Further, if the County fails to pay within 60 days of the arbitrator's award, the undue balance shall accrue interest at the rate of 4% per annum. The County opposes that proposal, given the complexities of determining calculations with numerous wage rate differences resulting from shift differentials, overtime hours, holidays and compensatory time requests. A 60-day time limit would impose unnecessary and impractical time constraints on the County. Further, separate checks are not necessary as the County's

practice of including retroactive payment as a separate amount on regular payroll checks satisfies the Guild's interest in subjecting such payment to favorable withholding tax rates.

I am sympathetic to the Guild's interest in prompt payment of the retroactive increase incorporated in this award. I also recognize that the County faces a fairly complex set of challenges in determining each individual's amount. On balance I am unable to conclude that the Guild has met its burden of demonstrating that the County's good faith efforts to resolve the actual amounts, without a strict timetable with consequences, are unworkable or that there is a compelling need for change. Based on the foregoing, and in particular my expectation that the County will give high priority to determining the amounts owed and to providing retroactive payment to the employees represented by the Guild, I find that the current language is not unworkable or inequitable.

CONCLUSION:
I do not award the change the Guild sought in Article 21.

IX. Washington Paid Family Leave Act

In 2017 the state of Washington enacted its Paid Family and Medical Leave (PFML) program.[19] Recognizing the public interest in balancing the demands of the workplace with the desirability of promoting family stability and economic security, the program is intended to provide reasonable paid family leave for:

- The birth or placement of a child with the employee
- The care of a family member who is experiencing a serious health condition
- A qualifying exigency under the Federal Family and Medical Leave Act
- Reasonable paid medical leave for an employee's own serious health condition
- Reasonable assistance to businesses in implementing and maintaining a program to support their employees and family.[20]

[19] RCW 50A.001.005.
[20] RCW 50A.05.005

With few exceptions not applicable here, all Washington employers must participate in the program, even if its employees already are enrolled in a private short-term disability plan. Although the initial phase of the program began on January 1, 2019, parties to CBAs such as here were not covered by the law "unless and until the existing agreement is reopened or renegotiated by the parties or expires."[21] Accordingly, the County and the Guild must now implement the provisions of the Act.

Employers subject to the Act are currently required to remit a premium of 0.4% of an employee's wages. Of that amount, the Act contemplates a default ratio in which the employer will pay 37% of the amount, with the employee contributing the other 63% from his or her compensation. Alternatively, the Act permits the employer to assume responsibility for the entire 4/10 of 1%. Beginning in calendar year 2021, the total premium rates will be adjusted and could range from 0.1% to 0.6% of an employee's wages.

The County proposes that the Act's default proportionate share of premiums, with the County contributing 37% and the Guild deputies 63%, should apply. The County contends that split is consistent with the comparable Washington counties and with its internal groups.[22] The County further argues that the Guild's argument that it already provides for short-term disability and that the Act therefore provides no additional benefit is misguided. Significantly, the new Act covers not only personal medical issues, but also family members. Further, the Act also includes various legal job protections, including restoration to one's former position upon return from leave and various anti-discrimination retaliation provisions.[23]

The Guild first argues that any effective reduction in the take-home pay of the corrections deputies merely exacerbates their relative standing with their peer jurisdictions. Further, the County's argument relies on groups that are prohibited from striking, but do not receive binding

[21] WAC 192-520-010
[22] As Oregon does not have similar legislation, there can be no comparison with those jurisdictions.
[23] Although the Guild raised the argument about duplication of coverage during the hearing, it did not mention this contention in its post-hearing brief.

arbitration in the event of impasse. Moreover, with respect to the comparators, only the correction deputies in Thurston County contribute to the payment for the Act. Finally, such a cost will not be passed on to the deputies in the Oregon jurisdictions, as that state does not have a comparable statute.

In balancing the competing considerations, I initially recognize that this is a matter of first impression for the Parties' CBA. I also appreciate that the legislature intended that employers and employees would share responsibility for the premium. Further, the total amount of the premium beginning in calendar year 2021 will be subject to an annual adjustment. As that ratio could result in a premium from 0.1% to 0.6%, the total potential future premium is uncertain and can vary significantly.

Although the County seeks to incorporate the default percentage in the CBA, I recognize that in the give-and-take of good faith collective bargaining, the parties might reach a reasonable compromise that reflects the interests of the County, the employees and the public. I also recognize the well-accepted principle that bargaining units that are not eligible for interest arbitration provide scant guidance for units such as the Guild. Thus, I place little or no weight on the internal examples on which the County relies.

With no meaningful guidance from comparators, I am confronted with determining a fair and just resolution in consideration of other statutory factors and guidelines. I initially reject the Guild's apparent desire to shift the entire cost to the County, as the Act contemplates a shared burden as the default. On the other hand, the County's position assumes no movement from the default percentage, an unlikely result following good-faith negotiations. In that regard I note that the Act contemplates that an employer may elect "to pay all or any portion"
of the employee's share…"[24] In light of the foregoing, in balancing the County's budgetary concerns with the public interest in maintaining terms and conditions for the employees that would not harm their relative standing among their peers, I anticipate that good-faith

[24] RCW 50A. 10. 030 (3)(d).

negotiations would result in an agreement that the parties make an equal financial contribution for their shared responsibility. Accordingly, I consider a 50/50 split in responsibility for the premiums to represent a reasonable and equitable resolution.

CONCLUSION:

I will award the change the Employer sought, as modified to reflect a 50/50 split in the contribution to the premium for the Act in ARTICLE 9, OTHER LEAVES, as set forth below.

Article 9, Section 9.4.1 – Family and Medical Paid Leave

The County will offer Paid Family and Medical Leave in compliance with the Washington Paid Family and Medical Leave Program currently scheduled to begin on January 1, 2020. The County will contribute to the Paid Family and Medical Leave Program based upon 50% of the premiums as provided in Chapter 50A.10.030 (3) (d) RCW. The County shall deduct from the employee's wages 50% percent of the required premiums for the Family and Medical Leave Program as permitted by RCW 50A.04.115 beginning on January 1, 2020. Employees will be required to participate in the Family and Medical Paid Leave Program per RCW 50A.04.

Respectfully submitted,

Richard L. Ahearn
Interest Arbitrator
November 1, 2019