

In the Matter of an Interest Arbitration Between Portland Firefighters' Association, Local 43 and City of Portland. IA-01-00

BACKGROUND

This is a statutory interest arbitration between the Portland Firefighters' Association, Local 43 ("PFFA") and the City of Portland ("City"), under the Oregon Public Employees Collective Bargaining Act, ORS 243.650 et seq. I held hearings from October 23, 2000 through October 31, 2000 in Portland, Oregon. Both parties were present at the hearings, and represented by counsel. Each party was given a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearings. A stenographic record of the proceedings was made. Post-hearing briefs were filed December 7, 2000. In light of the holiday season the parties stipulated to waive the 30 day limitation for issuing the Award contained in the statute. (Tr 1404:3-11)

STATUTORY CRITERIA

ORS 243.746 Selection of arbitrator, arbitration procedure; last best offers; bases for findings and opinions, sharing arbitration costs.

.....

(3) ...Not less than 14 calendar days prior to the date of the hearing, each party shall submit to the other party a written last best offer package on all unresolved mandatory subjects, and neither party may change the last best offer package unless pursuant to stipulation of the parties or as otherwise provided in this subsection. ...

(4) ...unsolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator. 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

(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.

(5) Not more than 30 days after the conclusion of the hearings or such further additional periods to which the parties may agree, the arbitrator shall select only one of the last best offer packages submitted by the parties and shall promulgate written findings along with an opinion and order.

PRELIMINARY MATTERS

At the beginning of the hearing PFFA moved to have me make certain "findings of fact."⁽¹⁾ It did so, it said, because the City intends to have any arbitration award in favor of the PFFA declared unenforceable for three reasons:

1. The PFFA's Last Best Offer Package contains a proposal that was not subjected to the collective bargaining process.⁽²⁾
2. The "Addendum" portion of the package renders the award less than "final and binding."
3. One section of the proposed contract is "permissive."

The Addendum, which is part of the PFFA Last Best Offer package, contains alternative language to that which is contained in the main body of the Last Best Offer package. For instance, Article 12A. in the main body of the Last Best Offer package reads:

Upon sufficient notification, the City shall grant leaves of absence without pay to employees covered by this Agreement for the purpose of attending, as official delegates, union conventions for purposes directly related to and central to the collective bargaining relations between the parties, to the extent that such leaves can be granted without interfering with the reasonable needs of the Bureau of Fire. (Emphasis added)

In the Addendum Article 12A. reads:

Upon sufficient notification, the City shall grant leaves of absence without pay to employees covered by this Agreement for the purpose of attending, as official delegates, union conventions to the extent that such leaves can be granted without interfering with the reasonable needs of the Bureau of Fire.

PFFA proposes to have the language in the Addendum replace language in its Last Best Offer, if the Employment Relations Board ("ERB") overturns an Administrative Law Judge's decision upholding the City's position on permissive subjects.

The facts which PFFA asked me to find relate to whether it brought to arbitration a proposal that was not previously subjected to the collective bargaining process, (3) whether the Addendum makes the Last Best Offer package conditional, (4) and whether certain language acts to prevent other language from being permissive. (5) At the hearing I tentatively ruled that I would not make the "findings of fact" for two reasons. First, those findings are unnecessary to determine the issues before me in accordance with the statutory criteria. Second, the underlying matters are within the jurisdiction of ERB and some are currently before it. If I gratuitously decided the factual issues upon which ERB would make its legal determinations that would invade ERB's jurisdiction. At the very least, since the findings are unnecessary to my task, they are outside my jurisdiction. I now confirm that ruling.

The parties entered the following stipulations:

- (a) The City and PFFA stipulate that all current language in the collective bargaining agreement where neither side has proposed a change, is automatically included in whichever Last Best Offer package the arbitrator awards.
- (b) The City and PFFA stipulate that all contract language modified as a result of the tentative agreements contained in Exhibit Joint 2 shall automatically be included in whichever Last Best Offer package the arbitrator awards. (J-2)

The stipulations of the parties are made part of this Award.

THE INTEREST AND WELFARE OF THE PUBLIC

The statute requires that an arbitrator give first priority to the interest and welfare of the public when deciding which Last Best Offer package to award. At the hearing the City asserted that the Last Best Offer package of the PFFA does not promote the interest and welfare of the public because it requires the City to engage in unlawful behavior. At PFFA's request the City clarified its arguments on the record (See, Tr. 1102-1107, 1208-1218), so that PFFA could respond in its brief. The specific language the City claims requires it to engage in unlawful behavior is contained in the proposal for "Longevity Pay." It reads:

- 3. Longevity pay shall not be included in determining the employee's regular rate of pay for purposes of calculating overtime owed under the provisions of this Agreement including but not limited to the overtime provisions under Article 8. (6)
- 4. For the limited purposes of this section of the Agreement only, the City shall be allowed to establish the Section 207(k) exemption under the FLSA.
- 5. The Association agrees to defend and indemnify the City from any and all claims that the City failed to include longevity pay in the regular rate of pay in violation of the FLSA.

The disputed language is almost identical to language the City agreed to incorporate into its collective bargaining agreement with the Portland Police Association ("PPA").

The City asserts the longevity proposal is both central to the dispute and inimical to the interest and welfare of the public because, as applied, it is unlawful. It makes four arguments to support its position. First, the City argues that ERB has ruled an interest arbitrator has jurisdiction to decide whether a proposal contained in a Last Best Offer package is unlawful. Second, the City argues that the PFFA proposal on longevity contains sections whose application requires the City to violate the Fair Labor Standards Act ("FLSA"). Third, the City argues that the same language is legal under the police contract. Fourth, the City argues that PFFA cannot negotiate a waiver of the FLSA. In the City's view, if the PFFA Last Best Offer package were ordered the Award would be vacated by the courts because it requires illegal behavior.⁽⁷⁾ Thus, it must be rejected because the interest and welfare of the public are not served by ordering a Last Best Offer package that would cause the Award to be vacated.

PFFA makes four arguments to support its position that its Last Best Offer package does not require the City to violate the FLSA.⁽⁸⁾ First, PFFA argues that its proposal on longevity is not illegal on its face, but only raises a question of illegality when an employee is required to work in excess of 144 hours in a 19 day work period.⁽⁹⁾ Second, because of the limited number of 53 hour week employees who are eligible for longevity pay, the City will be able to avoid violating the FLSA. Third, 40 hour employees will be unaffected by the longevity pay provisions on overtime. Fourth, the City can exercise its managerial discretion to refuse to permit any employee receiving longevity pay from working FLSA overtime. If it does that, there will never be a conflict between the FLSA and the contract language.

As a preliminary matter, I must determine whether it is proper to consider the legality of a proposal when determining whether a Last Best Offer package is in the interest and welfare of the public. In *Springfield Police Association v. City of Springfield* 17 PECBR 17/260 (1997) the arbitrator found that a City retirement proposal was unconstitutional and, if awarded, was likely to be vacated by the courts. He found that the interest and welfare of the public would not be served by awarding a Last Best Offer package that led to that result. ERB upheld the arbitrator's right to make that finding and to use it in applying the "interest and welfare of the public" standard to deciding between the Last Best Offer packages. In a footnote ERB noted that the likelihood the award would be vacated would have "fiscal consequences to the public." (id. at 271) Thus, *Springfield* establishes that an arbitrator can find a Last Best Offer package is likely to be vacated because of an unlawful provision and therefore not in the interest and welfare of the public. It suggests that the consequences of illegality-- "a protracted labor dispute and extended legal proceedings" (id. At 271) - are proper considerations in determining whether a Last Best Offer package serves the interest and welfare of the public. In light of the *Springfield* decision, I conclude that I have the authority to determine the legality of the PFFA proposal and take that determination into account in deciding which Last Best Offer package best serves the interest and welfare of the public.

The PFFA longevity proposal was the most highly disputed issue at the hearing.⁽¹⁰⁾ It contains the same language that the City agreed to in its contract with the PPA. To understand why it is alleged to be illegal in the PFFA unit one must look first at how it operates in the PPA unit, where the City agreed to the language.

Police overtime is fundamentally different from fire fighter overtime under the current collective bargaining agreements. Police overtime is contractual and exceeds the requirements under the FLSA. That is, under the PPA contract the City must pay for overtime in circumstances where the FLSA would require no payment. David Shaff, the City's Employee Relations Manager testified about police scheduling. Police work 8 hour days. They get paid for overtime if they work more than 8 hours in a day. (Tr. 1210:3-4) That is not required by the FLSA. On a shift when they are not scheduled to work they can be paid six hours for a court appearance that lasts five minutes because of negotiated minimums. (Tr. 1210:5-8) That is not required by the FLSA. They are paid for all hours in excess of 40 in a week, which is required by the FLSA. When calculating the 40 hours of work, however, the contract requires the City to count all time paid (vacation, sick leave, other paid leave) towards the 40 hours that trigger overtime. (Tr. 1210:9-12)) Under the FLSA these hours are not counted.

Prior to the recent collective bargaining agreement on longevity the City did not use a 7(k) exemption for the police. It did not need one. The FLSA exemption is designed for police and fire departments that work other than a standard 40 hour week. It enables the employer to avoid paying "structural" overtime because of non-traditional schedules. Since the Portland police work a 40 hour

week, a 7(k) exemption was unnecessary. Since the contractual requirements for overtime pay are more rigorous than the FLSA requirements, the FLSA was almost irrelevant in the police unit. Why, then, did the City and PPA bother to include FLSA 7(k) language and language about how overtime would be calculated in their collective bargaining agreement?

When it negotiated the longevity agreement with the police, the City had certain financial goals it sought to meet. After substantially agreeing on longevity pay, the City discovered it had not properly calculated its cost. Longevity is part of the regular rate of pay for police and must be included in the hourly rate upon which overtime is calculated. (Tr. 1209:2-8) Adding longevity to police salary increases the cost of each hour of overtime for police officers that get longevity pay. [\(11\)](#) Because of this additional cost, the City found it could not meet its financial goals. While it was willing to provide longevity pay, it would not exceed its financial authority. Consequently, the City and the police union agreed: "For the limited purposes of this section of the Agreement only, the City shall be allowed to establish the Section 207(k) exemption under the FLSA." (Tr.1209:16-23)

The exemption the City agreed to adopt allows 171 hours of work in a 28 day work period. (Tr.1211:10-12) Since police work 40 hour weeks, this exemption automatically builds in a cushion of 11 hours each 28 day period. Police would have to work in excess of 11 contractual overtime hours in 28 days before they would be eligible for FLSA overtime. [\(12\)](#) In addition, under the FLSA, all leave time taken during the 28 day period is subtracted from the 171 hour maximum that triggers FLSA overtime. This creates an additional cushion. As a result, there will never be a circumstance in which a police officer will work over 171 FLSA hours in a 28 day period. (Tr.1211:15-17) Thus, the parties could negotiate a provision that appears illegal on its face - because it eliminates longevity pay from the regular rate of pay upon which FLSA overtime is calculated - without ever actually violating the FLSA. This enabled the parties to avoid increasing the cost of overtime for police officers who receive longevity, thereby meeting the City's financial goals and permitting a negotiated agreement.

The fire department currently uses a 7(k) exemption under which fire fighters can work 144 hours in a 19 day work period. (10/23 Tr.164:1-5) Fire fighters are scheduled to work a 53 hour workweek. (Tr.1268:21-22) They are not entitled to overtime under special rules contained in their collective bargaining agreement. Rather, under Article 8, Section 7, they are paid overtime in accordance with the FLSA. (Joint Exhibit 1) Under the FLSA, all time that is not worked is excluded from the calculation of overtime. (Tr.958:8-10) Thus, any paid leaves they take are not counted towards the 144 hours in a 19 day period. Fire fighters can work extra shifts ("call shifts") that do not bring their hours total above 144 and for which they are paid at time and one quarter. (Tr. 958:10-12) If the call shift brings them above 144 hours, they are paid FLSA overtime. [\(13\)](#) In calendar year 1999, the average FLSA overtime worked by all bargaining unit employees was 16 hours. (Ex. C-73) Approximately 65% of the PFFA bargaining unit is eligible for longevity pay. [\(14\)](#)

The crux of the PFFA argument is that the City can avoid engaging in unlawful behavior by refusing to allow any employee receiving longevity pay to work any overtime. If it does that, the language excluding longevity from the regular rate of pay when calculating overtime is irrelevant. There is no overtime to be calculated, hence no need to exclude longevity from the regular rate of pay. PFFA makes three subsidiary arguments as to how this is feasible. First, it asserts that because the City has adopted a 7(k) exemption there is no potential for 40 hour employees to work overtime. Second, it asserts that there is no contractual requirement to provide overtime or to distribute call shifts in any specific way, so the City can avoid having employees work overtime if they are receiving longevity pay. Third, it argues that the way in which overtime pay is calculated under the FLSA - ignoring time not worked when calculating hours worked - will mean that it is unlikely any employee will ever be eligible for FLSA overtime.

First, neither the evidence nor the PFFA argument makes it clear why 40 hour employees would not be affected by the proposal to exclude longevity from the regular rate of pay used to calculate overtime. Apparently PFFA assumes all 40 hour employees are covered by the 7(k) exemption and could work up to 144 hours in a 19 day work period before becoming eligible for overtime. But they are not. The exemption can only apply to firefighters "engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk." 29 USC §203(y) It does not apply to firefighters assigned solely to inspection, arson investigation, or administrative duties. [\(15\)](#) The evidence shows that fire inspectors, fire investigators, and staff fire officers (lieutenants and captains) who are assigned to 40 hour weeks received

significant overtime while the City employed a 7(k) exemption for firefighters. (C-73, 74).⁽¹⁶⁾ Thus, the facts do not support the PFFA assertion that 40 hour employees would not be affected by the proposal to omit longevity pay from the regular rate used to calculate overtime. In fact, 40 hour employees are likely to be the first affected by the FLSA violation proposed in the PFFA Last Best Offer package.

Second, PFFA asserts that there is no contractual restriction on how the City assigns overtime. It can restrict overtime assignments to firefighters who are not eligible for longevity pay. If it does that, there will never be an occasion on which the City will be obliged to violate the FLSA in calculating overtime. The difficulty with this argument is that 393 bargaining unit members are eligible for longevity. (PFFA Exhibit 309) That leaves 213 bargaining unit employees to do all the overtime.⁽¹⁷⁾ That would amount to almost a tripling of overtime for employees remaining eligible to perform overtime.⁽¹⁸⁾ That assumes, of course, that employees who are not eligible for longevity - and the need for overtime - are equally distributed through all of the ranks (firefighter, lieutenant, captain), assignments, and specialties. It also assumes that employees not eligible for longevity are capable of performing all the work currently performed on overtime. The evidence demonstrates these assumptions are unwarranted.

In calendar year 1999, fire officers, inspectors, and investigators worked the majority of overtime in excess of 100 hours for the year. (C-74) The 36 Fire Captains listed in Exhibit C-74 worked a total of 954 hours of overtime in calendar 1999. In that year only two were not eligible for longevity pay (Gymkowski and Bancroft). If they were required to perform all of the overtime, each would have had to work 477 hours of overtime during the year. If there were no change in the ranks of Fire Captain between then and now, no Fire Captain would be eligible to work overtime under the PFFA proposal. There are similar, albeit less extreme, problems for Fire Lieutenants and Firefighter Specialists who perform unique functions. Thus, the PFFA assertion that employees not eligible for longevity could perform all overtime is without any factual basis.

Third, there is no support for the PFFA position that given the way FLSA overtime is calculated - by not counting paid leaves as time worked - it is unlikely any employee will ever be eligible for overtime. There is currently significant overtime among both 40 hour and 53 hour employees. (C-75) That means the method for calculating overtime under the FLSA does not yield the result PFFA asserts. Moreover, given the variety of command levels and tasks that must be done, it does not appear even theoretically possible that the Bureau of Fire could operate without any of the 381 employees eligible for longevity and overtime ever working a single hour of overtime.⁽¹⁹⁾ Given the possibility of "Greater Alarms" (Joint Exhibit 1, Article 8, Section 3), floods, earthquakes, and other natural or man-made disasters, the City would be so constrained by the PFFA proposal that it might be faced with an unacceptable dilemma. It could be obliged to knowingly violate the FLSA by calling in all the resources needed for an emergency, or to compromise citizen safety by refusing to call in any employee receiving longevity pay.

The evidence does not support PFFA's argument that the City could avoid violating the FLSA by never having any employee eligible for longevity work overtime. The legal consequences of having an employee eligible for longevity work overtime are serious. As both sides recognize, an employee's rights under the FLSA are individual rights and a union cannot waive them. *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S. 728; 101 S.Ct. 1437 (1981) Under the FLSA, longevity pay must be included in the regular rate used to calculate overtime. *Featsent v. City of Youngstown* 70 F.3d 900, 905 (1995); *Theisen v. City of Maple Grove* 41 F.Supp.2d 932, 938 (1999) Thus, any employee in the bargaining unit who had a single hour of overtime calculated in accordance with the PFFA's Last Best Offer package could bring an action against the City to recover back pay, liquidated damages, attorney fees, and - potentially - penalties for a willful violation.⁽²⁰⁾

The two considerations that led ERB to uphold the arbitrator's refusal to award a vacatable Last Best Offer package in Springfield are present in this case. The language on longevity in the PFFA Last Best Offer package clearly requires the City to violate the FLSA. The language is only legal - according to PFFA - if it is never applied. The evidence shows it will be impossible for the City to avoid ever requiring overtime for an employee who is eligible for longevity pay. It is, therefore, inevitable that the City will be required to violate the FLSA if the PFFA's Last Best Offer package is awarded. Longevity pay is central to the dispute between the parties.⁽²¹⁾ As in Springfield, the proposal on an issue that is central to the dispute between the parties is unlawful.⁽²²⁾

There is a second similarity to Springfield. A violation of the FLSA is not trivial. Since the City is aware of the illegality of paying overtime in the fashion required by the PFFA proposal, any such payment might well be considered a willful violation, subjecting the City to a \$10,000 penalty for each violation. 29 USC §216 Any one of the 381 Fire Bureau employees who receive longevity pay under the PFFA proposal has standing to challenge the City on the first occasion he or she is paid for overtime. Since the FLSA permits liquidated damages, penalties, and attorney fees, it is likely a potential litigant would be able to obtain help in bringing an action. Thus, there is a significant potential for costly litigation. In Springfield there was only the possibility of a single suit on constitutionality. Here there is the possibility of a suit every time an employee receiving longevity works overtime. That could be extremely costly and disruptive. [\(23\)](#)

PFFA's Last Best Offer package includes an indemnification provision that reads:

The Association agrees to defend and indemnify the City from any and all claims that the City failed to include longevity pay in the regular rate of pay in violation of the FLSA.

This provision may require PFFA to defend any FLSA lawsuits against the City, but it cannot prevent them. Moreover, it may well violate public policy for one party to indemnify another against penalties for unlawful behavior. Thus, the City might still be liable for any penalties for willful violations of the FLSA.

It would not serve the interest and welfare of the public for me to award PFFA's Last Best Offer package because it would inevitably require the City to engage in clearly unlawful behavior that could subject it to costly penalties and continuing litigation. [\(24\)](#) In trying to avoid litigation the City would be obliged to weigh the safety of both its firefighters and citizens against engaging in unlawful behavior. It does not serve the interest and welfare of the public to impale the City on the horns of that dilemma.

An arbitrator is required to award the Last Best Offer package of one party. He is not empowered to eliminate any provision from a Last Best Offer package in order to make it more acceptable. The statute requires me to give "first priority" to the interest and welfare of the public. Where, as here, there is a provision that is inimical to the interest and welfare of the public because it requires unlawful behavior and promotes litigation, that provision alone requires rejecting the Last Best Offer package of which it is a part. It would be disingenuous for me to go through each of the proposals of the parties and weigh them against the statutory criteria knowing that I must ultimately reject the PFFA Last Best Offer package. [\(25\)](#) No matter how much better the PFFA Last Best Offer package might be on other criteria, it must be rejected under the "priority" criterion. And that requires awarding the City's Last Best Offer package. I must make it clear, however, that I am not awarding the City's Last Best Offer package because I accept each of its arguments, or because all of its elements meet the statutory criteria more closely than PFFA's Last Best Offer package. Rather, no element of the City Last Best Offer package is inimical to the interest and welfare of the public. One element of the PFFA Last Best Offer package is inimical to the interest and welfare of the public. That element - by itself - requires rejecting the entire package. Thus, in applying the statutory criterion to which I am obliged to give first priority I must award the City's Last Best Offer package.

By reason of the foregoing, I make the following:

AWARD

The parties are ordered to adopt the Last Best Offer package of the City of Portland, including the unchanged current language and the language modified by tentative agreement, as provided in their stipulation.

Norman Brand

San Francisco, CA

February 27, 2001

Appearances:

Robert Reid, Esq., Portland Firefighters' Association, Local 43

Marianna Kanwit, Esq., Senior Deputy City Attorney, City of Portland

1. 0 See, "Union's Motion for Finding of Facts" dated 23 October 2000.
2. 0 The City asserted that the PFFA proposal on longevity had never been subjected to bargaining.
3. 0 See, "Union's Motion for Finding of Facts" p.2, paragraphs 1 through 4.
4. 0 See, "Union's Motion for Finding of Facts" p.2, paragraphs 5 and 6
5. 0 See, "Union's Motion for Finding of Facts" p.2, paragraph 7.
6. 0 Article 8 provides: "7. OVERTIME The City shall pay overtime in accordance with the Fair Labor Standards Act."
7. 0 The City notes that under ORS 243.746 the arbitrator has no power to change any element in a Last Best Offer package and must choose one party's Last Best Offer package in its entirety.
8. 0 PFFA does not question the City's legal assertion that under the FLSA the "regular rate of pay" upon which overtime is calculated must include "longevity" pay. As discussed below, there is convincing precedent supporting the City's position that longevity pay must be included in the "regular rate of pay" when calculating FLSA overtime.
9. 0 The City has adopted the exemption for fire protection employees permitted under Section 207(k) of the FLSA. ("7(k) exemption") In accordance with 29 C.F.R. §553.230, the City has adopted a 19 day work period, which requires fire fighters to work 144 hours before becoming eligible for FLSA overtime. (10/23 Tr. 164:1-5. The first day transcript bears separate pagination. Consequently, all references to that day will include the date.)
10. 0 It was the centerpiece of PFFA's argument about parity with PPA. I make no finding about parity since it is unnecessary in light of my disposition of the legality issue.
11. 0 According to Exhibit PFFA 311, 38.7% of the police unit is eligible for longevity. While this exhibit had some problems, it is sufficiently accurate to make comparisons in the absence of more reliable data.
12. 0 This does not affect the overtime they are entitled to under their contract.

13. 0 Approximately \$6.7 million was expended on call shifts in FY 1999-2000. For FY 2000-2001, \$4.1 million was budgeted for call shifts. (C-107) The exhibits do not show how much of this was expended on overtime for call shifts.
14. 0 Exhibit PFFA 309 shows that 393 bargaining unit members are eligible for the longevity proposed by PFFA, out of 606 employees. That is 65% of the bargaining unit members.
15. 0 See, *Falken v. Glynn County, Georgia* 197 F.3d 1341 (11 Cir. 1999); and *Lockwood v. Prince George's County, Maryland* 2000 U.S.App. LEXIS 15302 (4 Cir. 2000), unpublished.
16. 0 It is highly unlikely they worked 62 hours beyond their normal 160 hours in a 28 day work period before becoming eligible for each hour of overtime.
17. 0 Battalion Chiefs are not eligible for overtime. (Tr.1062:1) Eliminating all 12 Battalion Chiefs from those restricted from overtime work still leaves 63% of the unit ineligible to perform overtime under the PFFA argument.
18. 0 At 15.98 hours average overtime (C-74), 606 employees in the PFFA unit performed 9684 hours of overtime in calendar year 1999. If 37% of the unit (225 employees) is required to do all the overtime, the average overtime will be 43 hours.
19. 0 PFFA also asserts that the City could run "short-staffed" to avoid calling in employees eligible for longevity to work overtime, or it could "detail" 40 hour employees to fire suppression. As to the former, it certainly would be possible to run a shift with one or two vacancies. But if there were a flu going around, or other circumstance that caused abnormally high absence, it would compromise the safety of both citizens and firefighters to run shifts significantly understaffed. As discussed above, 40 hour employees detailed to a single overtime shift are not likely to be eligible for the 7(k) exemption.
20. 0 29 USC §216.
21. 0 There is a further problem embedded in the PFFA proposal on longevity. It eliminates the 7(k) exemption for all purposes other than longevity. The language reads: "For the limited purposes of this section of the Agreement only, the City shall be allowed to establish the Section 207(k) exemption under the FLSA." Thus, the City would not have the current 7(k) exemption that applies to 53 hour employees for any purpose other than calculating overtime for those receiving longevity. All employees would have to be paid overtime after 40 hours. Those receiving longevity would have to be paid for overtime in violation of the FLSA. The proposed language is unworkable.
22. 0 It is key in determining the interest and welfare of the public that this proposal is central to the dispute and that the illegality is patent. This is not an example of one side searching for potential illegalities in the recesses of the other side's Last Best Offer package. Nor is it a case in which the patent illegality is merely hypothetical. Because the illegality is central, patent, and inevitable it is inimical to the interest and welfare of the public.
23. 0 As a practical matter, the City would be obliged to move to vacate the Award in order to avoid engaging in willful violations of the FLSA. It is likely that a court would vacate an Award of the PFFA Last Best Offer package on one of two grounds. First, on statutory grounds a court could find the Award exceeded my powers. ORS §36.355(1)(d). Since the parties cannot waive individual employees' FLSA rights, any proposal to waive them is not a mandatory subject of bargaining and cannot be brought before an arbitrator under ORS § 243.746(3). Second, if the court found the Award ordered an illegal act it could refuse to confirm the Award. If the City refused to implement the Award the parties would be back at ERB. It would be a long and costly legal battle.

24. 0 Alternatively, it could also require the City to immediately move to vacate the Award in an attempt to insulate itself from liability.
25. 0 Accord, City of Oregon City and Oregon Firefighters Assoc. Local No. 1159, IA-04-99 (Abernathy, 1999).