SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

504

FROM: Human Resources Dept.

SUBMITTAL DATE:
July 26, 2007

SUBJECT: Action on Advisory Arbitration Opinions as required by the Memoranda of Understanding ("MOU'") between the County of Riverside and SEIU, Local 1997; LIUNA, Local 777; and RSA.

RECOMMENDED MOTION: That the Board of Supervisors act on the three advisory arbitration opinions issued by neutral arbitrators during FY 2006-2007. 1) Accept without further factual testimony the advisory arbitration opinion of Arbitrator Michael Prihar dated September 19, 2006, in the grievance filed by SEIU on behalf of Wayne Rogers; 2) reject in part without further factual testimony the August 15, 2006, advisory arbitration opinion of Arbitrator William S. Schilling in the grievance filed by LIUNA on behalf of Kevin Cameron, Lupe Duran-Eason, and Arturo Zaragoza; and 3) reject in part without further factual testimony the advisory arbitration opinion of Arbitrator Mark Burstein dated May 3, 2007, in the grievance filed by RSA on behalf of Stacey Frazer.

BACKGROUND: The MOU's between the County and the various unions that represent County employees each contain a clause that provides for advisory arbitration as part of the grievance resolution procedure. After receipt of an advisory arbitration opinion the Board is empowered to accept, reject, or accept part of a decision and reject the rest, without further testimony from either party. In the event the Board rejects in whole or in part the advisory opinion of the arbitrator it must state the reasons for so acting.

Ronald W. Komers
Asst. County Executive Officer/HR Director

FINANCIAL DATA				
	Current F.Y. Total Cost:	$ -	In Current Year Budget:	NO
	Current F.Y. Net County Cost:	$ -	Budget Adjustment:	NO
	Annual Net County Cost:	$ -	For Fiscal Year:	2006/2007

SOURCE OF FUNDS:

Positions To Be Deleted Per A-30 ☐

Requires 4/5 Vote ☐

C.E.O. RECOMMENDATION: APPROVE

County Executive Office Signature

BY: Steve P. Schubert

☒ Policy ☐ Consent — Dep't Recomm.:

☒ Policy ☐ Consent — Per Exec. Ofc.:

Prev. Agn. Ref.: | **District:** | **Agenda Number:** 3.39

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BACKGROUND (continued)

The purpose of the advisory arbitration process is to safeguard the Board's authority to determine its financial and contractual obligations and/or to ensure that the advice received from the arbitrator is in accordance with current legal requirements.

Occasionally in addressing a particular dispute an arbitrator will issue an advisory opinion that exceeds, in whole or in part, his or her authority under the MOU. For example, such an advisory opinion may require the County to spend funds that it has not agreed to spend or impose a contractual requirement that the County did not agree to when it adopted the MOU. An opinion of this nature is no longer a determination of the rights of the parties under the MOU but becomes an interest arbitration in which the arbitrator is usurping the constitutional authority of the Board. Legislative attempts to impose involuntary interest arbitration upon local government bodies have repeatedly failed for similar reasons and preserving the final say in the advisory arbitration process permits the Board to protect its jurisdiction.

It is important to keep in mind that if a registered employee organization is dissatisfied with the final decision of the Board it has the option of seeking review of that decision in the Superior Court. So while the decision by the Board is the final step in the County's administrative process it is not necessarily the final word with respect to the particular dispute.

However if the Board refuses to act one way or the other on an advisory opinion the Court of Appeal has determined that the decision is not final under the County's administrative procedures. This inaction would frustrate the attempts of the registered employee organization to seek review by the Courts of the advisory arbitration opinion.

RECOMMENDATIONS

The first two decisions for your consideration involve what is commonly referred to as a "working out of class" grievance. The County receives many grievances on this issue every year from employees who actually are, or in most cases believe that they are, working in a higher rated classification than their own. In large measure this is due to the constantly changing work performed by County employees as demands for service grow and technologies develop.

In most cases the employee is performing duties that are part of his or her own classification but are also duties performed by employees in the next higher classification. Invariably the employee is unable to identify or quantify in any meaningful way the amount of time he or she spends performing the duties which are the exclusive purview of the higher rated classification.

In a smaller number of cases an employee working in a lower rated classification is actually assigned the duties of a separate, and identifiable higher rated classification. Historically there has been recognition of the trade off in this situation. By performing the work of the higher rated classification the employee has an opportunity to demonstrate that he or she is ready for promotion. On the other hand, the County is not required to hire a full-time employee to perform these higher rated duties that need only be performed for up to 480 hours in a period of time identified by the MOU.

Finally, there are cases, such as those described below, where the employee is performing some tasks that either exceed or are different from those duties assigned to his or her classification, but for

which there is no existing classification that adequately encapsulates this particular set of duties. In cases such as this, a classification study is undertaken to determine the appropriate classification for the group of tasks assigned to the employee.

Because it is impossible to determine with any degree of certainty when the employee's extra duties justified a new classification, rather than the more common scenario of performing higher rated duties for 480 hours during a fixed period of time, it has been the County's long standing practice that the conclusion of the classification study is the operative date to implement any change to the employee's status. An employee reclassified as a result of this study is appointed prospectively and none of the MOU's requires additional payment for the hours spent performing the previously unclassified bundle of tasks.

In the first decision set out below the arbitrator properly considered the long standing practice of the County. In the second decision a newer arbitrator, perhaps unfamiliar with the County's long standing practice, sought to impose what he thought was an appropriate remedy.

Prihar Decision (Rogers Grievance): The issue in the Wayne Rogers grievance filed by SEIU was whether the employee was entitled to compensation for hours "worked out of class" from January 2004 until he was reclassified on January 19, 2006. Mr. Rogers was performing some duties that were outside the scope of his existing classification but did not fit within any existing County classification. He was reclassified following a study by the Human Resources Department and his grievance sought pay for the time spent performing the out of class duties. The MOU between the County and SEIU does not provide any monetary remedy for an employee found to be working out of class in excess of 480 hours in a calendar year. On that basis the arbitrator refused to order a remedy for Mr. Rogers.

Recommendation: The arbitrator correctly applied the terms of the MOU between the parties and we recommend that the advisory arbitration decision be accepted by the Board.

Schilling Decision (Cameron, Duran-Eason, Duran Grievances): The issue in the grievances filed by LIUNA on behalf of Kevin Cameron, Lupe Duran-Eason, and Arturo Zaragoza Duran, was whether they were "working out of class" in excess of 480 hours in a calendar year. These employees had been displaced as a result of a closure of the facility they worked at and they were moved to a new facility and assigned different duties. During the transitional period they continued to be paid the rate for their existing classification while a study was done to determine their new classifications. At the conclusion of the study they were reclassified into new positions.

The LIUNA MOU sets out various scenarios for employees who believe they are working out of class. The MOU recognizes that employees who have been ultimately reclassified into the appropriate position and do not receive any payment for any time spent "working out of class" prior to the reclassification. On the other hand, if the employees had not been reclassified in the new positions following the study, but were returned to their former classification, then the MOU provides for payment because the employees will not have the long term benefit of the new, higher rated position.

The arbitrator recognized that the MOU did not provide for payment for the grievants on the facts of this case but determined that was not fair or did not make sense to him and imposed a requirement that the employees be paid, even though such payment was not required by the MOU. In so doing

he was acting as an interest arbitrator and modifying the MOU between the County and LIUNA. This was clearly in excess of his authority under the MOU, which specifically states that:

> The Arbitrator shall have no power to alter, amend, change, add to or subtract from any of the terms of this MOU, but shall determine only whether or not there has been a violation of the MOU in respect to the alleged grievance and remedy.

Recommendation: We recommend that the Board reject the portion of the advisory arbitration decision that was in excess of the arbitrator's authority; specifically the portion that ordered a monetary remedy for the three grievants. We recommend that the Board accept the remainder of the advisory arbitration decision.

Burstein Decision (Stacey Frazer Grievance): The issue submitted to the arbitrator by RSA in this grievance was:

> Whether the County violated Article VII, Section 1 of the MOU and/or an established past practice when it required Grievant to provide a physician's certificate, for a short term illness lasing [*sic*] one-day in duration, before returning to work her next scheduled shift?
>
> If so, what is the appropriate remedy?

The MOU permits the department to request a doctor's note for any absence due to sickness but RSA contended, and the arbitrator agreed, that the department's practice had been to require a doctor's note only for an absence of three days or more, unless an employee was on a "sick leave letter".

The arbitrator made the following order:

> I order that the Department cease and desist from ordering a Deputy or Correctional Deputy, with no prior written notice from the Department about an alleged abuse of sick leave, to furnish a certificate from a physician in violation of the Department's written policies and/or past practice.

As noted by the Court of Appeal in *RSA v. County of Riverside*, Case No. E039131, "the MOU expressly provides that 'The arbitrator shall not decide any issue not within the statement of the issues submitted by the parties.'" In that case the Court of Appeal determined that an arbitrator's award that applied to the entire bargaining unit, flowing from a grievance filed on behalf of an individual employee, "clearly exceeded the scope of the issue submitted to [the arbitrator]."

The advisory arbitration opinion in this grievance makes a similar mistake. The arbitrator exceeded his authority under the MOU by including a remedy for the entire bargaining unit when the only issue before him related to the applicability of the MOU provisions to Ms Frazer's situation.

Recommendation:

We recommend that the Board reject the proposed order set out above as far as it pertains to any employee other than the grievant, Ms Frazer, and accept the remainder of the advisory arbitration opinion.