

IN THE MATTER OF THE INTEREST ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D., ARBITRATOR

CITY OF ROSEBURG, OREGON,

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 1110.

(July 1, 2006 through June 30, 2009 CBA)

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:
: INTEREST ARBITRATOR'S
: OPINION AND ORDER

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I. INTRODUCTION

This is an interest arbitration proceeding, conducted under the provisions of ORS 243.746,¹ to resolve a dispute over the terms and conditions of employment of bargaining unit members in the City of Roseburg fire department.² The parties were able to resolve

¹ For strike-prohibited employees, including uniformed safety personnel such as firefighters, the legislature has enacted interest arbitration as an "expeditious, effective, and binding" means of resolving bargaining disputes that might well result in strikes in the private sector ORS 243.742.

² The positions involved are firefighter, driver/engineer, and lieutenant.

all but two issues in their negotiations: 1) wages, and 2) the level of employee co-pay for medical insurance premiums.

At a hearing held February 21, 2007 in the City's offices in Roseburg, the parties had full opportunity to present testimonial and documentary evidence as well as to argue the issues.³ A certified court reporter transcribed the proceedings, and the parties provided a copy of the transcript along with their post-hearing written briefs which were postmarked April 13, 2007. I received the Union's brief on or about April 16, 2007, and the City's brief several days later.⁴ With receipt of the briefs and transcript, the record closed.⁵ Having carefully considered the evidence and argument, as well as the decisions of my fellow arbitrators who have considered issues similar to those presented in this matter, I am now prepared to issue the following Interest Arbitration Opinion and Order⁶

³ By agreement of the parties and the Arbitrator—and consistent with the nature of an interest arbitration as a continuation of the process of collective bargaining—witnesses were not formally sworn. Each party had an opportunity to pose questions to witnesses presented by the other side, often without the necessity of waiting until the end of “direct” before engaging in “cross examination” on a specific issue. I commend the parties for the cooperative spirit with which they approached presentation of the information necessary for me to decide the issues.

⁴ The City's brief was inadvertently sent to my former mailing address and had to be forwarded.

⁵ On May 4, 2007, however, the parties jointly supplemented the record by submitting an interest arbitration award issued on May 1, 2007, after the close of briefing in this case. The decision, IA-13-06, *Lane Rural Fire District and IAFF, Local 851* (White, May 1, 2007), by Arbitrator Burton White was forwarded for my consideration, *inter alia*, in resolving the parties' dispute over selecting appropriate comparable jurisdictions consistent with the criteria set forth in ORS 243.746(4)(e). After reading Arbitrator White's decision, I requested that the parties forward copies of two scholarly articles he had relied upon in rendering his opinion, and the parties agreed to submit copies of the articles, which I received on May 16, 2007.

⁶ I am grateful to the parties for granting my request to be allowed time beyond the statutory 30-day limit to review the record and issue this Opinion and Order.

II. BACKGROUND

Roseburg is a city of approximately 21,000⁷ located on I-5 in Douglas County, roughly equidistant (in freeway miles) between Eugene to the north and Grants Pass to the south. The Fire Department bargaining unit consists of twenty-eight positions—nine lieutenants, nine driver/engineers, and ten firefighters.⁸ Exh. E-15. Three shifts, A, B, and C, work 24 hour shifts. Exh. U-13. Call volume in 2005 was 180 fire calls and 2,491 EMS⁹ (emergency medical) calls. *Id.* Roseburg has been hard hit by a decline in the timber industry in recent years, and Douglas County is considered “severely distressed” economically by the Oregon Economic & Community Development Department. Exh. E-11. For example, the Douglas County unemployment rate was 8.1% in December 2006, far above the national average (4.5%, seasonally adjusted) and the average for the State of Oregon (5.4%, seasonally adjusted). Exh. E-10. On the other hand, as the Union points out, home values have increased substantially in Roseburg, providing a healthy tax base (*see*, Exh. U-16), and the City has been successful in maintaining a sound financial picture by keeping expenditures under budget while revenues have generally exceeded budget. Exh. U-17 (“Rainy day reserves grow to \$7.2 million for City of Roseburg,” *Roseburg News Review*, November 10, 2006).

⁷ The 2006 State Fire Marshal’s Survey lists Roseburg’s population at 20,530. Exh. E-19. Figures from the Portland State University Population Research Center varied from 20,790 in July 2005 to 21,050 in July 2006. Exhs. E-20 and U-71.

⁸ As of the date of the hearing, one of the firefighter positions was vacant because of a recent resignation.

⁹ Although the City provides EMT services through the Fire Department, it has chosen not to do so at the “Paramedic” level, i.e. unlike some other departments, it does not provide “Advanced Life Support” (ALS) services. This issue will be discussed more fully in connection with the comparison of overall compensation under ORS 243.746(4)(e).

III. ISSUES

The parties have tentatively resolved all issues in bargaining for their 2006-2009 Agreement except for the following two items reflected in their “Last Best Offers”

(LBO’s):

A. Wages

The City has proposed three 4% increases in the base wage rate effective July 1, 2006 (retroactive), July 1, 2007, and July 1, 2008. The Union has proposed 3% increases effective July 1, 2006 (retroactive), January 1, 2007 (retroactive), July 1, 2007, January 1, 2008, July 1, 2008, and January 1, 2009. Compounded over the life of the Agreement, the City’s offer would result in a total wage increase of 12.5% in base wages, while the Union’s proposal would result in an increase of 19.4%. Exh E-28.

B. Health Insurance Premium Co-Pays

The City proposes that the employee co-pays for health insurance premiums be increases as follows:

Full Family	From \$30.00 per month to \$35.00 per month
Employee and Spouse	From \$26.00 per month to \$31.00 per month
Employee and Children	From \$22.00 per month to \$27.00 per month
Employee Only	From \$13.00 per month to \$16.00 per month

The Union proposes that the co-pays remain unchanged.

The parties seem to agree that the wage issues will determine the result in this case given the modest proposed increases in employee premium share on health insurance.

III. STATUTORY CRITERIA

Since the passage of SB 750 in 1995, an interest arbitrator has been required to select either the City's or the Union's LBO "package," i.e. the Arbitrator is not allowed to evaluate the parties' offers on an issue-by-issue basis, selecting the proposal (or crafting a different contract clause) that best serves the interests of the parties and the public. In choosing between the parties' LBO's, the statute requires the Arbitrator to apply the following criteria:

(4) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, unresolved 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 paragraphs (b) to (h) of this subsection as follows:

(a) The interest and welfare of the public.

(b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.

(c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.

(d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.

(e) Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:

(A) For any city with a population of more than 325,000,

“comparable” includes comparison to out-of-state cities of the same or similar size;

(B) For counties with a population of more than 400,000, “comparable” includes comparison to out-of-state counties of the same or similar size; and

(C) For the State of Oregon, “comparable” includes comparison to other states.

(f) The CPI-All Cities Index, commonly known as the cost of living.

(g) The stipulations of the parties.

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

(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. The opinion and order shall be served on the parties and the board. Service may be personal or by registered or certified mail. The findings, opinions and order shall be based on the criteria prescribed in subsection (4) of this section.

ORS 243.746(4).

Although the statute directs the interest arbitrator to give priority to criterion (a), i.e. the “interest and welfare of the public,” and to give only secondary priority to criteria (b) through (g), most arbitrators have found it impossible to apply an abstract principle like “interest and welfare of the public” without considering the secondary factors. As the late Carlton Snow observed shortly after the enactment of SB 750, “In the abstract, it is impossible to find meaning in the phrase ‘the interest and welfare of the public.’ The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case.” *Oregon Public Employees’ Union, Local 503 and State of*

Oregon (OSCI Security Staff), IA-11-95 (Snow, 1996).¹⁰ I proceed, then, to an analysis of the secondary factors, and after considering those factors, I will analyze the “interest and welfare of the public” criterion in light of the (b) through (g) provisions. Although I will discuss each of the statutory factors in order, the bulk of the discussion will relate to the identification of the appropriate comparable jurisdictions with which to compare Roseburg for purposes of “comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities.” ORS 243.746(4)(e). That is so not only because of the relative importance of the overall compensation evaluation as compared to the other secondary factors,¹¹ but also because interest arbitrators have interpreted and applied that criterion in quite different ways since the enactment of SB 750.

A. Ability to Pay – ORS 243.746(4)(b)

The first of the statutory secondary criteria is ability to pay. Here, the City does not argue that it cannot pay what the Union asks in wages, but argues instead a “relative ability to pay” analysis. That is, as the statute instructs, the ability to pay equation requires consideration of other governmental services and priorities, as well as the maintenance of reasonable operating reserves against future contingencies. In other

¹⁰ To illustrate Arbitrator Snow’s point, I note that in this case, as in virtually every other Oregon interest arbitration award I have read where wages are at issue, the Employer argues that the “interest and welfare of the public” is best served by providing “reasonable” compensation (often with reference to how other employees in the jurisdiction, public and private, are compensated) in a way that protects and preserves the public fisc and recognizes the many competing priorities of a governmental agency. Unions, on the other hand, argue that “public welfare” is promoted by paying employees on a par with their perceived peers in similar jurisdictions, thus resulting in enhanced recruitment and retention, as well as improved morale and better public service. Both arguments would seem to be true in every case in the abstract, but it is only in considering the detailed factual circumstances of specific parties in context with the other statutory criteria that these general principles can be applied in a meaningful way.

¹¹ Most who labor in the field of Oregon interest arbitration, including the parties here, seem to agree that the comparison of overall compensation of the subject employees influences the outcome more than any other secondary factor.

words, the statute recognizes the common sense notion that a governmental entity has many programmatic needs, as well as other units of employees (both represented and non-represented) competing for available public dollars. The Union notes that the city has \$7.2 Million in a “Rainy Day Reserve,” but while that fact is certainly relevant, it is not in itself sufficient reason to put a checkmark in the Union column under the “ability to pay” criterion.

For one thing, reserve funds are designed to provide a cushion against future contingencies, i.e. matters that cannot be predicted with absolute accuracy.¹² The evidence establishes that the City has budgeted conservatively and spent its funds wisely, but unforeseen events may alter that financial equation. For example, the City Manager noted that unless Congress reauthorizes a federal subsidy to states severely impacted by a decline in logging in national forests, Roseburg will lose approximately \$400,000 in anticipated annual road funds that previously flowed to the City through Douglas County. Exh E-26. That money will need to be replaced in one of several ways—with additional fees and taxes, depletion of City reserves, or cuts in services (and/or a reduction in employee headcounts). It is most likely, I assume, that the City would utilize some combination of these approaches to deal with a projected loss of revenue.¹³ In other words, although the City apparently projects a continuation of the trend that revenues will

¹² To continue the “rainy day fund” metaphor, it is difficult to predict just when it will rain and precisely how much precipitation will fall.

¹³ With respect to spending the rainy day reserve, I note that in the same newspaper article the Union cites for the proposition that the City’s financial health is “looking better than it has in previous years,” Finance Director Cheryl Guyett projected that future expenditures would exceed revenues during the six-year budget cycle, and that the rainy day fund would decrease from \$7.2 million to \$2.3 million over six years. It is unclear to me whether this projection took into account the potential loss of road funds described previously, although I note that Guyett’s projection was made in November 2006 and the newspaper article describing the impending loss of federal timber dollars appeared in February 2007, just prior to the hearing in this matter. As an aside, I also note that in the November 2006 article, Guyett is quoted as attributing some of the expenditure savings as of that time to, among other things, the temporary closing of a fire station. Exh U-17.

continue to grow, *see*, Exh. U-17 (“revenues are expected to increase \$600,000 each year” in the six-year budget projection), projections are just that, and the City must consider the possibility that unanticipated events will cause those projections to be inaccurate. Thus, it is prudent for the City to maintain an adequate reserve and to budget its expenditures conservatively.

At the same time, the Union points out that the three-year cost differential to the City of the Union’s wage proposal (as compared to the City’s LBO) is approximately \$186,000. Exh. U-40. The City’s cost estimate was remarkably similar. Exh. E-27 (\$190,474). I agree that this difference in cost between the two wage proposals is not unreasonable, in itself, when considering the City’s ability to pay, even given budgetary “challenges.”

I note, however, that the projected cost differential between the parties’ proposals over the three-year term of the Agreement is limited by the manner in which the Union proposes the wage increases take effect—specifically, that 3% increases be awarded every six months. This approach has the effect of back loading the cost as compared to the City’s proposal of 4% annual increases. I agree with the Union that the 3%/3% approaches to annual increases helps the City afford larger salary increases, at least in the short term, but the resulting increase in the base wage (an increase of 19.4% under the Union’s proposal as compared to 12.5% under the City’s LBO) creates a significant “bow wave” in ensuing years.¹⁴

In estimating the size of that bow wave, I agree with the Union that the City overstates the future effect of the Union’s *current* wage proposal by projecting the effect

¹⁴ By “bow wave,” I mean the built-in additional cost of the Union proposal going forward into the next contract cycle even if wage rates remained the same under the new Agreement.

of a 3%/3% approach in years 4 through 6 and comparing the resulting cost to a continuation of the City's 4% annual raise proposal in those years Exh. E-39 (estimating a cost differential for the entire six-year period of \$959,300). I think it is more helpful to consider the difference in the two proposals by comparing how much added future wage cost is built into the Union's proposal going forward even without additional wage increases in the next contract. I calculate that built-in "status quo" differential, assuming another three-year Agreement, as approximately \$510,000.¹⁵

The Union argues that the future cost of today's proposals is irrelevant because "the statute does not ask the arbitrator to consider the 'what if' of the future." Union Brief at 13. I find nothing in the statute, however, that precludes consideration of the longer term cost impacts of a proposal when considering issues under the (4)(b) criterion. In fact, in its references to consideration of "future operating reserves," which are often projected beyond the life of a labor agreement, the statute seems to contemplate a broader focus than "what does the proposal cost during the life of the contract?" Similarly, the Union itself has presented evidence and argument based on the theory that the City's financial health is projected to be strong, even beyond the term of the 2006-2009 Agreement. *See, e.g.* Exh. U-17.

In the end, however, the City does not deny that it has the present ability to pay, and in fact concedes "this case is not about ability to pay" City Brief at 10. Rather, the City argues that it is "unreasonable" to expect Roseburg to pay wages that are comparable to wages paid in much larger districts, many of which are part of the Portland

¹⁵ I calculated this figure by doubling the total wage cost for the second six months of Year 3 of the Union proposal, derived from Exh. U-J (\$1,504,061) which produces an annualized figure for Year 4. The resulting product (\$3,008,122) exceeds the projected Year 4 cost under the City's proposal (i.e. the same as Year 3, \$2,838,086) by \$170,036. *Id.* I then multiplied that number by 3 to obtain an estimate of the bow wave heading into years 4 through 6, i.e. \$510,108.

labor market. I will deal with those issues in the context of the comparability analysis under ORS 243.746(4)(e), but for now, it is sufficient to say that these arguments are not truly “ability to pay” arguments under ORS 243.746(b). Thus, the “ability to pay” criterion, viewed in isolation and considering only the costs during this contract, favors the Union’s LBO

Nevertheless, in determining what weight to give the “ability to pay” criterion, I will consider the effect of the bow wave created by the Union’s proposal in the context of the primary standard I am expected to apply—namely, the “interest and welfare of the public.”

B Ability to Attract and Retain Qualified Personnel – ORS 243.746(4)(c)

I find the Union’s arguments about the City’s alleged recruitment and retention problems unconvincing. Citing five employees (going back to 1999) who apparently left for higher-paying jurisdictions (and three who are said to be currently applying elsewhere), the Union claims that the City’s firefighter wages are insufficient to attract and retain qualified personnel. The City counters that of nine firefighters who left the City since 2002, only two have left since May 2004 (one in 2006 and another in 2007, just prior to the hearing). According to the City, both of those employees cited “family reasons” as being at least partly responsible for their decision to go to a higher paying district.¹⁶ The City also notes that the other seven left for reasons other than pay (e.g. retirement or medical reasons), and thus do not reflect a retention problem.

Taking the evidence as a whole, I do not see a significant retention problem at this

¹⁶ I do note, however, that one of the firefighters who left within the last two years, Jeff Bell, testified that his primary consideration for moving to the Salem Fire Department was higher wages, but that he chose Salem over another district where he had an opportunity in order to be nearer to family.

time. Less than half the firefighters who left the City since 1999 allegedly left for financial reasons (five of twelve), and none did so between 2002 (Phillips)¹⁷ and 2006 (Bell). If compensation has been such a problem in retaining firefighters, I would not expect to see a four-year gap between moves to another jurisdiction. I also discount the fact that three current members of the department may be looking elsewhere. Until they actually make a move, it is premature to count them as evidence of a retention problem. In sum, there is a situation here that bears watching,¹⁸ but I find the evidence insufficient to establish that the City has been unable to retain firefighters as a result of its compensation.

Similarly, the City notes that in its most recent recruitments, in 2001, 2003, and 2004, it found many more qualified applicants to interview than it had positions to fill (19 interviews in 2001 for 3 positions, 39 interviews in 2003 for 3 positions, and 35 interviews in 2004 for one position).¹⁹ Thus, on the “ability to attract” side of the equation, I also find it difficult to conclude that the City is failing because of its compensation levels.

In sum, the “ability to attract and retain qualified personnel” factor favors the City’s LBO

¹⁷ Curiously, although the City’s exhibit on this topic includes 2002, it does not reflect the separation of Phillips. Cf. Exh. E-13 with Exh. U-56

¹⁸ As the Union points out, the City could find itself becoming a training ground for newer firefighters who leave once they become qualified to transfer to another jurisdiction. Union Brief at 14. I agree that could lead to a relatively inexperienced fire department, a situation that is definitely not in the “interest and welfare of the public.” On the evidence before me, however, I am not prepared to find that the Union has established that there is a *current* retention problem in Roseburg.

¹⁹ The Union argues that other departments, unlike Roseburg, attract *hundreds* of qualified applicants in their recruitments. Even if that is true, however, and even if the difference in numbers of qualified applicants is a result of the City’s wage levels, as opposed to geography or some other influences, the statutory criteria are directed to the ability to attract qualified applicants. The evidence establishes that Roseburg has done so at the level necessary to fill its available positions.

C. Overall Compensation, Comparable Communities – ORS 243.746(4)(d)(e)²⁰

We come now to the heart of the dispute between the parties—namely, the appropriate jurisdictions with which to compare Roseburg in evaluating “the overall compensation of other employees performing similar services with the same or other employees in comparable communities.” ORS 243.746(4)(d). The Union contends that since the adoption of SB 750 in 1995, population has become the sole permitted criterion for comparability, relying on the following statutory language: “As used in this paragraph, ‘comparable’ is limited to communities of the same or nearest population range within Oregon.” According to the Union, this language is clear on its face and requires no examination of extrinsic indicators of legislative intent—the Legislature intended that population, and population alone, be taken into account in determining comparator communities for the purpose of evaluating overall levels of compensation. Union Brief at 15. Moreover, relying on prior arbitral precedent, the Union declares that it matters not whether the “community” employs its own firefighters or enters into a legal arrangement with another agency, such as a fire district, to provide fire protection. If a community is within the appropriate population “range,” the Union contends, the overall compensation of the firefighters who serve that community may be used for comparison.

The City, on the other hand, asserts that the Legislature could not have intended that a City the size of Roseburg be compared to fire districts such as Tualatin Valley Fire & Rescue, Clackamas F.D. #1, and Klamath County F.D. #1²¹—each of which serves

²⁰ I do not treat factor (d), overall compensation, as an independent variable. From the structure of the statute, it seems clear that the purpose of determining overall compensation under factor (d) is to compare that compensation to the compensation received by “other employees performing similar services . . . in comparable communities” under factor (e).

²¹ The Union’s list of comparables includes the cities of West Linn, served by IVF&R, Milwaukie, served by Clackamas #1, and Klamath Falls, served by Klamath #1.

much larger populations and service areas than Roseburg—simply because one of the constituent communities *within* each of those districts approximates Roseburg’s population. In addition, the City argues that it unfairly distorts the overall compensation comparison to compare Roseburg to communities like West Linn and Milwaukie, cities close to the major metropolitan area of Portland, because such communities are likely to have greater resources and thus a greater ability to pay wages commensurate with the highest wage labor market in the State. Even after SB 750, the City points out, interest arbitrators have continued to employ a geographical labor market analysis in determining the “comparable communities” for applying the overall compensation comparison required by ORS 243.746(4)(e).

Because these issues are at the heart of the parties’ dispute and may influence the outcome more than the other criteria, and also because the prior decisions of interest arbitrators on these issues do not always appear to be consistent with each other, I will set forth in some detail my reading of the development of arbitral approaches to application of the “comparable community” analysis under SB 750²²

1. Comparing cities and fire districts

In 1999, Arbitrator Howell Lankford held that SB 750 contemplated that a fire district could be an appropriate comparator for a city, declining to accept the city’s argument in that case that fire districts are not subject to the same “conflicting demands for limited financial resources that a city must deal with.” *North Bend Firefighters Union and City of North Bend*, IA-07-99 (Lankford, 1999). Arbitrator Nancy Brown followed

²² The disparate views of arbitrators set forth below, especially with respect to the “population only” argument, would seem to be persuasive evidence that, contrary to the Union’s argument, the language of SB 750 governing the selection of comparable communities is not “clear on its face ”

suit (admittedly, without much discussion) in *Grants Pass Firefighters Union and City of Grants Pass*, IA-02-00 (Brown, 2000), accepting the Union’s proposed list of comparables.²³ Arbitrator Eric Lindauer also agreed with the Lankford approach in *Astoria Firefighters Union and City of Astoria*, IA-14-00 (Lindauer, 2000), overruling the city’s objection that cities which were part of larger fire districts could not properly be considered “comparable communities” for cities employing their own firefighters.

Shortly after Arbitrator Lindauer’s *Astoria* decision, Arbitrator Katrina Boedecker relied on *Astoria*, *Grants Pass*, and *North Bend* to reject the city’s argument—which echoes the City’s argument here—that “if Tualatin, West Linn, and Milwaukie” can be compared to comparably-sized cities within larger fire districts, “eventually the union will claim that Ashland is comparable to San Francisco or Seattle.” *Ashland Firefighters Association, Local 1269, IAFF and City of Ashland*, IA-12-00 (Boedecker, 2001).²⁴ Paraphrasing the employer’s argument in *Ashland*, if smaller cities can be compared to cities of comparable size within fire districts that pay Portland wages, and Portland can be compared to cities of the “same or comparable size” outside Oregon under ORS 243.746(4)(e)(A), then smaller cities will ultimately be compared to those large cities as well. This is essentially the City’s argument here. Arbitrator Boedecker found it impossible to agree with that argument, however, and thus she held that cities served by fire districts can appropriately be considered “comparable,” under SB 750, to cities with their own municipal fire departments. Thus, in an unbroken line of interest arbitration

²³ As an aside, I note that Arbitrator Brown approved two fire district comparables that included two communities that also appear on the Union’s proposed list in this case, i.e. Klamath Falls and Milwaukie

²⁴ Once again, note that two of the cities within fire districts involved in the *Ashland* case—West Linn and Milwaukie—also appear on the Union’s list of proposed comparables here

decisions construing SB 750, the principle of comparing overall compensation between cities of comparable size, even if one of them is part of a larger fire district, has been firmly established.

While I understand the City's argument that it often makes little economic sense to compare smallish cities to cities of similar size that are part of larger fire districts, the arbitrators who have gone before me have explicitly rejected the argument that the statute does not permit such comparisons. In general, I believe it promotes stability in public employee bargaining for an arbitrator to follow the decisions of prior arbitrators, and a party asking for a deviation from established interpretations of the law carries a heavy burden. That is so, in my view, even if I might have decided the issue differently as a matter of first impression.²⁵ Not that slavish devotion to precedent is required. If I were convinced that my fellow arbitrators had utterly misread the statute, I might be willing to strike out on my own in a different direction now. But I am not convinced that they have erred to that extent. As Arbitrator Boedecker pointed out, nothing in SB 750 "suggests that 'community' should be defined 'entity that provides fire service.'" *Ashland, supra*. Thus, it is a plausible reading of SB 750 that the manner in which a city chooses to deliver fire protection services is irrelevant in determining whether it is a "community" of comparable population to the subject jurisdiction and thus an appropriate comparator.

Consequently, I cannot agree with the City's argument that the Union improperly selected cities served by fire districts as comparables.²⁶ A city within the same or nearest

²⁵ For example, I might have given more weight to the "one-way comparability" argument the City makes here. *See, fn. 27, post*. None of the prior arbitration decisions seems to deal with that argument expressly.

²⁶ Nor can I accept expert witness Jim Mooney's contention that the City is making a different argument here than those previously rejected by Arbitrators Lankford, Lindauer, Brown, and Boedecker. As noted, several of the Union's proposed comparables were approved in the prior interest arbitrations cited. Thus, those decisions implicitly rejected the argument that it is improper to compare overall compensation in city

population range is not excluded as a comparator solely on the basis that the city has arranged to have fire protection services delivered by a fire district, even if all of the communities within that fire district, taken together, would make the district an inappropriate comparator.²⁷

2. Geography and labor market considerations

a. decisions of arbitrators

That fire districts may not be excluded from comparison to the City *per se*, however, does not necessarily foreclose a slightly different argument, namely that a *particular* fire district (or city, for that matter), might be an inappropriate comparator based on geographic location and/or labor market factors. The Union argues strenuously that SB 750 removed all consideration of geographical proximity and labor market issues from the definition of an appropriate comparable under ORS 243.746(4)(e). The only statutory criterion left, contends the Union, is population. Interest arbitrators have not always agreed in their responses to this argument

Howell Lankford captured the essence of the disagreement:

fire departments with compensation paid by cities that do not actually *employ* firefighters, but rather provide fire protection services as part of a larger fire district. In fact, as I read the decisions, Arbitrator Boedecker *explicitly* rejected the City's arguments

²⁷ I recognize, as Jim Mooney pointed out, that this approach to the statute creates "one-way comparability," i.e. it makes a jurisdiction the size of TVF&R a comparable for Roseburg, whereas the reverse would never be true. That is, in a proceeding to determine the appropriate overall compensation for employees of a jurisdiction as large as TVF&R, Roseburg would not fall within the "same or nearest population range." Unions often use a parallel form of analysis in arguing against Employer proposals to use a "50% to 150% population range" for selecting appropriate comparables, i.e. they note (as did the Union in this case) that the 50%/150% analysis results in jurisdictions half as large as the subject being treated as comparables—but not jurisdictions twice as large. Thus, they point out, the 50% jurisdiction would be considered a comparable for the subject, but the subject could never be a comparable for the smaller jurisdiction. I agree that this lack of symmetry is a logical defect of the approach that treats cities and cities within larger fire districts as comparables, but given the unbroken string of arbitral decisions allowing that approach, I would deal with that lack of symmetry by adjusting the weight to be given particular comparables within the "same or nearest population range." That is, I would do so if the statute allows, a topic I will address later in this Opinion and Order

The statutory language—‘comparable is limited to communities of the same or nearest population range within Oregon’—could mean (1) that no community shall be considered comparable if it is not of same or nearest population range, or (2) that nothing except being within the same or nearest population range shall be considered in determining comparability.

North Bend Firefighters, supra. Finding “possible meaning number 1” in the statutory language, a number of arbitrators have held that it is permissible to narrow the list of otherwise appropriate comparables by considering factors such as geography and/or labor market—that is, so long as each jurisdiction that remains on the list of comparables is within the appropriate population range and the list contains a sufficient number of comparators to provide an adequate comparison. *See, IAFF, Local 2091 and Winston-Dillard Fire District #5, IA-07-95* (Lehleitner, 1995); *North Bend Firefighters’ Assn. and City of North Bend, IA-09-05* (Snow, 1996); *Polk County Deputy Sheriffs’ Assn. and Polk County, IA-11-00* (Krebs, 2001); *Madras Police Employees’ Assn. and City of Madras, IA-11-02* (Helm, 2002); *Jefferson County Law Enforcement Assn. and Jefferson County, IA-13-02* (Nelson, 2003) (implicit); *IAFF, Local 2091 and Winston-Dillard Fire District, IA-09-04* (Brand, 2005) ²⁸

Arbitrator Eric Lindauer arguably took a different approach in *City of Astoria, supra*. In responding to the city’s argument in that case that cities and fire districts should not be compared to each other, Lindauer noted “clear” statutory language that “comparability is defined solely on the basis of population.” *Id.*²⁹ Some arbitrators read

²⁸ In some of the cited cases, arbitrators appear to disregard certain comparators based on labor market or geography. In others, they view the jurisdictions as statutory comparators, but “discount” the weight they should be given based on similar considerations. It seems to me this is a distinction without a substantive difference. *See, fn 32, post*

²⁹ Although Arbitrator Lindauer seems the most frequently cited source of the “population only” approach to comparability, I note that Arbitrator Mark Downing had reached the same conclusion earlier in *Lane County Peace Officers’ Assn. and Lane County (Sheriff’s Office), IA-21-99* (Downing, 2000)

Arbitrator Lindauer's language as expressing unequivocal agreement with "possible meaning number 2" as set forth by Howell Lankford, i.e. that "nothing except being within the same or nearest population range shall be considered in determining comparability." See, e.g. *Newport Police Assn. and City of Newport*, IA-01-02 (Calhoun, 2002);³⁰ *Tigard Police Officers' Assn. and City of Tigard*, IA-08-02 (Levak, 2002). I am not so certain, however.

First, I note that Lindauer was not responding, strictly speaking, to a geography or labor market argument in *Astoria*. Rather, the primary thrust of the city's argument was based on the "nature of the entity," i.e. a contention that fire districts and cities are so dissimilar that they should not be treated as statutory comparables for each other. That, in fact, is the specific argument Arbitrator Lindauer rejected in the language quoted above, i.e. his assertion that the statute is "clear" that "comparability is defined solely on the basis of population." It is also true, however, that part of the city's argument in *Astoria* was that TVF&R, Clackamas F.D., and Klamath County F.D. are unique entities whose greater resources "distort comparability" when compared to smaller cities.³¹ Lindauer did not accept that argument, so although the matter is not free from doubt, it is possible to read *Astoria* as standing for the proposition the Union advocates here: only population may be considered in selecting comparables.

When Arbitrator Thomas Levak reviewed the issue in *Tigard Police Assn. and City of Tigard*, IA-08-02 (Levak, 2002), he declared that "Arbitrator Lindauer is

³⁰ Noting what he perceived as the difference between the Lehlitner approach in *Winston-Dillard D. #5* (the *most appropriate* comparables are those within the population range that are in geographical proximity to the subject jurisdiction) and his reading of Lindauer's observation in *Astoria* that comparability must be determined *solely* on the basis of population range, Arbitrator Calhoun said, in a *dictum*, that Lindauer's view "seems to be the sounder of the two." *Id*

³¹ That argument, of course, is very similar to the argument the City advances in this case

absolutely correct.” *Id.* But precisely what Arbitrator Levak meant in placing this imprimatur of “correctness” on the Lindauer approach is somewhat unclear in light of the explanatory sentence that immediately follows:

Not only is the statute clear and unambiguous on its face, it is clear from the very change made by the legislature that it intended a switch from the labor market standard to a population standard. Only jurisdictions *within a labor market* that are in the same or nearest population range can be given consideration under the statute.

Id. (emphasis supplied). What is the significance, if any, of Levak’s reference to “labor market” in this context? Does he mean to say, as the Union contends, that the union’s proposed comparables in that case did not meet the statutory criteria because under SB 750 population is the *sole* criterion for comparability? Or is he suggesting that it is permissible to limit consideration to jurisdictions within the same labor market so long as all comparables on the list of jurisdictions fall within the appropriate population range?

In evaluating this issue, I note that in *Tigard*, the union was attempting to compare its overall compensation solely to entities within the Portland area, several of which were much larger than Tigard. The city, on the other hand, proposed a 50%/150% population range around the State. In that context, Levak rejected the union’s attempt to utilize comparables limited to a specific geographic labor market, i.e. the Portland area, and in doing so he emphasized the importance of the statutory language “same or nearest population range.” Thus, it is possible to read Arbitrator Levak’s comment, as the Union does, to mean that population is the sole criterion for determining comparability under the statute.

But given Arbitrator Levak’s references to labor market, it is also possible to read this comment as not necessarily inconsistent with the Lehleitner approach. Arbitrator

Brand, in the second *Winston-Dillard* case, for example, determined that Arbitrator Levak's holding was unclear ("given this equivocal statement by Arbitrator Levak, it cannot be said that he decided population is the sole determinant of comparability") *IAFF, Local 1209 and Winston-Dillard F.D*, IA-09-04 (Brand, 2005). In context—that is, in light of the specific contentions that Levak rejected in *Tigard*—I find it more probable that the Union's reading of the decision is correct, but it seems to me that construction is not the only possible one. Consequently, it is not absolutely certain that Arbitrator Levak's *Tigard* decision supports the Union's position.

The Union cites two additional interest arbitration awards in support of the proposition that population is the sole criterion for determining comparability. In the first, Arbitrator Doug Collins, in *Benton County Deputy Sheriffs' Assn. and Benton County*, IA-16-01 (Collins, 2002), rejected the county's proposal to consider every county along the I-5 corridor as a comparable because, Collins said, "it ignores the statutory mandate to include all comparable communities within the same population range." This observation, read in isolation, seems to support the Union's argument. In the immediately preceding paragraph, however, Arbitrator Collins had noted:

although the statute does not address the use of the more traditional labor market analyses . . . neither does it specifically *preclude* the consideration of such factors within the population range. It is thus reasonable to give greater weight to those counties within the allowable population range that compete in the same general labor market as Benton County for the hiring and retention of employees. However, it is clear that the Act does not permit an arbitrator to rely solely on a labor-market analyses [sic].

Id (emphasis supplied). Arbitrator Collins did not cite George Lehleitner's *Winston-Dillard* decision, but the analysis seems consistent. In any event, given this language, it is

difficult to conclude that Arbitrator Collins agrees with the Union's approach that population range is the *sole* criterion for determining the appropriateness of proposed comparables.

Similarly, the Union cites Arbitrator Norman Brand's decision in *Coos Bay Police Officers' Assn and City of Coos Bay*, IA-05-01 (Brand, 2001). In that case, Brand declined to accept the city's proposed comparables for several reasons, one of which was the city's deletion of certain jurisdictions within the relevant population range because those cities were experiencing more robust growth than Coos Bay. *Id*. The Union, by contrast, presented the closest jurisdictions in population and proposed comparing an equal number up and down (e.g. three up, three down). Arbitrator Brand held "I find that the comparison jurisdictions used by the Association are more consonant with the statutory requirement than those used by the City."

I agree that this decision appears to support the Union's argument. But, as noted previously, in a later case Arbitrator Brand expressly rejected the notion that the inquiry into comparability "ends with population." Instead, he reasoned, the statute allows labor market considerations to inform the choice of comparables so long as all of the comparables actually utilized fall within the "same or nearest population range." *Winston-Dillard II, supra*. Again, there is no explicit citation to the first *Winston-Dillard* case of Arbitrator Lehleitner, but the analysis is consistent, and given that Arbitrator Brand was dealing with the same parties, it is reasonable to assume he was aware of the Lehleitner approach. Thus, ultimately I think it is safe to assume that Arbitrator Brand, in an appropriate case, also agrees with Arbitrator Lehleitner that labor market and

geography are permissible considerations in the selection of appropriate comparable jurisdictions.

In evaluating this history of arbitral consideration of the issue, I find seven or eight arbitrators who read the statute as Arbitrator Lehleitner does, and about four who agree with the Union³² (although some of the decisions of those who are said to be on the Union's side of the debate could be read differently). Concededly, there are eminent arbitrators on both sides of the equation, but it seems to me that the arbitral decisions in the Lehleitner line are better reasoned. In my own reading of the express language of the statute, I see nothing inconsistent with the idea that while all comparables must be within the same or nearest population range, an arbitrator may give more weight to the otherwise appropriate comparables that are most similar to the subject jurisdiction in terms of geographical location and/or labor market.³³ In other words, the language of the statute, as written, expresses an intention to *exclude* as comparables those jurisdictions that fall outside the appropriate population range, but does not clearly express an intention that all jurisdictions *within that range* must be given equal weight in the analysis. Thus, I do not find—again, in the express language—any prohibition on an arbitrator's use of traditional considerations such as geography and labor market in winnowing a list of statutory comparables down to those that seem the “most appropriate” comparators within the same or nearest population range

³² I did not read every interest arbitration award that might have addressed this issue, however.

³³ Under this approach, it seems to me it is little more than semantics whether an arbitrator “excludes” out-of-area or out-of-market comparators or “discounts” the weight to be given to them. See, e.g., *IAFF, Local #2935 and City of Coos Bay*, IA-09-05 (Runkel, 2006) (“although the statute restricts the jurisdictions that can be compared, it does not require that each of the comparable jurisdictions must be given equal weight”). In some cases, an arbitrator may determine that the “appropriate weight” is zero, in which case the jurisdiction will be “excluded.” In another case, the weight may be 50% or some other fraction as compared to other comparables. *Id.* The difference, however, is one of degree, not of kind.

b. legislative history of SB 750

In this case, however, the Union has made an additional argument that, so far as I can determine, has not previously been considered in depth by interest arbitrators—at least as of the time of the hearing and briefing in this matter. Specifically, the Union argues that the legislative history of SB 750 supports its position that population is the *sole* comparability measure because the original version that passed the legislature provided for two criteria in conjunction: (1) population range, and (2) geographic labor market. Union Brief at 16. The Governor threatened a veto, however, and the Governor’s office and the proponents of the bill engaged in “pre-veto” negotiations in an attempt to craft a bill both sides could accept. In those negotiations, the “geographic labor market” criterion was deleted. The bill then passed again in its modified form and the Governor signed it. It is clear from this history, the Union argues, that the legislature intended to preclude the use of geographic and labor market considerations in the selection of comparables³⁴

After the parties submitted their briefs in this case, they jointly submitted a subsequently issued interest arbitration award rendered by Arbitrator Burton White in *IAFF, Local #851 and Lane Rural Fire/Rescue District*, IA-13-06 (May 1, 2007). In his Opinion and Order, Arbitrator White addresses the legislative history argument the Union makes here. White notes that a history of the genesis of SB 750, contained in a 1996 law

³⁴ It is unclear to me why this argument is only coming to the fore now, some twelve years after the enactment of SB 750 and long after arbitrators began considering the proper construction of the language of the statute. I also note that despite the significant number of arbitral decisions that have found a place in the comparability analysis for labor market and geographical considerations, the legislature has apparently not seen fit to clarify or amend the statutory criteria. Nevertheless, the Union’s argument is a serious one that I must consider on its merits.

review article by Lewis & Clark Law School Professor Henry Drummond,³⁵ supports the Union's contention that the original Derfler-Bryant bill limited the comparability analysis to jurisdictions "with nearly the same population" *and* within the "geographic labor market of the public employer." During the pre-veto negotiations between the Governor's office and the legislature, the "geographic labor market" language was omitted.³⁶ From that fact, the union in *Lane County* argued—and I think it is fair to say that Arbitrator White all but found—that the legislature intended to remove all considerations of geographic labor market from the comparability equation.³⁷ As noted in the prior footnote, however, despite finding that arbitrators are precluded from using labor market factors in *selecting* comparables, in reaching his decision Arbitrator White *discounted the*

³⁵ H. Drummond, "A Case Study of the *ex ante* Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law," 32 Willamette L. Rev. 69 (1996). Drummond negotiated on behalf of Democratic Governor Kitzhaber with the representatives of the Republican-led legislature, attempting to work around a possible veto of SB 750 in its original form. Thus, Drummond was intimately involved in the birth of SB 750 in the form it became law. As an aside, it is again unclear to me why this 1996 article written by Drummond has not previously found its way into the arbitral discussions of these issues.

³⁶ Precisely *why* the negotiators decided to delete the language is not a part of Arbitrator White's consideration of the issue. Nevertheless, one could plausibly argue, as the Union has argued here, that if the negotiators agreed to remove the "geographic labor market" language from the statute, their intention might well have been to eliminate labor market considerations from the comparability analysis. On the other hand, I note that the language deleted in the final version of the bill removed what had been one aspect of a *limitation* on what communities could be considered "comparable," i.e. those jurisdictions within a "geographical labor market." Thus, removal of that language would allow a broader range of jurisdictions to be considered in the comparability analysis, e.g. it would allow comparisons between communities in different parts of the state. In other words, it seems possible that the negotiators might have intended simply to *expand* the range of appropriate comparables. If that is the case, deletion of the geographical labor market language would not necessarily *preclude* taking labor market considerations into account in the comparability analysis.

³⁷ To quote the relevant passage of the decision, Arbitrator White wrote "I also agree with those arbitrators who are uncomfortable when listed comparators present patently dissimilar elements. My concern occurs when they express that discomfort through what may be an arbitral modification of the language of ORS 243.746(4)(e)." Opinion at 17. Arbitrator White then goes on to suggest that, while it may be improper for an interest arbitrator to consider labor market issues in the selection of appropriate comparators under the (4)(b) criteria, it would not be improper to consider them under (4)(h), the "such other factors as are traditionally taken into account" criterion, when determining the *weight* to be given specific comparators. *Id.* at 18. In fact, Arbitrator went on to apply just that form of analysis, indicating that the weight he gave to some of the Union's comparables was reduced because they were "urban rather than rural." *Id.* at 21.

weight given to specific comparables based on the differences between rural and urban communities, apparently applying an “other factors” analysis under ORS 243.746(4)(h).
Opinion at 17-18

Thus, although Arbitrator White appears to have agreed with the legislative history argument the Union makes in this case regarding (4)(e), he reached the same *result* the Union argues against, and it appears that he did so by considering the urban versus rural character of the comparables under the “catch all” provision of the statute, ORS 243.746(4)(h); *but see*, Opinion at 21 (“since the factors in paragraphs (a) through (g) provided sufficient evidence for my decision, I did not apply the ‘other factors’ addressed in ORS 243.746(h)”). If it is an “arbitral modification” of the statute to consider labor market or geographical factors under (4)(e), however, as Arbitrator White suggests, Opinion at 17, why is it any less an “arbitral modification” to allow those “prohibited” factors to influence the comparability analysis by bringing them in the back door under (4)(h)? I note, for example, the legislative directive that the “other factors” under the “catch all” provision must be “*consistent with* paragraphs (a) through (g) of this subsection,” including Section (4)(e). Therefore, if the legislature intentionally excluded geography and labor market from the comparability analysis under (4)(e), it would seem “inconsistent” to allow those considerations to re-enter the analysis via the “other factors” language of (4)(h).

Moreover, the statute cautions that the “other factors” analysis may *not* be employed if “the factors in paragraphs (a) through (g) of this subsection provide sufficient evidence for an award.” Thus, as Howell Lankford has noted, SB 750 changed the “other factors” criterion from an “enabling” provision into one of “restriction,” i.e.

from a provision that allowed an arbitrator to consider such other factors as would result in a fuller record and replicate the kinds of considerations typically taken into account in bargaining, to one that restricts the “other factors” analysis to those cases in which the (a) through (g) factors do not supply sufficient evidence to decide the case. *Oregon State Police Officers’ Assn and Oregon State Police*, IA-18-99 (Lankford, 2000). For both these reasons, I find it problematical to apply geographic labor market and similar considerations under the “other factors” section of the statute if, in fact, the legislature intended that they be excluded from the analysis under (4)(e).

In reading the Drummond article for myself, however, I am not convinced that it supports the Union’s legislative history argument. It is true that at page 122 of the article as published in the Willamette Law Review, Prof. Drummond confirms the factual bases of the Union’s argument, i.e. that as a result of the *ex ante* veto negotiations, the population criterion of the original bill was modified to “within the nearest or same population range”³⁸ and the “within the geographic labor market” limitation was deleted entirely. *Id.* at 129. Contrary to the Union’s contention about the significance of this deletion, however, Prof. Drummond specifically states as follows:

This ‘comparability’ limitation *does not preclude use of other traditional benchmarks, such as labor market, per capita income, and similar criteria.*

Id. (emphasis supplied) Thus, according to the Governor’s representative in the process that led to the deletion of the “geographic labor market” language from the original version of SB 750, the negotiators did not intend to preclude consideration of “traditional

³⁸ The bill was also changed in these negotiations to allow state agencies, as well as Portland and Multnomah County, to compare themselves to out of state jurisdictions of comparable population. *Id.* at 129

benchmarks, such as labor market, per capita income, and similar criteria” in the comparability analysis.³⁹ *Id.* at 129 It seems to me that this observation—again, by the Governor’s representative in the negotiations—at a minimum validates the Lehleitner approach, i.e. while all comparators must be within the same or nearest population range, geography and labor market factors (as well as other traditional “benchmarks”) may be used to determine the appropriate comparables for purposes of evaluating overall compensation

Consequently, I find—consistent with both the express statutory language and the greater weight of arbitral precedent—that being within the “same or nearest population range” is not the *sole* criterion to apply in selecting comparators for overall compensation under ORS 243.746(4)(d) and (e). In an appropriate case, interest arbitrators are also free to apply “traditional benchmarks” such as geographical labor market considerations. The Drummond article summarizing the negotiations that led to the final passage of SB 750 confirms that result is what the *ex ante* veto negotiators intended⁴⁰

³⁹ Prof. Drummond does not expressly say who proposed the deletion of the language in question, nor does he indicate whether the negotiators specifically discussed the intended effect of the deletion. Given the political context, however, with the Governor’s office attempting to water down what was viewed as a “management friendly” bill, and Republican legislators apparently attempting to curb the power of interest arbitrators, it seems unlikely that the “conservative” legislators were proposing that labor market considerations be removed entirely from the comparability analysis. Nor, in fact, does Prof. Drummond suggest that the Governor’s office wanted to do so. Consequently, it appears that deletion of the geographical labor market language was merely intended to remove the absolute requirement in the original version of the bill that “comparable communities” had to be *both* within the same or nearest population range, *and* also within the same geographical labor market.

⁴⁰ Nor do I find that the article by my fellow arbitrators John Abernathy and Timothy Williams, written shortly after the enactment of SB 750 (and also cited by Arbitrator White in the *Lane Rural F.D.* case) supports a different result. J. Abernathy and T. Williams, “Last Best Offer—Total Package: Oregon’s New Form of Interest Arbitration,” 14 LERC Monograph Series No. 14, 84, University of Oregon. First, I note that although the authors apparently read the statute as limiting comparability to “only population,” *Id.* at 94, they do not provide an analysis supporting that reading. In other words, they deal with neither the statutory language nor the legislative history that I have considered in arriving at a different conclusion—at any rate, they do not do so expressly. Moreover, later in the article, the authors note that “the new comparability criterion will generate its share of controversy also. For example, is the basis of comparison similar-sized communities in the entire state or just in the *geographical labor market of the community*”

3. Selection of appropriate comparators

a. the parties' proposals

I turn, then, to a discussion of the most appropriate comparables in this case. The Union simply prepared a list of cities comparable in population to Roseburg (whether they operate municipal fire departments or are part of a larger fire district) and went “four up, four down,” i.e. chose the four jurisdictions with slightly higher populations and the four with slightly lower populations than Roseburg’s population of roughly 21,000. Exhs. U-72-74. This approach has the benefit of simplicity, and it gives primacy to the basic statutory criterion (population within the same or nearest range). I note, however, that by looking only at population (and taking advantage of prior arbitral decisions that allow comparison to cities of similar size that are served as part of fire districts with much larger service populations), the Union’s list contains some proposed comparators that have little in common with Roseburg other than nominal population. In any event, the process resulted in the following list of comparables: Ashland (21, 430), Grants Pass (23,000), Redmond (23,500), and West Linn (24, 180) on the high side, and Milwaukie (20, 835), Klamath Falls (20,720), Newberg (20,570), and Forest Grove (20,380) on the lower population side of the equation.⁴¹

involved in the interest arbitration?” Id. at 94 (emphasis supplied) This query casts doubt on whether the first-quoted comment supports the Union’s argument here. At the very least, the authors seem to be noting that the comparability language of SB 750 is susceptible of an interpretation that allows consideration of geography and labor market, such as in the Lehleitner approach, to determine which comparables on the list of jurisdictions of similar population within the state should be given the most weight

⁴¹ On the high side, Woodburn (22,615) was closer in population than Grants Pass, Redmond, and West Linn, but because Woodburn does not employ classifications other than firefighter (i.e. no engineers, etc), the Union argues that Woodburn should be excluded from the comparison because the employees there do not perform “similar duties” to the employees involved in this proceeding. It is not entirely clear to me that Woodburn could not be used with respect to firefighter compensation, however, even if the lack of engineer and lieutenant positions makes it less useful for a complete compensation comparison.

The City, on the other hand, proposed three different lists of comparators for the Arbitrator's consideration. The first consisted of Southern Oregon fire service providers (cities and fire districts) with service populations within 30% of Roseburg. That produced a list of Ashland (20,590), Coos Bay (15,950), Grants Pass (23,000), South Lane (16,000), and Winston-Dillard (15,000). Exh. E-21. This list brings geography into the mix, which may be appropriate at some level, but I question whether Coos Bay, South Lane and Winston-Dillard are within the "same or nearest population range" as that term is used in the statute.⁴² If those three comparables were removed from the list, however, the list would obviously be too small for an adequate comparison.

The City's second cut looks statewide at cities and fire districts within 30% of Roseburg's population. That approach adds Forest Grove (19,200) and Newberg (19,900) to Ashland, Coos Bay, Grants Pass, South Lane, and Winston-Dillard. Exh. E-22.⁴³ Although this list contains two new jurisdictions (Forest Grove and Newberg) that appear to be appropriate, the resulting list is still inadequate for comparison if Coos Bay, South Lane, and Winston-Dillard are excluded as being outside the population range.

The City's third list adds three additional jurisdictions to those on the second list: Douglas County Fire District #2 (36,000), Redmond (23,500) and Woodburn (22,110). I would exclude Douglas #2 for the same reason I would exclude Coos Bay, South Lane,

⁴² Although I recognize that interest arbitrators have historically considered ranges in population as wide as 50%-150% or even 50%/200%, each of which is broader than the 30% range the City proposes here, it seems to me that the "same or nearest population range" language of SB 750 calls for a much closer correlation between the populations of comparator jurisdictions. Precisely how close in population the comparator must be may vary from case to case, but if there are enough jurisdictions close in population to allow reliable analysis, jurisdictions that might have been appropriate comparables under the old law may no longer be appropriate comparables.

⁴³ The Union argues, however, that the City inexplicably failed to include jurisdictions on the list that met the expressed criteria and further argues that most, if not all, of those omitted jurisdictions pay more than Roseburg.

and Winston-Dillard. Despite its proximity and unique geographical relationship to Roseburg (apparently Douglas #2 completely surrounds the City), it is not within the same or nearest population range.

b. appropriate comparables

In making the selection of appropriate comparables, I start with the jurisdictions that appear on both parties' proposed lists, i.e. the Union's final list and one or more of the City's lists. Those jurisdictions are Ashland, Grants Pass, Redmond, Newberg, and Forest Grove. Despite differing methods of analysis, both parties designate these jurisdictions as appropriate comparators to Roseburg for purposes of analyzing overall compensation. I agree. I will reject several of the City's proposed comparables, as set forth above, because they fall outside the statutory population range, i.e. Douglas #2, Coos Bay, South Lane, and Winston-Dillard. That leaves Woodburn and the three cities of comparable size that are part of larger fire districts, i.e. West Linn (TVF&R), Milwaukie (Clackamas #1), and Klamath Falls (Klamath Co. #1).

With respect to Milwaukie and West Linn, I find that they would be entitled to little or no weight in my analysis because they are suburban Portland communities and exist in an economic environment very different from Roseburg. I agree with the observations of Arbitrator Norman Brand:

Suburban entities with nearly the same population as rural entities are not necessarily comparable to the rural entities. They are likely to have higher tax bases because property values tend to be higher in suburbs of cities like Portland than in rural areas. [footnote omitted]. To the extent they are served by larger departments, those departments may exist in a labor market that pays generally higher wages. The departments themselves may have economies of scale and resources not available to a rural department.

IAFF, Local 2091 and Winston-Dillard Fire Dist., IA-09-04 (Brand, 2005). Thus, I do not find West Linn and Milwaukie helpful in comparing overall compensation. Klamath Falls, however, is a different animal. It is not a suburban Portland jurisdiction, nor is it in a significantly different geographic region of the state. It is true, as the City argues, that Klamath Falls is part of a larger fire district and does not employ its own firefighters, but as previously discussed, those arguments have been considered and consistently rejected by interest arbitrators under SB 750. Consequently, I will include Klamath Falls in the final list of comparables.⁴⁴

Thus, I analyze the overall compensation of Roseburg firefighters with respect to the following comparators: Ashland, Grants Pass, Redmond, Newberg, Klamath Falls, and Forest Grove.

4. Comparison of overall compensation

The Union analysis placed bargaining unit firefighters roughly 15% behind their comparators, engineers just over 11% behind, and lieutenants also lagging by 15%. Exhs. U-118, 121, and 122 (corrected as of April 13, 2007). In each case, however, a substantial portion of the differential was attributable to the inclusion of West Linn and Milwaukie in the Union's data. As noted in the previous section, I do not find that these cities are entitled to weight in the analysis. Even without those two jurisdictions, however, the Union calculated that Roseburg firefighters are nearly 9% behind their peers. Exh. U-119. The City counters that the Union data is flawed in several respects.

⁴⁴ Woodburn, given its lack of positions other than firefighter, may be a useful check as part of the comparison of Roseburg firefighter overall compensation to that of the other jurisdictions, although Woodburn seems significantly lower in overall compensation than any of the other potential comparables. *See*, Exh. E-24. That lower firefighter compensation may be of marginal relevance with respect to the firefighter analysis, even if it is not helpful with respect to engineer or lieutenant. Nevertheless, I do not include Woodburn on the list of full-fledged comparables.

a. monetizing PTO

First, the City objects to “monetizing” vacation and holiday pay on the theory that the benefit received in each jurisdiction—time off work without loss of pay—is exactly the same no matter what the wages. In effect, says the City, monetizing time off counts wages twice. I understand the City’s point, but the legislature clearly intended that vacation and holiday pay be taken into account because these items are specifically enumerated in the definition of “overall compensation” set forth in ORS 243.746(4)(d). Therefore, I have no power to disregard paid time off (PTO) as an element of “compensation” in comparing Roseburg firefighters and their counterparts in comparable jurisdictions.

b. PTO analysis

Next, the City contends that the Union’s data on PTO is misleading because, while Roseburg may be behind other jurisdictions in total days of PTO available to a firefighter during the tenth year of employment, total PTO over the course of a ten-year career in Roseburg exceeds the total PTO in the comparator jurisdictions. Exh. E-24.⁴⁵ Given that fact, the City urges that I disregard the PTO component of the Union’s overall compensation analysis. I agree with the City that considering PTO at the ten year mark does not provide an accurate view of the PTO component of overall compensation. From Exh. E-24, it is clear that Roseburg offers more total PTO than the comparators for which I have data, and that is not only true when looking at years one through ten, but appears

⁴⁵ The Employer’s chart in Exh. E-24 does not include Klamath Falls, but the other comparators range from a ten-year PTO total of 220 hours (Forest Grove) to 286 hours (Ashland), with an average of 253.8 hours. Roseburg firefighters receive 285 hours, well above the average of the comparators for which I have data in the record. Including sick leave in the analysis, even with Roseburg (14 hours) behind the average of 16 hours for the comparators for which I have data, does not overcome the excess of PTO hours available during the course of a ten-year career at Roseburg. From a quick check of the Klamath Falls collective bargaining agreement (Exh. U-P), it does not appear that factoring in PTO in Klamath Falls would significantly alter the analysis set forth in Exh. E-24

to be true in subsequent years as well. To be sure, there are isolated years in which Roseburg is behind one or more comparators, especially years five and ten, but overall PTO in Roseburg is at or near the top in total PTO available over the course of a career. Therefore, I will disregard the PTO component of the Union's overall compensation data.

c. paramedic pay

The Union's data included the higher of EMT-Intermediate pay or paramedic pay (for those jurisdictions that include it in their compensation scheme) in the comparator jurisdictions. The City notes, however, that it has not chosen to offer paramedic services and, consequently does not offer additional compensation to firefighters who obtain a paramedic certificate. City Brief at 30. Therefore, the City argues, the paramedic premiums paid by some of its comparators should be disregarded in comparing overall compensation.

The issue, it seems to me, is whether the Roseburg EMT's are performing "similar services" to paramedics in comparator jurisdictions within the meaning of (4)(e) of the statute. There is, of course, a relationship between what EMT's do and what paramedics do, but that is also true for firefighters and engineers, or engineers and lieutenants. Yet the Union does not propose a comparison of the compensation of Roseburg firefighters to the comparators' engineers or Roseburg's engineers to the comparators lieutenants. In fact, the Union argues that Woodburn should be disregarded entirely because Woodburn does not employ engineers or lieutenants, thus there were not enough "employees performing similar services." Union Brief at 19-20. I think the same principle applies here. While Roseburg's EMT's perform tasks that are "similar" to the tasks of paramedics in other jurisdictions, they are not "similar" in the statutory sense

because there is a clear distinction in the firefighting community between EMT's and paramedics.⁴⁶ Thus, in comparing overall compensation, I will use the comparator jurisdictions' EMT incentive, not paramedic incentive pay.

d. comparing wages as of the same date(s)

Both parties have mixed apples and oranges in their compensation comparison tables. The Union's charts compare Roseburg compensation as of 6/30/06 with compensation in some comparator jurisdictions in effect on later dates, specifically as of 1/1/07 for those jurisdictions that received wage increases on that date (Grants Pass and Redmond).⁴⁷ I find that it is most helpful to begin the comparison with compensation using a 7/1/06 date for all comparators and comparing that overall compensation to Roseburg as of 6/30/06 (so that the effect of the City's proposed increase of 4% on 7/1/06 will be clear)⁴⁸

e. team or assignment pay

The City has backed out team or assignment pay in its chart because those assignments are at the discretion of the City and, as the Union concedes, "not very many employees can get [assignment pays]." Tr. at 80-81. I agree with the City that it is

⁴⁶ If Roseburg offered a paramedic incentive above the EMT incentive, even though the City does not offer paramedic services, then the Union's analysis might be appropriate. Similarly, if Roseburg offered paramedic services even though the City did not offer an additional incentive above the EMT level, the Union would also have a point. But Roseburg neither offers paramedic services nor an additional paramedic incentive. Consequently, I agree that it distorts the compensation analysis to include the comparators' paramedic incentive in the calculations.

⁴⁷ To complete the overall compensation analysis, of course, it is necessary to compare compensation levels, to the extent possible, with scheduled increases in the comparator jurisdictions during the life of the Agreement.

⁴⁸ The City's chart, between pages 31 and 32 of its Brief, compares overall compensation as of 7/1/06, including the effect of the City's LBO. Again, I find it more helpful to begin the analysis prior to any July 1, 2006 increase so as to illuminate the excess or deficit of bargaining unit compensation as of the beginning of the 2006-2009 Agreement.

misleading to factor in assignment pay as if it were available to every firefighter, so I will disregard team and assignment pay in comparing overall compensation.

f. comparison of overall firefighter compensation

For the reasons set forth above, I will compare overall compensation using the Union's compensation figures, but without considering PTO, assignment pay, and the paramedic incentive. The statute, however, provides no guidance on exactly *how* the Arbitrator should "compare" overall compensation, e.g. should I compare the subject to the average of the comparators? Evaluate whether the subject is above or below the median? Or should I use some other rank within the table of comparators as the standard? The answer is unclear, but both parties here have used the average of the comparators' overall compensation as the yardstick in their analyses. Consequently, I will use that standard as well for the purposes of this case.⁴⁹

Using the chart in the City's Brief between pages 31 and 32 (but revising Roseburg data to reflect compensation prior to implementation of either LBO),⁵⁰ I find overall firefighter compensation in Roseburg of \$4,927.83 as compared to an average of \$5,071.88 in the comparator jurisdictions on 7/1/06, a Roseburg deficit of 2.9%. That deficit, of course, would be more than offset by the 4% raise proposed by the City, even if adjusted for increased employee contributions to health insurance.⁵¹ As of 7/1/07,

⁴⁹ In using average overall compensation as the comparison here, I do not mean to foreclose the possibility that other forms of comparison would be appropriate under different circumstances.

⁵⁰ Although I use the City's chart for ease of reference, I carefully checked that chart against the Union's corrected Exh. U-118.

⁵¹ The equivalent analysis for engineers, using Exh. U-121 (corrected) shows a deficit of 1.52% prior to the City's proposed 4% raise on 7/1/06, which translates into roughly a 2.5% excess after a 4% raise on 7/1/06. That first year cushion appears substantial enough to keep engineers' compensation under the City LBO at or above the average of the comparables for the life of the contract. For lieutenants (using Exh. U-123) as revised above, the calculations show a 5.2% deficit prior to an increase on 7/1/06, resulting in a deficit of

however, assuming the City's LBO of 4% raises on 7/1/06 and 7/1/07, Roseburg compensation would be \$5,325.89 as compared to \$5,297.99 for the comparators, a Roseburg excess of 0.99%. Although it becomes more difficult to compare overall compensation in the third year of the Agreement (because it requires some projection of raises that are keyed to the CPI or that have not yet been negotiated), it appears that the City's LBO would result in overall firefighter compensation exceeding the average of the comparators by nearly 2% (1.8%), and even after the scheduled Klamath Falls raise of 3.5% effective 1/1/09, the City would still be 1.2% over the average.⁵² These projected compensation differences would lessen, of course, if Newberg and Forest Grove firefighters receive wage increases on 7/1/08, because I calculated the 7/1/08 and 1/1/09 averages using compensation in those jurisdictions as of 7/1/07, which presumably will be out of date in the final year of this Agreement.

Comparing these numbers to the effect of the Union's LBO as of 7/1/07 (again using the revised comparisons which exclude PTO, assignment pay, and paramedic incentive) Roseburg firefighter compensation would exceed the comparators by 1.73% (\$5,384.77 as compared to \$5,292.99). As of 7/1/08, Roseburg compensation would exceed the comparators by 5.0% (\$5,712.71 as opposed to \$5,440.39 for the

approximately 1% after a 4% raise on 7/1/06. Under the City's LBO providing for three 4% raises, lieutenants would fall farther behind Ashland (scheduled for three 5% raises in 2006-09) but stay approximately 5.2% ahead of Redmond (scheduled for two 7% annual increases in 2006-08). The other comparable jurisdictions appear to be scheduling raises less than those offered under the City's LBO, however, and my calculations indicate that lieutenant overall compensation (as revised above) in the third year of the Agreement will be roughly comparable to the average of the other jurisdictions (within 0.03% of the average of the comparables without taking account of any raise granted to Forest Grove lieutenants in 2008). Thus, the City's LBO appears sufficient to allow engineers and lieutenants to keep pace with overall compensation in the comparator jurisdictions. I therefore focus in the text on firefighter compensation.

⁵² For those jurisdictions that have future raises keyed to the CPI, I have assumed a CPI mid-range between the 3.5% minimum and the 4.5% maximum.

comparators). By 1/1/09, however, Roseburg might exceed the comparators by almost 7.5% (\$5,884.09 as compared to \$5,473.12).

In table form, a comparison of the effect of the parties' LBO's as compared to overall firefighter compensation of the comparators looks like this:

<u>Date</u>	<u>City LBO</u>	<u>Union LBO</u>
7/1/06	+0.97%	+0.007%
7/1/07	+0.99%	+1.73%
7/1/08	+1.81%	+5.00%
1/1/09	+1.20%	+7.51%

It is apparent that the major difference between the two LBO's is in the third year, in which the City's proposal would cause the firefighters to remain slightly ahead of the comparators and the Union's proposal would have the firefighters pulling ahead of the comparators by a substantial amount.

In general, I lean toward giving preference, insofar as this specific criterion is concerned,⁵³ to the LBO that comes closest to the comparators or that exceeds the comparators by a modest amount. In other words, I would apply a presumption, consistent with the statute, that strike-prohibited employees should earn roughly what their counterparts in comparable jurisdictions earn. On the other hand, nothing in the statute suggests that the process of interest arbitration should result in increases in compensation significantly beyond those comparators, and thus if the projected compensation increases of a union LBO substantially exceed projected increases in comparator compensation, the presumption shifts in the other direction.

⁵³ Although comparison of overall compensation is probably the most important of the secondary factors, it is only one component of the "interest and welfare of the public" standard that I must apply.

In the end, although it is difficult to predict with accuracy, I think it is likely that raises in other jurisdictions in the out years will cause the slight excess in compensation under the City's LBO to fall near or even slightly below the comparators in the third year, and at the same time, those out year increases for the comparators will decrease the excess in the Union's LBO. On the other hand, it seems likely that the Union's LBO would still outpace the average of the comparators by a substantial amount in the third year, whereas the City's LBO will probably be in the same range as those comparators. Consequently, the comparison of overall compensation favors the City's LBO.⁵⁴

D. Cost of Living – ORS 243.746(4)(f)

The next secondary criterion is the “cost of living,” specifically the “CPI-All Cities Index.” The Union notes (and the City readily agrees) that Oregon firefighter wages in recent contracts have outpaced increases in the cost of living. From that fact, the Union argues that the CPI has not been a major factor in determining appropriate wage increases for Oregon firefighters and therefore should not be given much weight. Union Brief at 40-41. The statute clearly requires that CPI be taken into account, however, and it is undisputed that the City's wage proposal exceeds the cost of living. The Union's proposal, on the other hand, significantly exceeds projected increases in the CPI. Thus, this factor also favors the City's LBO.

E. Interest and Welfare of the Public

I return then, to the primary criterion set forth in the statute, i.e. the “interest and welfare of the public.” ORS 243.746(4)(a). An evaluation of the public welfare requires more than a mechanical application of the secondary criteria, e.g. counting up the factors

⁵⁴ Had the Union been correct that West Linn and Milwaukie should be treated as comparables, however, the increase in average overall compensation for the comparators might well have justified the Union's wage proposal.

that favor one side or the other and awarding the LBO to the party with the majority of factors in its column. Nevertheless, here only “ability to pay” favors the Union (but does in a qualified way because I must consider the effects of the “bow wave”), while “ability to attract and retain,” “comparison of overall compensation,” and “cost of living” all favor the City. That creates a powerful argument that the City’s LBO should be awarded, particularly because the most influential of the secondary factors, i.e. the overall compensation criterion, favors the City.

Had I found that Roseburg compensation could appropriately be compared to firefighter wages in the Portland area, the Union’s proposal for wage increases of 19% or more over the life of the Agreement (as opposed to the City’s offer of a 12.5% increase) might be in the interest and welfare of the public, despite the potential impact on the City’s finances, i.e. extraordinary deficits in firefighter compensation as compared to comparable jurisdictions could call for a less cautious approach. But for the reasons already discussed above, I do not find that the statute requires that Roseburg pay Portland wages or even that it is required to pay an average of overall compensation that has been inflated by inclusion of jurisdictions in the very different Portland market.⁵⁵ Thus, the Union has failed to establish the legal predicate on which it primarily relied in proposing a 19.4% wage increase in its LBO.

Viewed in that light, the City’s 12.5% proposed wage increase does not seem inappropriate. In fact, I note that among the comparables, only two jurisdictions appear to be scheduled for raises that exceed the increase the City proposes. Redmond has three

⁵⁵ The Union’s documents substantiate that a very large percentage of the compensation deficit claimed resulted from the inclusion of TVF&R and Clackamas #1 in the calculations. *Cf.* Exh. U-188 (corrected) which calculates the firefighter wage deficit at 14.83% *with* Exh. U-119 which calculates the difference at 8.84% without TVF&R and Clackamas #1.

5%/2% raises in its 2005-08 contract, but those three raises will still leave Redmond firefighters lagging far behind Roseburg and other comparator jurisdictions even if I award the City's LBO in this case (\$4,799.73 as of 7/1/08 as compared to the comparators' average of \$5,440.39 and \$5,538.93 for Roseburg). Thus, the increases in the Redmond contract do not support the larger raises for Roseburg contained in the Union's LBO, because even with those raises, Redmond will remain behind Roseburg. Similarly, Ashland has three 5% raises in its 2006-09 Agreement, but the City's LBO would result in Roseburg compensation as of 7/1/08 of \$5,538.93 as compared to \$5,564.21 for Ashland. While Ashland would thus pull slightly ahead of Roseburg in the third year, the difference is negligible (0.4%) and approximates the amount by which Roseburg compensation would exceed Ashland compensation in each of the first two years of the Agreement under the City's LBO. Consequently, the larger increases under the Ashland agreement do not call for larger Roseburg firefighter wage increases, either. The remaining jurisdictions all appear to be scheduled for smaller increases than the 12.5% contemplated by the City's LBO.

Moreover, it is difficult to accept that it is in the interest and welfare of the public for the City to enter the next negotiations with \$500,000 of built-in additional wage costs in the next contract cycle (over and above the built-in costs of the City's proposed 12.5% wage increase for 2006-09). Those additional amounts would become a City budgetary obligation even without consideration of the costs of any further improvements in wages or benefits for the following years. In evaluating whether it is in the interest and the welfare of the public to require the City at this time to take on those obligations, it is important that Douglas County as a whole is considered "severely economically

distressed.” For example, the county unemployment rate is above 8%, and the City faces a potential loss of \$400,000 in annual timber revenue from the federal government (via Douglas County) while also forecasting dwindling reserves over the six-year budgeting cycle despite projected increases in revenue.⁵⁶

Perhaps the Union is correct that the City will continue to budget conservatively by under-estimating revenues and over-estimating expenses. Perhaps not, however, and given that budgetary projections can be off the mark, sometimes by a wide margin, and also given the level of proposed wages in the Union’s LBO and the size of the bow wave they create, I do not find that it is in the public interest and welfare to take the chance that optimistic estimates of the City’s financial picture will come true.⁵⁷

The City’s LBO shall be adopted.⁵⁸

⁵⁶ I have also taken into account that the City’s LBO constitutes a substantial wage increase (12.5%) that appears to continue the trend of exceeding projected increases in CPI, as well as the fact that prior wages have not yet led to a problem in recruitment and retention in Roseburg

⁵⁷ By the time the parties begin negotiations for their next Agreement, the economic conditions—and the third year comparisons to other jurisdictions—will no doubt be much clearer. It may well be that the Union will have a compelling case for substantial wage increases in the next contract cycle to make up for any deficit in compensation in the third year of this Agreement. On the other hand, if the City’s financial condition worsens, it would not be in the interest and welfare of the public to head into the next contract cycle facing a half million dollar obligation over three years that could result in painful cuts in City services, layoffs of firefighters or other personnel, and/or attempts to reduce firefighter wages.

⁵⁸ I have not found it necessary to discuss in detail that portion of the City’s proposal to increase employee co-pays for health insurance premiums. Both parties agreed that the increases were insignificant compared to the differences in overall compensation proposed. Moreover, the overall compensation analysis above takes account of the increased premium share proposed by the City, and thus it has already been considered as part of the compensation equation

ORDER

For the reasons set forth in the foregoing Opinion, it is hereby ORDERED that the City's Last Best Offer pursuant to ORS 243.746 be adopted and become part of the parties' Agreement for 2006-2009.

Dated this 22nd day of May, 2007



Michael E. Cavanaugh, J.D.
Interest Arbitrator