

In the Matter of an Interest Arbitration Between
AFSCME Local 88

and

Multnomah County
(Juvenile Custody Services Specialists)

Award & Opinion
NB2670

R E C E I V E D
NOV 24 2008

EMPLOYMENT
RELATIONS BOARD

Before
Norman Brand

Appearances

For AFSCME Local 88
Allison Hassler, Esq.

For
Multnomah County
Multnomah County Attorney
by **Katherine A. Short, Esq.**

October 14, 2008

Background

The County of Multnomah (“County”) and AFSCME Local 88 (“Union”) are parties to a collective bargaining agreement (“CBA”) for a bargaining unit of approximately 61 Juvenile Custody Services Specialists (“JCSS”). The CBA ran to June 30, 2007, and was not automatically renewed because a party sought to modify it. The parties were unsuccessful in negotiating a successor agreement and petitioned the Oregon Employment Relations Board for arbitration. I held hearings on August 18 and 19, 2008, at the County offices in Portland, OR.

Both parties were present at the hearings, and represented by counsel. Each had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearings. At the close of the hearing the parties asked to file post-hearing briefs. I received the last brief on September 15, 2008, at which time I declared the hearings closed.

Last Best Offers of the Parties

Union

Article 14. Compensation

- 2.7% COLA effective July 1, 2007
- 1.7% Market Adjustment, effective July 1, 2007
- July 1, 2008 wage adjustment 3.8%

Article 27. Termination

- 2 year contract

County

Article 14. Compensation

- 2.7% COLA effective July 1, 2007
- 3.8% COLA effective July 1, 2008
- Future COLAs 2% min to 5% max
- Shift differential increases (swing to \$1.00; graveyard/relief to \$1.25)

Article 27. Termination

- Three (3) year contract

Addendum A

Classification included in the Bargaining Unit with Pay Range

- Updated reflecting 2.7% COLA effective July 1, 2007
- Updated reflecting 3.8% COLA effective July 1, 2008

Statutory Criteria

In accordance with ORS §243.746, the arbitrator must select the Last Best

Offer ("LBO") of one party, using the following criteria:

(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.¹

Application of Statutory Criteria

(a) The Interest and Welfare of the Public

The parties agree this “first priority” criterion is neither defined, nor easily ascertainable in this interest arbitration. They offer different verbal formulations, reflecting their respective positions. The Union correctly states that “an efficient, skilled and adequately paid workforce is in the best interest of the public.” It argues that because of the “increased skills and knowledge required by their unique jobs” the JCSS should be paid at the top of the market range. In the absence of a compelling reason for a three year agreement, it argues for a two year agreement because of the uncertainty of the times. The County quotes a “scant” legislative history to argue this criterion represents taxpayer “demands for accountability and efficiency from government.” In that light it argues that it is paying top market wages to JCSS and, regardless of its ability to pay, it should not

¹ The statute requires giving “first priority to paragraph (a) and secondary priority to paragraphs (b) to (h)”.

provide a “market adjustment” that does not reflect actual market conditions. The County recognizes the uncertainty of the times and offers a 2%-5% Portland CPI-W 2nd half increase for the third year of the contract. It notes that in the last 20 years CPI has been over 5% only once and under 2% four times. The County goes on to note that when no public interest is identified the arbitrator must consider the secondary criteria.

Both parties are correct. The public interest is served by paying a skilled workforce adequately; the public interest is not served by paying a skilled workforce substantially above the top rate in the labor market. In order to ascertain which Last Best Offer (“LBO”) best serves the interest and welfare of the public, one must look to the secondary criteria.

(b) Reasonable Financial Ability of the Unit of Government

The Union argues that the County’s financial position is “robust,” with a record of under spending its budget, under estimating tax revenues, and maintaining large unrestricted reserves. According to the Union, the County has an “excessive ability to pay for the very modest wage increase proposed by the Union.” Furthermore, the Union notes, ability to pay is one of the criteria an arbitrator must consider. The County concedes it has the ability to meet the cost of the Union’s LBO. It asserts, however, that regardless of how much money it

has, the County should not be required to pay a “market adjustment” when comparisons with the relevant labor market do not support the a need for any adjustment. Thus, one must look to the other criteria to determine whether the JCSS are in need of a “market adjustment” to keep them at the top level of compensation in their labor market.

(c) Ability to Attract and Retain Personnel

The County does not appear to have any difficulty in attracting or retaining personnel in the JCSS position. Over the past 8 years it has lost an average of fewer than 2 employees per year for all causes, including retirement, resignation, and layoff. That amounts to less than 3% of the work force. In a 2006 recruitment for 3 jobs, there were 98 applicants and 17 qualified candidates certified to a list. In 2007, when the County recruited for 2 bi-lingual jobs, there were 34 applicants and 7 qualified candidates certified to a list. These 5 new hires continue to be permanent employees of the County. In addition, the County is able to maintain an on-call list of qualified JCSS which it uses to avoid overtime. All of the new hires came from the on-call JCSS list. The large number of applicants for JCSS jobs, and the existence of a group willing to work on-call, demonstrates there is no need to adjust compensation in order to attract qualified candidates for open jobs. The low level of turnover indicates there is no need to adjust compensation to avoid excessive turnover.

(d+e) Comparability

It is common for each party to compare itself with a different group of jurisdictions. Each comparison shows a different picture of where bargaining unit members stand in relation to their relevant labor market. By choosing different jurisdictions for comparison, the parties each support their own LBO. Moreover, the way in which each side calculates and compares the “direct or indirect monetary benefits received” by employees ordinarily skews the comparison to its advantage. In this case, in addition to the normal differences in choice of comparators and method of calculation, the parties have taken radically different approaches to the basic calculation.

The County calculates the “indirect monetary benefits” received by employees, such as health care and retirement, by subtracting from compensation any amount the employee pays for those benefits. The Union calculates the indirect monetary benefits by using the price various counties pay to provide those benefits. Thus, for instance, the County shows its employees pay nothing for their retirement benefit and \$48.34 per month for health insurance. The Union shows the County pays \$262 per month for the retirement benefit and \$999 per month for health insurance. This difference in approach to calculating comparables raises a statutory issue.

The statute calls for comparing “overall compensation presently received by the employees.”² In calculating the value of benefits, the statute focuses on what the employee receives. The testimonial evidence is that there is a rough equality of benefits among the health plans provided by all comparators. The amount the employer pays for health insurance does not reflect the benefit the employee receives. Thus, county cost is not a correct measure of the “indirect compensation” provided by the various counties. The fact JCSS have the same health benefit as similar employees in comparable jurisdictions is the measure of “indirect compensation.” The critical measure of “direct compensation” is whether some employees must pay to receive the benefit others get for free. Unlike the comparators, JCSS pay a monthly amount toward their health insurance. This monthly amount represents a reduction in their total direct compensation of \$48.34 per month. That is properly reflected in the County comparisons. The Union comparisons, showing the amount each County pays for health insurance, do not reflect the direct or indirect compensation received by employees. Moreover, in its comparisons the Union mixes amounts paid to employees with amounts paid by employers to arrive at its comparison of “direct or indirect monetary benefits received.” In my view, this “mixed” comparison does not conform to the requirement of the statute.³

² In comparing direct compensation both sides used what is currently paid employees in comparable jurisdictions. The Union used the current pay of JCSS for comparison, while the County increased the current pay by the two retroactive increases the parties agree on. While it could be argued the County comparison skips a step necessary for proper comparison (show present JCSS compensation, then show with proposed increases of each side) it is not misleading in this case.

³ It should be noted, however, that using employer costs for providing retirement benefits, as a measure of the indirect (delayed) compensation received by employees is reasonable. In a defined benefit plan, the monthly contribution is closely related to the promised benefits, although affected by Plan assumptions and experience. For instance, it is probable Sacramento employees receive a much greater retirement benefit than JCSS, since Sacramento contributes \$1,440 per month for the benefit. Showing the difference in retirement benefits by using what the employer pays is valid, and can demonstrate a significant inequity. Where benefits are equal, however, deducting the obligatory employee contribution to retirement from overall compensation is equally valid. In this case, California retirement benefits appear to be almost five

The County points out two other problems with the Union's comparative data. First, there is a flaw in the Union's comparison of retirement benefits. The Union used erroneous data for Oregon, misstating the actual cost of the benefit to other employers. Second, the County argues the Union should have included shift differentials in its overall compensation comparison, since over 70% of the bargaining unit receives those differentials. The Union argues it is improper to include shift differentials, since they are not always in the control of individual employees and including them "skews the total compensation figures" to the County's advantage. It goes on to say: "an abnormally high percentage of employees receive this pay." This last argument favors including them. Where, because of negotiated eligibility for shift differential, over 70% of the unit receives shift differential, it is a legitimate item to be included in total compensation. The County must, of course, fairly represent the amount the differential actually affects total compensation for all employee groups. It has done so here.

The Union points out a significant element of compensation that is not included in either comparison. The comparators used by the County, almost uniformly, provide faster advancement from the hiring rate to the top rate. JCSS take ten years to go from the entry level to the top step of their salary range. According to the Union, in other jurisdictions employees progress to the top step in 5, 6, or 7 years. The difference in rate of progression results in the County comparing what an employee makes after 5 years with what a JCSS makes after 10 years. The Union criticism is legitimate, since rate of progression implicates overall direct compensation received over a normal work career. The Union has not, however, provided comparative data that show the specific differences. Nor

times greater than Oregon and four times greater than Washington. Including the county retirement cost as a dollar amount and averaging skews all of the comparisons.

does it specifically argue how its LBO better reflects the JCSS market position adjusted for their slower progression to the top step of their pay range.

The County data suffer from one serious flaw. The County includes the Oregon Youth Authority as a comparative jurisdiction. In my view, the statute does not permit comparing counties with states. Rather, it requires county to county comparisons, while permitting counties over 400,000 to look out of state. Including OYA lowers the average slightly at all levels and require an adjustment. The conceptual flaws in the comparative data provided by the Union, however, are serious enough to make its comparisons unreliable. Consequently, I have relied on the County comparative data, roughly adjusted for OYA. The data show that with the agreed upon raises JCSS are at the top of the labor market, including King County, WA. This is true at the new hire and 10 year level, for all shifts, for 2007 and 2008. Thus, comparing JCSS to similar jurisdictions, both larger and smaller, does not provide a basis for awarding the 1.7% "market adjustment" contained in the Union LBO.

The Union argues, however, that all of the comparisons are flawed because the work done by JCSS is different. They service a contract with Clackamas and Washington counties to hold their problem youth bringing in revenue to the County. In addition, they hold youth who have committed "Measure 11" crimes,⁴ while other counties send them to adult facilities. The County argues the statute addresses only job duties, not the populations served. As to the first Union argument, the County is correct. Providing services, under contract, to other counties does not change the nature of the work. It simply creates more JCSS jobs. The Union's second argument is more compelling. If it were the case that

⁴ These are serious person on person crimes.

the population served was so different that JCSS were required to perform entirely different duties, that would affect the validity of the comparators. But the evidence does not compel that conclusion. The “Measure 11” youths are potentially more difficult to handle, but the services provided them are similar to those the JCSS provide to other youth. They undoubtedly create more challenges for the JCSS, but they do not change their job duties so significantly as to make the comparators invalid.

(f) + (g) The CPI-All Cities Index; Stipulations of the Parties

According to the testimony, the parties have agreed to use the CPI-W Portland to determine cost of living. Additionally, their expired CBA provides for tying the July 1, 2006 raise to CPI-W for Portland for the second half of 2005. The increase the parties agreed to for 2007 and 2008 are consistent with the CPI-W Portland for those periods. The Union argues JCSS have had a loss of 1.8% (including the agreed upon increases) from 2000 to date, using the US Cities Average CPI. It does not explain why it chooses a seven year period. Nor does it assert the statute prohibits the parties from stipulating to a different CPI. Consequently, the CPI-All Cities index does not provide a basis for choosing the Union’s LBO.

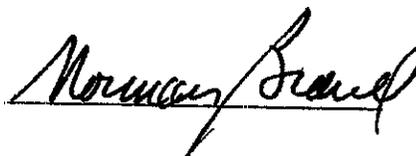
In light of my findings of fact and conclusions of law, I make the following:

Award

In accordance with the criteria contained in ORS §243.746, I select the LBO of Multnomah County.

San Francisco, CA

October 14, 2008

A handwritten signature in black ink that reads "Norman Brand". The signature is written in a cursive style with a horizontal line underneath the name.

Norman Brand