

IN THE MATTER OF THE)
)
INTEREST ARBITRATION)
)
BETWEEN)
)
CITY OF MEDFORD)
(The Employer))
)
AND)
)
INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS, Local 1431)
(The Union))

ARBITRATOR'S
OPINION
AND
AWARD

RECEIVED
MAR 21 2008
EMPLOYMENT
RELATIONS BOARD

HEARING: January 17, 2008

HEARING CLOSED: February 19, 2008

ARBITRATOR:

Sylvia Skratek, Ph.D.
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Seattle, Washington 98121

REPRESENTING THE EMPLOYER:

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REPRESENTING THE UNION:

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BACKGROUND

The City of Medford (hereafter “the City”) and the International Association of Firefighters, Local 1431 (hereafter “the Union”) are parties to a collective bargaining agreement that is in effect through June 30, 2008 (Ex C-1) During negotiations for that agreement, the parties bargained over an alternative 40-hour shift. As of March 2006, the parties had settled all matters contained within the current agreement with the exception of the 40-hour shift. Rather than hold up the 2005-2008 agreement the parties agreed to defer the 40-hour shift proposal to interim bargaining and agreed that “...the PECBA interim bargaining rules apply to such bargaining and that the 90-day period under ORS 243.968 commences on March 15, 2006. (Ex U-5) The parties were unsuccessful in their interim bargaining efforts and the matter was scheduled for interest arbitration. This matter came before Arbitrator Sylvia Skratek pursuant to ORS 243.746 and its administrative rules. A hearing was held on January 17, 2008 in Medford, Oregon. The parties stipulated that the matter is properly before this Arbitrator for resolution. At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs which were received by the Arbitrator in a timely manner. The record was closed as of February 19, 2008.

STATEMENT OF THE ISSUE

The issue presented to the Arbitrator for resolution is whether or not the collective bargaining agreement should be amended to incorporate the City’s proposal for a 40-hour work week.

APPEARING AS WITNESSES FOR THE EMPLOYER:

Douglas Detling, Human Resources Director
Dave Bierwiler, Fire Chief
Dan Petersen, Training/EMS Chief

APPEARING AS WITNESSES FOR THE UNION:

Tim Harvey, IAFF Local 1431 Vice President
Bryan Baumgartner, IAFF Local 1431 Secretary/Treasurer

LAST BEST OFFERS

City (Ex. C-2)

Add Section 12.3 to existing contract:

The City may implement a 40-hour shift schedule for operational personnel subject to the following conditions:

1. The hours of work will be four ten-hour days per work week Tuesday through Friday, 8 am to 6 pm, and/or Friday through Monday, 8 am to 6 pm
2. An employee hired after January 1, 2008, may be assigned to a 40-hour shift for the purpose of staffing operational units.
3. An employee hired prior to January 1, 2008, may volunteer for assignment to a 40-hour shift for the purpose of staffing operational units.
4. Assignments shall be made on a calendar year basis.
5. Assignments will be made by the department first considering requests for assignment.
6. The 40-hour shift schedule, if implemented, is designated a separate shift for vacation or holiday selection.
7. The rate of pay for these positions will be the 40-hour equivalent to the existing rates of pay for 56-hour operational personnel
8. 40-hour operational employees are eligible for call back at one and one-half times their 40-hour rate.
9. Shift trades are permitted between 40-hour and 56-hour operational personnel.
10. For each 40-hour shift, there will be three or four individuals assigned to a unit (three will be assigned to the unit and the fourth person will be on the unit unless detailed for other response activities).
11. The Department will determine which station they are assigned to, but they will be consistently on that unit.
12. The Department has the right to transfer 56 hour employees to the 40 hour crew to maintain staffing for that shift.
13. Captain and Engineer positions will be temporary assignments (with move-up pay)

Change Section 13.6 Vacation Leave, part F, by adding the italicized language as follows:

- F. For 56-hour employees, three employees shall be allowed to take vacation at the same time on any one shift. *For operational personnel working a 40-hour shift, one employee shall be allowed to take vacation at a time. The following applies regardless of shift:*

Union (Ex. U-1)

The Union's last best offer is "... to maintain the status quo... we have no proposal other than maintaining the existing contract and past practices between the parties."

STATUTORY CRITERIA

Pursuant to ORS 243.746 (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 subsections (b) to (h) of this subsection as follows:

- a) The interest and welfare of the public
- b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.
- c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.
- d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.
- e) Comparisons of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon.
- f) The CPI-All Cities Index, commonly known as the cost of living.
- g) The stipulations of the parties.
- h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

CONTEXT OF THE DISPUTE

The Medford Fire Department provides emergency response, fire prevention, and public education services to a 53 square mile area and a resident population base of 98,000. (Ex. C-4) There are 79 employees and 69 of those employees work as emergency responders. Classifications include: Captain, Engineer, Firefighter and Fire Inspectors.

The Fire Department responds to all fire, emergency medical and hazardous material calls. Personnel who have been designated emergency medical technicians (EMTs) are classified in one of the three emergency responder classifications: captain, engineer or firefighter.

The City's Fire Department works out of five stations located at various points throughout its coverage territory. (Ex. C-5) Each fire station houses at least one engine company.

Firefighters are assigned to one of three shifts designated A, B or C. Within each nine-day cycle, each shift is on duty for its 24-hour period. Each shift consists of five or more engine companies with three to five individuals from each classification (firefighter, engineer, captain) on duty at any given time. Three or more emergency responders staff each engine, which includes a captain and an engineer. Each of the five engines is fully staffed around the clock, on a 24-hour day, 7 days per week.

Line firefighters regularly work a 56-hour work week represented by a nine-day cycle of 24 hours on/24 hours off, 24 hours on/24 hours off, 24 hours on/24 hours off, and then an additional three days off. Over a four year period, each firefighter, engineer and captain will average a 56-hour work week under this schedule.

POSITIONS OF THE PARTIES

Both parties submitted to the Arbitrator comprehensive post hearing briefs setting forth their arguments as to why their respective last best offers were the most compatible

with the statutory criteria and best represented the interest and welfare of the public. The Arbitrator will briefly summarize each party's position below.

City

The City contends that its offer meets the needs of the City, the Department and the public by improving response capability during peak hours when most emergency calls occur over the current staffing arrangement. The City asserts that its offer is in the interest and welfare of the public and provides a well-compensated alternative to the 56-hour shift. There is little, if any, detriment to staff in light of how the offer is so narrowly tailored. Furthermore, the Department has a compelling need. Because the Department can improve its emergency services by adopting the 40-hour work shift (with little if any detriment to staff), it must do so. By taking on the task of providing emergency services, the Department is obligated to provide these services in the most efficient and effective manner possible within its allocated resources. The Union offered no evidence to dispute the clear improvement in emergency services resulting from having three to eight employees assigned to a 40-hour work shift.

The City of Medford asks that its last best offer be adopted.

Union

The Union is requesting maintenance of the status quo and argues that the City has not presented any convincing evidence for a compelling need to change the contract language. According to the Union, the City has evaded providing answers to important questions about its proposal. The lack of specificity in the proposed language and the numerous unanswered implementation questions provide ample reason to reject the proposed language. In addition to the complete lack of necessity shown and the detriment to public welfare, the potential upheaval for traditional employee practices and negative effects on recruitment and retention should caution the Arbitrator against selecting a last best offer that remains woefully ambiguous. The City has not proven that the status quo is unworkable. The City has also failed to establish a quid pro quo that would justify the change to the status quo. The City has not provided a compelling reason for the proposed language and the language itself is inconsistent with statutory criteria.

The Union asks that the City's last best offer be rejected and that the status quo be maintained.

ANALYSIS

Last Best Offer interest arbitration imposes restrictions on arbitrators by statutorily requiring the selection of one party's offer regardless of the merits that might be contained within the offer of the other party. Arbitrators are also restricted by the criteria specified in the statute which must be utilized by an arbitrator in making their determination. Under those criteria, first priority must be given to the interest and welfare of the public.

As stated by Arbitrator Carlton Snow:

The "public interest" standard allows an arbitrator to use a balancing process that weighs elements related to the impact of a proposal on the parties. Those related elements are codified in the secondary criteria set forth in paragraphs (b) to (h) of the legislation. Economic issues and departures from prior policies merit heightened scrutiny and an application by an arbitrator of what courts sometimes refer to as the "hard look" doctrine. (See Office of Comm. of the U.C. of C. 707 F2d 1413, 1425 (D.C. Cir. 1983).)

Use of the "public interest" standard as the first priority requires an arbitrator to balance all relevant factors the legislation instructs an interest arbitrator to consider. Using a balancing process to evaluate relevant statutory criteria, an interest arbitrator must determine whether one Last Best Offer package has been guided by more reasonable considerations than the other. In balancing all the relevant statutory criteria, an interest arbitrator must attempt to resolve questions of fact, evaluate the effectiveness of proposals, test the reasoning of the parties, and study comparability data. These factors help give substance to an otherwise elusive "public interest" determination. Otherwise, the decision-making process is unduly subjective, and it is more sensible to conclude the legislature designed a process that is reasonably objective.

A key test in the "public interest" balancing process is that any factor used by an interest arbitrator to evaluate Last Best Offers must advance one of the purposes the Oregon Legislature had in mind when it enacted SB 750. A pivotal purpose of collective bargaining legislation is to maintain the high morale of public safety employees as well as the efficient operation of governmental services.¹

In reaching a conclusion in this matter the Arbitrator took into consideration the appropriate elements of the balancing process described by Arbitrator Snow

¹ *Interest Arbitration between City of Portland, Oregon and Portland Police Association*. IA-06-03, p. 13

As cited by the City in its post hearing brief, several arbitrators have approached a proposed change in contract language by making a determination as to whether or not there was a legitimate reason for the change. Did a problem exist that was effectively addressed by the proposal? Or does the proposal represent a “better idea” regardless of whether there have been changed circumstances? In this matter the Arbitrator reviewed the validity of the City’s claim that its last best offer would allow the City to improve emergency response times and services during the peak times when most calls come in and most departmental activity takes place.

The City claims that the Department’s emergency call load has grown dramatically over the past twelve years and that the growth is projected to continue. A review of City Exhibit 6 finds that in 1997 there were 4,551 emergency incidents. In each subsequent year the number of emergency incidents has increased however the numbers themselves have been inconsistent with increases as low as .0056% in 2006 and as high as 27.4% in 2005. In 2006 the number of emergency incidents was 9,629 which is a bit more than double the number of emergency incidents in 1997. Worth noting however is the fact that the increase in emergency incidents in 2006 was only .0056%. The Union emphasizes that during the course of negotiations the parties were successful in convincing the City Council to allow the Department to fill seven vacancies and hire five new personnel. This increase in personnel raises a legitimate question as to whether it is the work hours that need to be changed or whether there is a necessity for additional personnel overall. The Arbitrator did not find any data regarding the increase in the population served by the Department from 1997 through 2006. Nor did she find any data regarding the increase or decrease in firefighters during that same time period. If indeed the Department had seven vacancies and a need for five additional hires, then it is not unreasonable for the Arbitrator to conclude that it was a shortage of firefighting personnel that contributed to the Department’s inability to meet its goal of 80% of emergencies having a response time of five minutes or less. According to Chief Bierwiler one out of seven calls experienced a delay because personnel were involved with another call or activity. Chief Bierwiler acknowledged that the effect of the new staff is not yet known. No data were provided at the hearing to show whether or not the

response time had improved or is expected to improve with the hiring of the additional personnel. The Arbitrator questions whether a problem continues to exist that must be addressed by the City's Last Best Offer.

Regardless of whether or not a problem continues to exist, the Arbitrator is not reluctant to find that a last best offer is a "better idea" than the status quo however in order for her to make such a finding she must be convinced that there is sound reasoning underlying the "better idea". Has the party putting forward the "better idea" given careful consideration to all of the elements that will be affected by its proposal, including but not limited to the work force? Has the party putting forward the "better idea" identified the driving force for its proposal, whether it be a growing population, an aging population, an increase in commuters, any one of which might cause an increase in the number of emergency incidents? Has the party putting forward the "better idea" delineated how its proposal will be an improvement over the status quo? Finally, has the party putting forward the "better idea" done so with sufficient specificity in the proposed language to prevent misinterpretations or misapplications of the language? This last question is of primary importance in "last best offer" interest arbitration since the arbitrator is being placed in the position of selecting language that will become part of a collective bargaining agreement. She or he must view the language in a manner that will to some extent recreate what would have, could have, or should have occurred during negotiations if the parties had fully discussed and developed the proposal. In this matter, it became clear during the hearing that the language had evolved over several years of negotiations. Union Exhibits 3 through 9 provide insight into the various attempts by the parties to reach a resolution on the matter. The language began as a concept in August 2005 and evolved over the years to a nine point proposal that was discussed in mediation in January 2008. The nine point proposal became a thirteen point Last Best Offer submitted to arbitration. The Last Best Offer was developed in response to questions that were raised by the Union in a mediation session on January 2, 2008. While the Arbitrator does not doubt the City's sincerity in attempting to develop language that would answer the Union's questions, it became apparent at the hearing that many questions remained unanswered. As Union witness Harvey testified, it is unclear why or when the 40 hour

shift might be implemented. Harvey further testified that there was no definition of an operational unit. Would it be a Manpower pool? What exactly would the forty hour employees be doing? Although the questions had been repeatedly asked during negotiations, the City had only answered in generalities. The Union wanted to define the boundaries of the position but the City provided no specifics as to how the operational unit would fit within the current structure of the Department. Notably there is no other use of the term “operational unit” within the collective bargaining agreement. Prior to the hearing, Harvey had not heard that it would be an engine unit and the Arbitrator notes that the proposed language contains no specific reference to an engine unit. The Union also raised questions regarding the staffing of the unit with new hires who could not come in and fill the positions of Captain and Engineer. How would these positions be filled and what would be the effect on the other staffing configurations within the Department?

In different circumstances the Arbitrator might be inclined to fine tune the language of the City’s proposal to incorporate many of the intentions that were expressed during the testimony at the hearing. However the Arbitrator is constrained by the statutory requirements of ORS 243 746 (5):

(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.

The language mandating the selection of “only one of the last best offer packages” limits the Arbitrator to the language proposed by one side or the other without any ability for modification. If it were simply a matter of interpretation or intent, then the Arbitrator might be tempted to select the City’s proposal with appropriate declarations as to the intent of the language contained within the proposal. Unfortunately it is not that simple. There are too many missing elements for the Arbitrator to select the City’s Last Best Offer. Without a definition of operational unit, without a clear indication of why or when the forty hour shift would be implemented, without an explanation as to how the unit

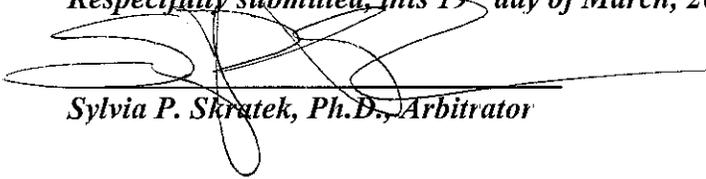
would be staffed with Captains and Engineers, and without a specific statement as to whether employees on the forty hour shifts would be exempt from FLSA overtime requirements (7K exemption) the Arbitrator cannot in good conscience select the City's proposal. The statutory criteria require that the Arbitrator shall base her findings and opinions on the listed criteria giving first priority to the interest and welfare of the public. In this matter, it is not in the interest and welfare of the public to select a Last Best Offer that raises more questions than it answers and that changes the long established traditional practice of a fifty-six hour work week for firefighters. That is not to say that the proposed concept is without merit but rather that the Arbitrator's hard look concludes that the concept has not evolved sufficiently to allow the Arbitrator to incorporate it within the Agreement thereby permitting a departure from a prior long established practice. To do so could conceivably lead to ongoing disputes regarding the intent and interpretation of the language and could have an effect on the morale of the employees. While it may indeed be a "better idea", it is an idea that needs further enunciation which this Arbitrator is not permitted to do under the statute. As stated by Arbitrator Snow: *A pivotal purpose of collective bargaining legislation is to maintain the high morale of public safety employees as well as the efficient operation of governmental services.* The City has not convinced this Arbitrator that its Last Best Offer advances this purpose.

AWARD

Having carefully considered all evidence, testimony and arguments submitted by the parties in this matter and based on the statutory criteria prescribed in ORS 243 746 (4), the Arbitrator selects the Association's Last Best Offer. The collective bargaining agreement should not be amended to incorporate the City's proposal for a 40-hour work week.

It is so ordered and awarded

Respectfully submitted, this 19th day of March, 2008,


Sylvia P. Skratek, Ph.D., Arbitrator