

BEFORE INTEREST ARBITRATOR KATRINA I. BOEDECKER

In the matter of the Interest)
Arbitration between:)
)
CITY OF ALBANY,) INTEREST ARBITRATION
 employer,) FINDINGS AND OPINION
 and)
)
INTERNATIONAL ASSOCIATION OF)
FIRE FIGHTERS, LOCAL 845,)
 union.)
_____)

Bullard Law, by Adam S. Collier, Attorney at Law, appeared on behalf of the employer.

The Tedesco Law Group, by Michael J. Tedesco, Attorney at Law and Julie Falender, Attorney at Law, appeared on behalf of the union.

JURISDICTION

On November 27, 2012, the parties notified the undersigned that she had been selected to be their Interest Arbitrator. The parties are working under a collective bargaining agreement that has a duration of July 1, 2010 through June 30, 2013.

The agreement states, at Article 7.1.D.: "Wage increase for the final year of Agreement to be negotiated pursuant to Article 25.3, Paragraph 2." That paragraph reads:

However, notwithstanding any other Section or Article of this Agreement, the Parties agree to reopen negotiations on or about March 1, 2012, for the sole purpose of

negotiating an across-the-board salary increase under Article 7.1, Wages, to be effective during the final year of this Agreement. The Parties agree that these negotiations will be subject to a ninety (90) day timeline rather than the statutorily required one hundred fifty (150) days. That is, either Party may request mediation after ninety (90) days.

The parties were unable to reach an agreement on the wage reopener during negotiations. The City of Albany fire fighters are prohibited from striking. Therefore, the parties submitted the wage issue to Interest Arbitration pursuant to ORS 243.746.

The Interest Arbitration hearing was held February 26, 2013, in Albany, Oregon. The parties stipulated that the matter is properly before the Interest Arbitrator. The parties submitted post-hearing briefs.

RELEVANT STATUTORY LANGUAGE

ORS 243.746(4) provides in relevant part:

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.

LAST BEST OFFERS

As the Interest Arbitrator, I am to determine which last, best offer, either from the employer or the union, better meets the statutory criteria of ORS 243.746(4).

Employer's Last Best Offer dated February 12, 2013

Wages 7.1.D. There shall be no across-the-board general salary increase during the period of July 1, 2012 - June 30, 2013. Employees shall continue to be eligible for step increases during this period.

Union's Last Best Offer dated February 7, 2013

Wages 7.1.D. Effective July 1, 2012, employees shall be provided a two percent (2%) salary increase. These new salaries shall be reflected in the wage schedule attached to this Agreement and marked Appendix A-3.

BACKGROUND

The International Association of Fire Fighters, Local 845, represents a bargaining unit of 68 employees in five different job classifications. Those classifications are fire fighter, apparatus operator, Lieutenant, and Deputy Fire Marshall I and II. There are 64 employees in fire suppression jobs; 4 in fire prevention jobs.

Albany is the 11th largest city in Oregon. In 2011, its population was 50,518. Interestingly, the city spans two counties. Albany is the county seat of Linn County. With 42,900 residents in Linn County, it is the largest city in that county. The rest of Albany's population (7,258) resides in Benton County, which makes Albany the second largest city in that county. This split between two counties impacts Albany's property tax allotment, which is the employer's largest revenue stream.

The city is governed by an elected, non-partisan Mayor and a six member city council. City Manager Wes Hare runs the employer's day to day matters. There are approximately 425 employees on staff; 79 employees are in the Police Department compared to the 68 employees in the Fire Department.

Recently, the employer commissioned a survey of its citizens to determine their evaluation of city services. Fire suppression was the highest ranked city service with an 85.6% approval rating. The citizens ranked Emergency Medical Services, delivered by the Fire Department, as the next highest approved city service with an 84% approval. The citizens rated their approval of these two functions of the fire department higher than the services of the Police Department, Senior Services, Recreation Programs, City Parks, and Festivals.

Also recently, the citizens of Albany passed a Police and Fire Public Safety levy. They approved increasing the tax rates from \$.95 per \$1,000 to \$1.15 per \$1,000.

The bargaining unit took a wage freeze in the first year of this collective bargaining agreement, fiscal year 2010-2011. It was the first bargaining unit of the employer to agree to a wage freeze.

ANALYSIS

Interest and Welfare of the Public

The state statute, at ORS 243.746(4) directs an Interest Arbitrator, when deciding which parties' last best offer should be awarded, to give first priority to the "interest and welfare of the public". The public interest can be addressed with a fiscally reasonable last best offer; the public welfare can be addressed with a last best offer that will maintain a trained work force.

Fiscally reasonable package -

The union is proposing a 2% wage increase for fiscal year 2013, which runs from July 1, 2012 through June 30, 2013. Both parties stipulated that the cost of the union's proposal is \$125,776.

The employer asserts that it has a "relative inability to pay" for the union's proposed wage increase. This is really an argument under the secondary criteria of the statute. ORS 243.746(4) provides that an Interest Arbitrator must give first priority to sub-section (a) "The interest and welfare of the public" in the final findings and opinion. Then an Interest Arbitrator can give secondary priority "to paragraphs (b) to (h) of this subsection". Sub-section (b) directs the Interest Arbitrator to consider the "reasonable financial ability of the [city] to meet the costs of the proposed contract" while weighing the other services and priorities of the city and allowing for a "reasonable operating reserve". The employer has the burden of proof to establish an inability to pay. The burden must be met by more than mere speculation. An unwillingness to pay does not satisfy the burden.

City Manager Hare testified about the employer's financial outlook. He agreed with the recent Moody's report about the employer's financial condition:

- The employer has a "modestly-sized but relatively stable tax base",
- Its financial operations are "buttressed by available reserves outside the general fund",
- It has a "relatively weak general fund reserves relative to its peers",
- It has "slightly below-average wealth measures", and

- It is challenged by "overlapping tax rate compression and limited assessed value growth."

Finance Director Stewart Taylor confirmed that the ending fund balance was currently about 10%. He expressed that he wanted it to be higher. He also acknowledged that property taxes have produced increased revenues in each of the past three years; although he pointed out that the rate of growth has slipped.

Hare testified that the history of high compensation for the fire fighters prompted the employer to propose a wage freeze.

Union witness Michele Schafer gave her analysis of the financial health of the employer. Schafer has served as the Director of the Department of Labor Issues and Collective Bargaining for the International Association of Fire Fighters for the past 13 years. Schafer concluded that the employer would have little difficulty absorbing the \$126,000 in additional labor costs annually. Schafer testified about the following signs of the employer's financial health:

- The employer's asset to liability ratio at the end of fiscal year 2012 (FY 12) was 2.22. That means that the employer had general fund assets of \$2.22 for each \$1.00 in general fund liabilities. This shows a positive ratio that increased from FY 11 to FY 12.
- The general fund balance increased about 4% from FY 11 to FY 12. Cash at the end of FY 12 was sufficient to cover over 100% of the general fund balance. The percentage of cash is important because to be available for appropriation, the fund

balance has to be liquid, i.e., available in cash or investments that are easily converted to cash.

- Moody's Investor Service publishes Moody's on Municipals. That publication has advanced that a 5% reserve level is appropriate during relatively normal non-recessionary economic conditions. It also states that it is understandable if a city wanted to maintain a higher reserve level in uncertain financial times when the likelihood of drawing on the balance is greater. However, if a city feels a higher reserve is essential it should be able to justify the level it wants to maintain. Albany's fund balance is above the 5% guideline for all years reviewed.
- The Government Finance Officers Association endorses a guideline for general fund balance as a percentage of general fund expenditures. The employer percentage was outside the guideline only for FY 06 to FY 08.

Schafer's review of the data showed that the employer's overall revenue growth is steady. The employer's Comprehensive Annual Financial Report (CAFR) demonstrates that its property tax revenue, which is more than half of its general fund revenue, has increased from year to year. Over the last three fiscal years, the employer has had a steady growth in revenues. The ending fund balance as a percentage of total revenues was 11.36% for FY 10; 11.41% for FY 11; and 11.55% for FY 12. These are all above the employer's policy of maintaining a minimum fund balance of 5% of its annual revenues. The costs of the union's wage proposal would not drop the ending fund balance near to the 5% threshold.

As further proof of the employer's ability to pay the wage increase, the union points out that the department acknowledges that it does have money. It just purchased a new SUV for the Fire Department's Battalion Chief at the cost of \$75,000.

Hidden revenues --

The union also claims that the employer has sources of "hidden revenues". One is an \$18.5 million settlement it received from PepsiCo in March 2010. The employer is reluctant to commit to funding ongoing labor costs with monies from a one-time settlement. The employer's reluctance is understandable. One-time monies are not an appropriate funding source for on-going commitments. They are better set aside for one time expenditures such as capital projects.

The union further asserts that the employer has had a "cash windfall" in terms of a federal grant specifically to pay for the retention and hiring of fire fighters. In July 27, 2012, the employer was awarded a SAFER grant of \$1,197,300 over two years. The terms of the grant call for the money to be spent on salaries and benefits (exclusive of overtime) for rehiring, retention and/or attrition categories. To qualify for the grant, the employer must maintain staffing at the level that existed at the time of the award. It must also commit to maintaining SAFER-funded staffing for two years. The employer has hired six full-time fire fighters with the SAFER money.

Employer witnesses testified that the SAFER money cannot be used to pay for labor costs of the employer's pre-existing employees, including wage increases. However, the union countered credibly that the six new fire fighters, hired with the SAFER grant money,

will reduce overtime costs of the fire department, currently budgeted at \$480,000. The union sees this decrease in overtime expenses as another pocket of "hidden" money available to the employer for funding the \$126,000 cost of a 2% wage increase.

Finally, the union contends that the police and fire levy, which the citizens recently approved, adds close to \$3 million to the two departments each year for the next five years.

Conclusion on Ability to Pay --

None of the Moody's points that Hare quoted ring a death knell. In fact for 2012, the employer had annual revenues of over \$29 million; the union's proposal is .04% of the annual revenue. As of June 30, 2012, the employer had a cash balance of \$2.82 million; the union's proposal is 4.46% of the cash balance. The union's proposal is a fiscally responsible approach that is well within the employer's resources.

The employer would like to modify the statute to add an adjective to the "ability to pay" criteria. The employer develops a new standard - relative inability to pay. The employer argues that the employer's revenues are "essentially flat." The record shows otherwise.

There is no question that public employers have had challenging economic times over the past few years. The City of Albany has not been exempted. Since 2009, the employer reduced the number of budgeted positions from 428 FTEs to 383 FTEs. The Fire Department, itself, lost 6.4 budgeted FTEs. But the fire fighters have been aware of the squeeze on the employer's dollars. They took a wage freeze in FY 10 - 11. Additionally, the SAFER grant

allowed the hiring of six new FTE's in the fire department; three filled vacant positions and three filled newly created positions. So the employer is pulling the fire department out of the morass it was in five years ago.

In predicting pressure on the General Fund in his 2007 -2008 budget message, Hare cited increasing personnel costs. He specifically noted, however, "I do not mean to imply that wages or benefits are too high relative to the market or what might reasonably be considered fair. We have outstanding employees, and I believe it is in the community's best interest to offer compensation that will attract and retain high quality workers." That was the employer's belief at the height of the recession. The only new sentiment noted in the record now that the employer is emerging from the recession is that the fire fighters have had a high level of compensation over the years. The record demonstrates, however, that Albany's fire fighters are actually below their comparables.

The public policy statement of the interest arbitration statute at ORS 243.742(1), states that "where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes ..." The employer is correct to point out that interest arbitration is provided as an alternate to the right to strike. It should not be used to achieve more than what could be gained through collective bargaining and the strike process. This conclusion, though, is applicable to both parties. Given the employer's financial position, absent interest arbitration, would it reasonably have taken a strike by its fire fighters, thus shutting down the provision of fire

suppression and emergency medical services to its citizens over \$126,000? That does not seem reasonably likely.

The employer should not have it both ways - claiming both riches and poverty. Both the city manager and the finance director have told local media that the employer's revenue picture is brighter as compared to a year ago. City Manager Hare reported, "Revenues are projected to be stable to slightly increasing property tax revenues." Hare is also quoted as saying, "... new buildings are being added to the property tax rolls, some properties are increasing in value and in some cases we are seeing increasing collection rates." The employer cannot tell its citizens that it has a safe revenue position, then tell its employees that it is broke.

What the employer characterizes as a "relative inability to pay" appears to be more of an unwillingness to pay. An unwillingness to pay is not a statutory standard.

Maintaining a Trained Work Force

I determined above that public welfare can be addressed by maintaining a trained work force. The statute also states that the employer's ability to maintain the work force be examined as a secondary criteria. ORS 243.746(4)(c) acknowledges that an Interest Arbitrator can consider the ability of the city "to attract and retain qualified personnel at the wage and benefit levels provided." The union agrees that the employer has not experienced significant problems with attracting and retaining employees. It posits that that might change if the employer's proposal is awarded, since that would cause two years of wage

freezes over a three year period. However, both parties agree that the employer does not have a present history of any recruitment or retention problems. Specifically, when the employer recently hired the six fire fighters through the SAFER grant, it had no difficulty attracting applicants.

As the employer points out, the interest and welfare of the public criterion includes the ability of the employer to sustain public support for public employees and city government. I find it significant that the employer's survey of its citizens shows that the public approves of the work of the fire department more than other city departments and programs. The citizens appreciate the trained workforce to maximize fire suppression services and the delivery of emergency medical services. The citizens of the City of Albany supported the recent police and fire levy. It can be reasonably concluded that the citizens believe that it serves their interest and welfare to fund their Fire Department and maintain a trained workforce.

Comparables

Both parties spent considerable time in their presentations arguing about which other employers are good comparable jurisdictions to this employer under ORS 243.746 (4)(d) and (e). Sub-section (d) directs that an Interest Arbitrator should consider "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." Then the statute at subsection (e) calls for a comparison of this overall compensation to the overall

compensation of "other employees performing similar services with the same or other employees in comparable communities."

The statute defines "comparable" jurisdictions as "communities of the same or nearest population range within Oregon." Population is the only statutory test of comparability in (e). Both parties acknowledge that the statute does not define "same or nearest." It does not link same or nearest to a specific number of comparators or to a specific percentage of the population of the subject city.

Employer's list --

The employer begins by looking at cities with populations within 20,000 of its own. That method generated an initial list of:

COMPARATOR	POPULATION
Springfield	59,695
Corvallis	54,520
ALBANY	50,520
Tigard	48,415
Lake Oswego	36,725
Keizer	36,715
Grants Pass	34,660
McMinnville	32,370
Oregon City	32,220

[From Portland State University Population Research Center, March 2012]

The employer then deleted Tigard and Oregon City from the list because their citizens receive fire services through a fire district that serves a population much larger than the other comparators. The employer added Redmond Fire and Rescue Fire

District since the district's population (45,000) is close to Albany's even though the City of Redmond's population (26,305) is below the 20,000 band that the employer originally used.

The employer's final list is:

COMPARATOR	POPULATION
Springfield	59,695
Corvallis	54,520
ALBANY	50,520
Redmond Fire District	45,000
Lake Oswego	36,725
Keizer	36,715
Grants Pass	34,660
McMinnville	32,370

Union's list --

The union looked at an equal number of jurisdictions above and below the population of Albany. It asserts that this approach gives a fair representation of comparable jurisdictions. This methodology put both Beaverton and Tigard on the list. The union dropped Beaverton because it is duplicative of Tigard since both communities are served by the same fire district.

COMPARATOR	POPULATION
Bend	77,455
Medford	75,545
Springfield	65,982
Corvallis	55,055
ALBANY	50,520
Tigard	48,695
Lake Oswego	36,770
Keizer	36,735

Grants Pass	34,740
McMinnville	32,435

[From Portland State University Population Research Center, 2012 estimates.]

The employer objects to the union's use of Tigard since it is part of a fire district. The union correctly points out that when the statute at hand was amended in 1995, the legislature could have included other indicia of comparability: geographic area; similar tax base; same governmental types (cities, districts, etc.); urban, suburban or rural. The final bill contains only population. Population must be our main guide. After all, the citizens of Tigard do receive fire services from salaried fire fighters. It is appropriate to examine what those salaries are.

Conclusion on the list of comparables --

The employer's list is weighted more towards cities that are smaller than the employer. It is curious that the employer deleted Oregon City and Tigard because they received fire services from fire districts, but it included Keizer which also gets its fire services from a fire district, albeit a much smaller one - the Keizer Fire District. The employer uses Redmond, with a population of 26,305, which is outside its enunciated parameter of 20,000 within Albany's 50,500 population. It includes Redmond by using the Redmond Fire District's population of 45,000 instead of the city's population. While that is a plausible approach to defining what is a "comparable community," the employer does not use the approach consistently.

The union points out that had the employer followed the approach of using fire district population size instead of city population

size, it would have had to include three other fire districts that are within 20,000 of Albany's population: Klamath County #1 (52,000), Jackson County #3 (49,000), and Marion County #1 (50,000). These three districts are actually closer in population to Albany than Redmond, the one district that the employer did choose to include.

The union produced a chart showing that the salary for the Redmond Fire District fire fighters is lower than that of Albany fire fighters, while the salaries of the other three districts are each higher than the employer's. It appears that the union is correct in arguing that the employer is targeting smaller, lower paying cities and districts, while excluding larger or better paying cities and districts.

The employer criticizes the union's use of a static number of comparators above and below the employer since this approach could ignore a jurisdiction that has an actually closer population to the city in the interest arbitration, although that is not the claim in this case. I find the union's approach defensible. The statute calls for comparators to be of the "same or nearest population range." "Range" establishes the limits between which a variation exists. *Black's Law Dictionary*, Revised Fourth Edition, defines range as "to have or extend in certain direction, to correspond in direction or line. "Range" allows for the examination of above and below a set point, since that is corresponding in direction.

The employer's inconsistent inclusions and exclusions tend to make its list less dependable. I adopt the union's list as appropriate comparable jurisdictions.

Determining Benchmarks

In addition to differing on the formula to select "appropriate" jurisdictions, the parties also diverge on what are "appropriate" job classifications, and what should be the "appropriate" length of service in the job to be used as a benchmark.

The employer uses only three classifications in the bargaining unit to compare among the other jurisdictions. It explains that it used this approach because these classifications have the most employees in the bargaining unit: fire fighter (39 employees); Apparatus Operator (12 employees); and Lieutenant (13 employees). It claims that these are the most relevant classifications since no other classification has more than three employees. This approach, however, ignores all of the fire prevention employees.

After advancing the three classifications, the employer then calculated the average tenure of the incumbents to determine what year-of-experience salary level to compare.

The union benchmarks at three different levels for all classifications in the bargaining unit. The levels are entry (new hire), mid-career (15+ years) and senior (25 + years). It also charts the compensation of the Deputy Fire Marshal positions I and II.

By using the longevity of current employees to determine benchmark levels, the employer misses the fact that the bargaining unit mix could change at any time with retirements, disabilities, etc. The union's use of entry, mid-career and senior levels as benchmarks is more realistic for benchmark positions.

The employer criticizes the union's inclusion of 2013 settlements. It argues that all of the comparator salaries should be taken from the date of July 1, 2012, since that is the beginning of the period of the wage reopener. I find that the parties benefit from the knowledge of other wage settlements for FY 2012-13 that came in from comparators. In dealing with the recession, other jurisdictions could have bargained wage increases or wage freezes. Parties might not start all their wage adjustments on the same date; what the salary level is at the end of the fiscal year is important data. The settlements that the union uses are for the same time period that the reopener covers. The union is correct to include the 2013 settlements since the collective bargaining agreement reopener is for 2012-2013. The use of current information makes the union's figures more accurate for comparison of the status quo.

The union's analysis shows that the bargaining unit is behind the average in overall compensation given by the comparables.

Consumer Price Index (CPI)

The union presented an exhibit about the Consumer Price Index - All Urban Consumer, without contradiction, that the CPI-U for the life of the agreement has ranged from a low of 1.1% to a high of 3.9%. For the relative 28 months of the report, 12 months were below 2%, 15 months were above 2%, and one was right at 2%. The union's proposal for a 2% wage increase is in line with the index. The employer's proposed wage freeze is inconsistent with the change in the value of consumer prices.

CONCLUSION

The employer has not established a compelling argument for a wage freeze. The union has proven that the employer can afford its wage proposal; that its proposal keeps it in parity with comparable jurisdictions; and that the proposal keeps pace with the cost of living.

Given the modest increase proposed by the union and the employer's financial picture, currently and as projected in the future, I find that the interest and welfare of the public in the City of Albany is best met by the award of the union's last, best offer.

The union's last best offer better satisfies the statute.

OPINION

Any arguments presented in briefs not cited within this decision I found non-persuasive or immaterial. Based on the record as a whole, I award that:

The union's last best offer better meets the statutory criteria.

ISSUED in Chehalis, Washington, this 21 day of May, 2013.

KATRINA I. BOEDECKER, Arbitrator