

INTEREST ARBITRATION AWARD

In the matter of interest arbitration between:

City of Union Gap, Washington

and

Union Gap Police Officers Association

PERC Case No.: 23524-1-10-00556

Arbitrator: Ronald L. Miller

Award date: August 19, 2011

Witnesses:

Association: Gregory Cobb, Association President
Joseph Vanicek, Association Secretary
Stace McKinley, Association Vice-President

City: Monte Scacco, Financial Consultant
Karen Clifton, City Treasurer

INTRODUCTION

The hearing in this matter was held at Union Gap City Hall on June 8, 2011. Ronald L. Miller served as Arbitrator by agreement of the parties. Mr. Jaime B. Goldberg, Attorney, with Makler, Lemoine and Goldberg, Portland, Oregon, represented the Union Gap Police Officers Association (Association). Mr. Bruce L. Disend, Attorney, with Kenyon Disend, Issaquah, Washington, represented the City of Union Gap (City).

The parties agreed that the matter was properly before the Arbitrator on its merits, that there was no issue having to do with the availability of witnesses, and no issue having to do with the availability of documents requested but not provided. The hearing proceeded in an orderly manner. The parties were given opportunities to make opening statements, submit evidence, and examine and

cross-examine witnesses. Witnesses testified under oath as administered by the Arbitrator. A transcript of the hearing was not made. The Arbitrator tape-recorded the hearing to supplement his notes.

The parties submitted the matter to the Arbitrator on the basis of evidence presented at the hearing and in post-hearing briefs. Post-hearing briefs were submitted in a timely manner.

On July 21, 2011, Mr. Disend, Mr. Goldberg, and the Arbitrator held a telephone conference concerning what weight, if any, to give to statements in the record regarding alleged assertions made during a mediation session. It is a well-established principle that mediation is a confidential process. Therefore, the Arbitrator has not considered any references to statements made by the parties during mediation.

The Arbitrator closed the record on July 25, 2011.

BACKGROUND

The City of Union Gap, population 5,850, is located in Yakima County, south-central Washington. To the north, the City of Yakima, population 91,000, borders Union Gap, and to the south, the Yakima Indian Reservation. The City is distinctive in that, for a community of less than 6,000 residents, Union Gap has a substantial retail infrastructure, including a large mall, big-box outlets, and national chain stores. Union Gap is a regional shopping center. Seventy percent of the City's tax revenue comes from sales tax. Sergeant Cobb characterized the socio-economic profile of Union Gap as "lower middle class" with pockets of poverty (Cobb testimony). The unemployment rate in Yakima County during the first quarter of 2011 was 11.2%, compared with 9.8% for Washington State, and 9.5% nationally.

The City has a police force of seventeen officers (Ex. C #12).

The City and the Association entered into a collective bargaining agreement effective January 1, 2007, through December 31, 2009 (Ex. A #1). Prior to the expiration of that agreement, the parties began negotiations for a

successor agreement. Two negotiation sessions were conducted: one on August 31, 2009, to establish ground rules for bargaining; and one on December 9, 2009, to bargain. Both parties acknowledge that little bargaining occurred.

Subsequently, the matter was submitted [date not specified] to the State of Washington Public Employment Relations Commission (PERC) for mediation. Ms. Clair Nickleberry was assigned by PERC to serve as mediator. One mediation session was held on August 18, 2010.

The PERC Executive Director, upon the recommendation of Ms. Nickleberry, certified certain issues for interest arbitration per the Revised Code of Washington (RCW) 41.56.450. Thereafter, PERC provided the parties with a list of names of qualified arbitrators from which the parties selected Ronald L. Miller to serve as arbitrator. The parties waived the right to create an arbitration panel.

ISSUES IN DISPUTE

At the hearing, three issues were resolved:

- Article 13, Section 7.3.2, Grievance Procedure – notice provision: the City accepted the Association’s proposal.
- Article 20, Termination: the City and Association agreed that a successor collective bargaining agreement would be for two years, 2010 and 2011, and negotiations for a successor agreement would begin in July 2011.
- Memorandum of Agreement – Community Service Officer: the Association agreed that this memorandum would not be renewed.

The Association presented the following issues for resolution:

- Article 5, Section 5: definition of “emergency”;
- Article 10, Section 1: specify percentage wage increases for 2010 and 2011;

- Article 10, Section 12: create a graveyard shift pay differential; in some documents this proposal is identified with Article 5.7;
- Article 13, Section 7.6.4: change the 50-50 sharing of the arbitrator's cost to the loser paying the full amount;
- Article 17, Section 1: delete the language giving the City the authority to unilaterally choose a health insurance plan.

The City presented the following issues for resolution:

- Article 10, Section 1: specify percentage wage increase for 2011;
- Article 10, Section 5: exclude scheduled training and scheduled activities from call-back pay;
- Memorandum of Agreement – Assigned Vehicles: do not renew;
- Memorandum of Agreement – Shift Coverage: do not renew.

SUMMARY OF THE AWARD

Article 5, Section 5: definition of "emergency"

The language of this section is revised to be:

An emergency shall be defined as unforeseen circumstances. The Chief of Police's or designee's decision as to what constitutes an emergency shall not be final and binding on all parties.

Article 10, Section 1: wage schedule

There is no wage increase for 2010.

The wage is increased 3%, retroactive to January 2011. This increase is derived from base pay and longevity pay differences between Union Gap and eight comparator cities.

Article 10, Section 5: call-back pay

The language "excluding scheduled training and other scheduled activities" is added to Article 10, Section 5.

Article 10, Section 12: graveyard shift pay differential

A graveyard shift pay differential is not established.

Article 13, Section 7.6.4: arbitrator's cost

The language of Article 13.7.6.4, "The cost of the arbitrator shall be equally shared (50-50) by the Employer and the Association" is retained.

Articles 17.1, 17.1.3, and 17.1.4: health insurance

The language "as established and determined from time to time by the Employer" is deleted from Article 17.1.1, 17.1.3, and 17.1.4.

Appendix "C" Health Insurance Impasse Procedure

1. The parties shall attempt to negotiate a replacement health insurance plan.
2. If there is no agreement on a replacement plan, on or before October 5, 2011, the City and the Association shall each prepare and exchange a health insurance proposal with rationale.
3. On or before October 5, 2011, the parties shall select an arbitrator; the parties will equally share the Arbitrator's fee.
4. The arbitrator shall be given the two proposals with rationale. At the arbitrator's discretion, the parties may be asked to participate in activities to narrow differences in their proposals.
5. If there is no agreement on a replacement plan, the arbitrator shall specify a date for submission of each party's final proposal.
6. The arbitrator shall select either the Association's complete final proposal or the City's complete final proposal.

Memorandum of Agreement – Assigned Vehicles

This memorandum is continued in effect.

Memorandum of Agreement – Shift Coverage

This memorandum is continued in effect.

AWARD

Article 5, Section 5: definition of emergency

Article 5.5 states:

Emergency shall be defined as unforeseen circumstances as determined by the Chief of Police, or designee. The Chief's decision as to what constitutes an emergency shall be final and binding on all parties.

The Association proposes to delete all language after “unforeseen circumstances.” The result of such a change would be that a decision by the Chief would no longer be final and binding; rather, a decision could be challenged through the contractual grievance procedure. A language change would not alter the obligation of an officer to comply with the Chief's direction.

The City argues that there is no demonstrated need to change the language of Article 5.5. According to the City, the present language of Article 5.5 has been in the Agreement for “many years.” Furthermore, under the current Chief, there has been no alleged adverse incident, such as a declaration of an emergency to avoid overtime pay.

It is a well-established principle of interest arbitration that the party seeking to change contractual language bears the burden of persuasion. The Association cites no incident in support of its proposal. Nevertheless, a party to a collective bargaining agreement need not wait until a problem arises before it deals with contractual language that the party believes is contrary to its members' interest.

Article 5.5 assigns final and binding decision-making authority to the Chief; there is no opportunity for an officer to challenge such a decision through the grievance procedure. Defining the Chief's decision as “final and binding” runs

counter to the commonly recognized standard: comply then grieve. An employee's right to grieve is a fundamental principle in collective bargaining. The establishment of a right to grieve is, in and of itself, a reasonable basis for the Association to seek modification of Article 5.5.

Decision

The language of this section is revised to be:

An emergency shall be defined as unforeseen circumstances. The Chief of Police's or designee's decision as to what constitutes an emergency shall not be final and binding on all parties.

Article 10, Section 1: wage schedule

The parties are proposing the following wage increases retroactive to January of each year.

Association:	2010, 4% increase
	2011, 4% increase
City:	2010, 0% increase
	2011, 2% increase

Additionally, as part of both proposals, an officer would continue to (1) use a police vehicle for transportation to and from work, and (2) have the option to participate in a deferred compensation program where the City matches an officer's contributions up to 3% per year.

RCW 41.56.465 provides standards or guidelines to be considered by interest arbitrators in determining an award; among them are:

- RCW 41.56.465(1)(e): "Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment";
- RCW 41.56.465(2): "... shall also consider a comparison of the wages, hours, and conditions of employment of personnel involved in the

proceedings with the wages, hours, and conditions of employment of like personnel of like employers of similar size on the west coast of the United States.”

465(1)(e): “other factors” – City’s ability to pay

The City bases its wage proposal on two premises: (1) financial inability to increase its wage offer, and (2) the need for internal parity with other employee groups.

First, has the City established an inability to pay? As a regional shopping center, the City’s tax revenue largely consists of revenue from sales tax, currently 70% of total tax revenue. As such, the City prospers with expansion of its retail infrastructure, and experiences an increase or decrease in sales tax revenue depending upon changing economic conditions. For example (Ex. C #15), during the first quarter of 2011, sales tax revenue was 7.76% less than *projected* for that period. However, when sales tax revenue for the first quarter of 2011 is compared with the same period in 2010, *actual* sales tax revenue is about the same.

Despite indications that sales tax revenue was falling short of projection, and with foreknowledge that the City was heading to interest arbitration with the Association, the City nevertheless drew down its cash reserve during the first quarter of 2011. In part, the City was obligated by a collective bargaining agreement to hire an additional firefighter. However, other actions were discretionary, including among others, hiring an administrative secretary, a part-time custodian, a code enforcement officer, and a clerk secretary (Ex. A #9, page 2; Ex. A #11, page 3). As a result, a cash reserve of about \$550,000 at the start of 2011 was reduced to about \$100,000 as of April 2011 (Ex. C #14; Ex. C #17; Scacco testimony). As of April 2011, a city with a budget of about \$6 million was operating with a cash reserve of \$100,000. Mr. Scacco described the City’s financial situation as an expenditure problem not a revenue problem (Scacco testimony).

Contributing to the City's tenuous financial condition is disagreement between the Mayor and some City Council members. The Mayor is optimistic that projections for increased sales tax revenue will be realized. The City Council members are more pessimistic regarding future sales tax revenue. With 2011 first quarter sales tax revenue falling short of projection, these Council members are pressing for cutbacks in budgets and expenditures.

At the time of this Award, August 2011, the national economy is struggling to avoid a double-dip recession. Attaining the sales tax increase built into the 2011 budget is akin to swimming against the tide; at best, sales tax revenue could be at the 2010 level. Unemployment in the Yakima region is likely to remain at 11.2%, if not increase. While cognizant of the City's discretionary expenditures during early 2011, the Arbitrator realizes the City is not in a financial position to pay the 4% (2010) and 4% (2011) wage increases proposed by the Association. However, modest budget adjustments should permit the City to increase wages by 3% for 2011.

465(1)(e): "other factors" – internal parity

During the 2010 and 2011 period for this Award, the City reached wage agreements with other employee groups (Ex. C #10).

2010

- Clerical: no wage increase
- Public Works: no wage increase
- Fire: no wage increase
- Police: under negotiation (officers continue to use police vehicles for transportation to and from work, and have the option to participate in a deferred compensation program with a City match)
- Exempt: no wage increase

2011

- Clerical: under negotiation
- Public Works: no wage increase

- Fire: 2% wage increase (starting January)
- Police: under negotiation (officers continue to use police vehicles for transportation to and from work, and have the option to participate in a deferred compensation program with a City match)
- Exempt: 2% (starting May)

The City argues that in the context of limited financial resources, when its employees are asked to make sacrifices, one group, the police, should not be given a larger wage increase than that of other groups. The City contends that its 2% wage increase proposal for police is consistent with a 2% wage increase negotiated with firefighters and a 2% wage increase assigned to exempt personnel.

Internal parity is one of the “other factors” often considered by interest arbitrators, but it is not controlling. In contrast, the statute specifically provides in RCW 41.56.465(2) that interest arbitrators shall consider comparators “of like personnel,” in other words, external parity. The language “of like personnel” in subsection 465(2) means police to police comparisons. Firefighters and exempt personnel are not “like personnel.” Although firefighters have interest arbitration rights, this status does not mean that firefighters and police officers are “like personnel.”

465(1)(e): “other factors” – hiring and retention

The parties do not dispute that there is little turnover among police officers (Ex. C #12, page 1). A factor for this stability is that Union Gap has higher pay for longevity in all years-of-service categories than the averages of the eight comparator cities (data in Ex. A #7 as modified in this Award).

465(2): comparison to “like personnel of like employers of similar size”

The Association entered a list of twelve comparator cities (Ex. A #4). The Association characterized the cities as similar to Union Gap in population and geographic proximity.

Buckley	Fircrest
Chehalis	Grandview
Duvall	Milton
East Wenatchee	Othello
Ephrata	Prosser
Fife	Selah

The City did not enter a list of comparator cities. The City make its case, instead, on internal factors: (1) financial inability to increase its wage offer, and (2) the need for internal parity with other employee groups. In the absence of external comparators from the City, this 465(2) analysis only considers the cities put forward by the Association.

The statute requires that comparisons be made to cities of “similar size.” The most common ranges used in arbitration for determining “similar size” are: cities 50% larger and 50% smaller in (1) population and in (2) assessed valuation than the subject city. In this matter, Union Gap is compared with other cities according to the following ranges (*2010 City Population, Property Tax, and Sales Tax*; Municipal Research and Service Center of Washington; Seattle, WA):

- Union Gap’s population is 5,850; the range is 2925 to 8775;
- Union Gap’s assessed valuation is \$528,127,448; the range is \$264,063,724 to \$792,191,172.

Two cities proposed by the Association are outside the population range:

- East Wenatchee 11,870;
- Grandview 9,290.

Two cities proposed by the Association are outside the assessed valuation range:

- Fife \$2,109,593,643;
- Duvall \$816,274,662.

Accordingly, the Association’s comparator list is revised to delete East Wenatchee, Duvall, Fife, and Grandview.

In giving meaning to “similar size” in a particular interest arbitration case, arbitrators have variously applied limiting criteria such as: a comparator city’s location east or west of the Cascades; a comparator city’s location in a rural or

urban county; geographic proximity among cities; labor market for police officers; etc. The remaining eight comparators from the Association's list reflect a reasonable balance of those limiting criteria for "similar size."

- 4 cities are located east of the Cascades
- 4 cities are located west of the Cascades
- 4 counties in which the cities are located are rural
- 4 counties in which the cities are located are urban
- 3 cities have assessed valuations greater than Union Gap
- 4 cities have assessed valuations less than Union Gap
- 1 city has an assessed valuation almost the same as Union Gap
- 6 cities have populations larger than Union Gap
- 2 cities have populations smaller than Union Gap

A further consideration when identifying comparators: relevant labor markets for police officers are not always local. As an officer gains experience, training, and specialized knowledge, his or her relevant labor market expands, possibly statewide. The geographic scope of the eight comparator cities incorporates the diverse potential labor markets for Union Gap police officers.

The Association provided wage data for its original twelve comparator cities (Ex. A #7). When that wage data is recalculated (using the same methodology) to reflect removal of the four designated cities, the following data indicates base pay and longevity pay differences between Union Gap and the averages of eight comparator cities. During the time the Association researched data for Ex. A #7, some cities were in various stages of renegotiating contracts with their police unions. Therefore, the wage data for those cities is not current as of this Award.

5 YEARS OF SERVICE

	Base Pay	Longevity	Adjusted Base
Average of 8 comparators	\$4,850.10	\$54.18	\$4,904.28
Union Gap	\$4,760.00	\$71.40	\$4,831.40
		Difference	-1.50%

10 YEARS OF SERVICE

	Base Pay	Longevity	Adjusted Base
Average of 8 comparators	\$4,973.06	\$114.98	\$5,088.04
Union Gap	\$4,760.00	\$119.00	\$4,879.00
		Difference	-4.28%

15 YEARS OF SERVICE

	Base Pay	Longevity	Adjusted Base
Average of 8 comparators	\$4,973.06	\$154.55	\$5,127.61
Union Gap	\$4,760.00	\$214.20	\$4,974.20
		Difference	-3.08%

20 YEARS OF SERVICE

	Base Pay	Longevity	Adjusted Base
Average of 8 comparators	\$4,973.06	\$181.32	\$5,154.38
Union Gap	\$4,760.00	\$238.00	\$4,998.00
		Difference	-3.12%

Across the four years-of-service categories, the adjusted base pay (base pay plus longevity pay) at Union Gap is on average 3% percent behind the averages of eight comparator cities.

Decision

There is no wage increase for 2010.

The wage is increased 3%, retroactive to January 2011. This increase is derived from base pay and longevity pay differences between Union Gap and eight comparator cities.

Article 10, Section 5: call-back pay

Article 10.5 states:

Any employee called to work outside his/her regular shift shall be paid a minimum of four (4) hours at time and one-half (1½) his/her regular rate for all hours worked whichever is greater. "Called to work" shall be defined as being formally ordered by the supervisor to physically return or report to the police station or the site where work is to be performed.

The City proposes that the first sentence of Article 10.5 be changed:

Any employee called to work outside his/her regular shift, excluding scheduled training and other scheduled activities, shall be paid a minimum of four (4) hours at time and one-half (1½) his/her regular rate for all hours worked whichever is greater. "Called to work" shall be defined as being formally ordered by the supervisor to physically return or report to the police station or the site where work is to be performed.

The City argues that given the nature of police work and the small size of the City's police force, the proposed language balances the needs of the police department with the interests of its officers. The exclusion would be limited to training and other activities scheduled in advance, thereby limiting disruptions to the lives of officers.

Because officers rotate shifts, the Association contends that a call-back is especially disruptive of an officer's off-duty hours. Further, the Association argues that the current language serves as a disincentive to use a call-back, and thereby, limits call-back use to only high priority activities.

Other provisions of the 2007-2009 Agreement relate to this issue. Article 5.4 provides in part that work schedules are made known "at least one (1) week prior to effective date, unless an emergency should dictate otherwise." Article 10.3 provides in part that "Time and one-half (1½) the employee's regular rate of pay shall be paid for all work in excess of eight (8) continuous hours in any day, and/or forty (40) hours in any week."

For some employees, any required hours of work beyond their normal work schedule are disruptive of their off-duty hours. On the other hand, for most employers, required overtime work, with advance notice and enhanced compensation, is an operational necessity. Call-back provisions in collective bargaining agreements typically deal with special situations, when advance notice is not feasible, and therefore, an employee's off-duty life is most disrupted. The language proposed by the City, "excluding scheduled training and other scheduled activities," would provide officers at least one-week notice; reference Article 5.4. With such notice, an officer would be paid regular overtime for "scheduled training and other scheduled activities" that take place in excess of eight (8) continuous hours in any day, and/or forty (40) hours in any week. This is a reasonable accommodation between the operational needs of the Police Department and an employee's off-duty life. Short of one-week notice, the four-hour minimum at time and one-half pay would apply.

Decision

The language "excluding scheduled training and other scheduled activities" is added to Article 10, Section 5.

Article 10, Section 12: graveyard shift pay differential

The Police Department operates three shifts: day, 7:00 a.m. to 3:00 p.m.; swing, 3:00 p.m. to 11:00 p.m.; graveyard, 11:00 p.m. to 7:00 a.m. All officers, regardless of seniority, rotate through the three shifts every two months. An officer works the graveyard shift for two months, twice a year. A normal workweek consists of five consecutive eight-hour work shifts.

The Association proposes to create a shift pay differential of three percent (3%) of base pay for employees who work the graveyard shift.

The Association argues that rotation to the graveyard shift may adversely impact an officer's health and family life. The Association contends that a pay

differential for working that shift would, to some degree, mitigate the adverse impact.

The Association has not made a convincing argument for creating a graveyard shift pay differential. A regular rotation through the three types of shifts has been the standard at the Police Department. A person who accepts employment as a police officer with the City understands that the rotation, without a graveyard shift pay differential, is the basis of his or her work schedule. Furthermore, a convincing case has not been made that more income while working the graveyard shift would meaningfully diminish the alleged adverse impact of working that shift.

Decision

A graveyard shift pay differential is not established.

Article 13, Section 7.6.4: arbitrator's cost

The Agreement provides that, "The cost of the arbitrator shall be equally shared (50-50) by the Employer and the Association."

To discourage groundless grievances or flagrant denial of grievances, the Association proposes that the cost of the arbitrator shall be borne by the losing party.

The Association presents no evidence in support of its contentions. Moreover, there is no consensus among public sector and private sector collective bargaining practitioners that either method, "loser pays" or "equally shared (50-50)" is preferable. The Arbitrator's preference aside, the Association has not made a persuasive case for changing "equally shared (50-50)."

Decision

The language of Article 13.7.6.4, "The cost of the arbitrator shall be equally shared (50-50) by the Employer and the Association" is retained.

Article 17: health insurance

Article 17 and its subsections identify components of health insurance: medical, 17.1.1; dental, 17.1.3; vision, 17.1.4. In each of these subsections there is language that the medical plan, dental plan, and vision plan are “established and determined from time to time by the Employer.”

The Association proposes that “established and determined from time to time by the Employer” be deleted from the respective subsections. The Association seeks to end unilateral decision making by the City on health insurance issues.

Health insurance is a mandatory issue for bargaining; therefore the Association has a right to bring this issue to the bargaining table. The record does not indicate when and under what circumstances the present language entered an agreement between the parties. Nevertheless, given the ongoing substantial increases in the cost of health insurance that are then associated with higher premiums, co-payments, or deductibles for employees, it is reasonable for the Association to seek codetermination, not just consultation.

Decision

The language “as established and determined from time to time by the Employer” is deleted from Article 17.1.1, 17.1.3, and 17.1.4.

Appendix “C” Health Insurance Impasse Procedure

Bargaining on health insurance is especially important at this time because the current health insurance plan, Association of Washington Cities (AWC) Plan A, will no longer be offered by the insurer after December 31, 2011.

Prior to January 1, 2012, the parties need to agree upon and implement a replacement for AWC Plan A; the City no longer unilaterally decides selection of a health insurance plan. Given the parties’ record of bargaining, or rather non-bargaining, during the current round of negotiations, the Arbitrator is concerned

that a replacement for AWC Plan A might not be agreed to and implemented in a timely manner.

To assure continuity of health insurance coverage, the parties shall implement the following process. The objective of this process is a negotiated settlement; however, should there be no negotiated settlement, this process assures continuity of coverage. This process carries forward the legislative intent stated in RCW 41.56.430 “that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.”

Decision

1. The parties shall attempt to negotiate a replacement health insurance plan.
2. If there is no agreement on a replacement plan, on or before October 5, 2011, the City and the Association shall each prepare and exchange a health insurance proposal with rationale.
3. On or before October 5, 2011, the parties shall select an arbitrator; the parties will equally share the Arbitrator’s fee.
4. The arbitrator shall be given the two proposals with rationale. At the arbitrator’s discretion, the parties may be asked to participate in activities to narrow differences in their proposals.
5. If there is no agreement on a replacement plan, the arbitrator shall specify a date for submission of each party’s final proposal.
6. The arbitrator shall select either the Association’s complete final proposal or the City’s complete final proposal.

Memorandum of Agreement – Assigned Vehicles
Memorandum of Agreement – Shift Coverage

During the hearing, the City sought not to renew these two memoranda. However, in its post-hearing brief, the City indicated a willingness to continue the memoranda, if their implementation could be made more flexible. Such modifications are best accomplished by the parties at the bargaining table.

Decision

Memorandum of Agreement – Assigned Vehicles is continued in effect.
Memorandum of Agreement – Shift Coverage is continued in effect.

Signature

August 19, 2011

Ronald L. Miller

Date