

IN RE ARBITRATION BETWEEN:

CITY OF HELENA MONTANA

and

IAFF, LOCAL 448, HELENA, MONTANA

DECISION AND AWARD OF ARBITRATOR

BOPA CASE # 5-2010 (407-2010)

JEFFREY W. JACOBS

ARBITRATOR

April 19, 2010

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IAFF, Local 448, Helena Montana

APPEARANCES:

FOR THE UNION:

Karl Englund, Attorney for the Union
Sean Logan, Union Treasurer
Kelly Tuck, Union President

FOR THE CITY:

David Nielsen, City Attorney
Tim Magee, Finance Director, City of Helena
Rae Lynn Nielsen, H.R. Director, City of Helena
Steve Larson, Fire Chief, City of Helena

PRELIMINARY STATEMENT

The parties were unable to resolve certain issues concerning the terms of the collective bargaining agreement and requested mediation from the Montana Board of Personnel Appeals, BOPA. The City of Helena and the International Association of Firefighters, Local #448 which represents the bargaining unit employees of the City of Helena Fire Department entered into a collective bargaining agreement for a three-year period commencing July 1, 2007, and will terminate on June 30, 2010. Pursuant to that Agreement, the City increased the monthly base wage by 2.5% for the first year, 2008, and 5% for the second year, 2009. For the third year of the Agreement, the parties agreed as follows: “Effective July 1, 2009 (FY10), monthly wages will increase by CPI-U, US City Average, December 2008. An adjustment approved by the commission for any positive wage adjustment will be given. The Union has the option to reopen wage negotiations under Section 12 only, relating to the wage adjustment for FY10.”

The Union reopened the contact with respect to that provision and sought wage adjustments above the 0.1% from the CPI adjustment. Two mediation sessions were held with mediators from the BOPA and the parties negotiated in good faith but were unable to resolve the wage issue herein.

A hearing in the above matter was held on March 4, 2010 at the City of Helena Offices. The parties presented oral and documentary evidence at that time. Post-hearing Briefs were received by the arbitrator on March 19, 2010. The matter has been submitted on a final offer – total package basis.

ISSUE PRESENTED

The issue in dispute at the time of the hearing was as follows:

1. Wage adjustment for 2010 pursuant to Section 12 of the parties’ labor agreement.

STATUTORY AUTHORITY

Montana Statutes Section 39-34-103(5) sets forth the required circumstances as follows:

“(5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:

- (a) comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;
- (b) the interests and welfare of the public and the financial ability of the public employer to pay;
- (c) appropriate cost-of-living indices;
- (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment.”

UNION'S POSITION

The Union’s position was for increase in wages in varying amounts as set forth below and which would result in a wage structure as follows:

POSITION	FY 10 salary	
Battalion Chief - Suppression	\$5,956.57	
Fire Marshal - Prevention	\$5,965.57	
Captain	\$5,091.81	
Lieutenant	\$4,640.36	
Firefighter II	\$4,303.14	
Firefighter I	\$4,071.02	
Confirmed Firefighter	\$3,891.20	
Probationary Firefighter	\$3,771.61	

The Union's position results in varying percentages of increases for different positions but results in an overall increase of some 3.89%, see Union Exhibit 6. The Battalion Chiefs/Fire Marshals would receive approximately 5.3%, Captains 3.9%, Lieutenants 3.1%, Firefighter II's 3.1%, Firefighter I's 2.0%, Confirmed Firefighter 0.80 % and Probationary Firefighter 0.45%. It should be noted that there are currently no Confirmed Firefighters on staff and that the probationary firefighters are moved up to the Confirmed Firefighter position once they pass probation.

In support of this position the Union made the following contentions:

1. The Union cited Montana Statutes 39-34-101 and noted that where there is an impasse reached between firefighters and a public employer, either party may petition for final and binding interest arbitration. Here the Union petitioned BOPA for such arbitration and the City has not raised any issue with respect to the arbitrator's jurisdiction.

2. The Union further cited Montana Statutes Section 39-34-103(5)(a), which provides that in making a decision, the Arbitrator shall consider "any relevant circumstances" including a "comparison of hours, wages and conditions of employment of the employees involved with employees performing similar services and with other services generally." The Union asserted, as will be discussed more below, that a comparison of the wages and hours of employment, the CPI-U figures and all other relevant circumstances, the arbitrator should conclude that the Union's is the more reasonable of the two positions in this matter and award that.

3. The Union further noted that the parties agree that wages paid to Helena firefighters should be comparable to wages paid in the other Montana "first class" cities, of Billings, Bozeman, Butte, Great Falls, Kalispell and Missoula. While there were some cities that did not have the same classifications and not all of the other cities have all of the same classifications as Helena, the parties were able to agree on the specific job titles from those other cities that are comparable to the different job classifications in Helena.

4. The Union also noted that there was agreement that the City of Helena's Fire Department is split into two Bureaus; i.e. Fire Suppression and Fire Prevention. This is in addition to the Fire Chief, Assistant Chiefs and non-bargaining unit administration employees. There is currently one vacant fire suppression position.

5. The Union noted that the schedules are somewhat complicated and include a so-called "Kelly Day," which is an unpaid day off every 6th day. The parties agree that the bargaining unit employees work 2,434.93 hours per year. The Union pointed out that the Firefighters in other comparable cities work varying numbers of hours, some work more and some fewer. Billings' firefighters work 2272, Bozeman's, 2756, Butte's 2112, Great Falls and Missoula's both work 2184 and Kalispell's work 2682.

6. The Union asserted most strenuously that the bargaining unit employees are hourly employees under both Section 207(k) of the Fair Labor Standards Act, FLSA, and the parties' labor agreement. The mere fact that they are paid on what appears to be a monthly basis does not make them salaried. The wage structure is set up to equalize the pay for the firefighter due to their irregular schedule. The Union noted that the City tacitly and explicitly acknowledged that the firefighters covered by this Agreement are hourly employees since the City agreed that they are entitled to overtime at time and one-half for overtime hours. See Section 18 of the Labor Agreement

7. Accordingly, the Union argued that the focus when comparing Helena firefighters' wages to other comparable jurisdiction must be their hourly wage, not, as the City suggests, their monthly wage. As the above agreements show, the other cities do not require the same number of hours as in Helena and their wages are vastly different as well. It thus makes no sense to compare monthly wages because of this disparity in the wages and number of hours.

8. The Union further argued that the history of negotiations for collective bargaining agreements between these parties shows that they have traditionally focused on hourly wages and not monthly salary or the like. The Union pointed to the 1999-2002 contract in which the Union agreed to an increase in the number of hours worked in exchange for an increase in hourly wages.

9. In the 2002-2004 contract, which was the subject of an arbitration between the parties before Arbitrator Axon, also dealt with the hourly wages. In fact, Arbitrator Axon specifically awarded the Union's position with respect to the top firefighter hourly base wages. The Union argued that the City is now seeking to suddenly change the focus to monthly wages without any justification or rational basis. The Union asserted that because these employees are non-exempt the law requires that the hourly comparisons be used.

10. The Union asserted that the appropriate methodology for determining the appropriate wage for the firefighters is thus to reduce their pay to an hourly rate. In short, the Union calculated the hourly wage paid to Helena bargaining unit firefighters and compared that to the average hourly wage paid to firefighters in comparable positions in comparable cities. The Union then noted that it determined the hourly wage for each rank in the bargaining unit and the hourly wage for each comparable position in the comparable cities and then averaged the hourly wage paid to employees in the comparable positions. The Union's position is thus based on the pay increases for each rank equal to the amount needed to bring that rank to the average hourly wage paid to firefighters in comparable positions in comparable cities.

11. The Union's position as summarized in Union Exhibit 5 with respect to hourly wages as compared to the average wages of the comparable cities is as follows: (note that the position set forth above was for the monthly salary but these figures are the extensions of those to hourly wage figures):

Rank	Helena Existing Pay Per Hour	Statewide Average Per Hour/Union Offer
Battalion Chief	\$27.84	\$29.40
Captain	\$24.11	\$25.09
Lieutenant	\$22.16	\$22.87
Firefighter II	\$20.57	\$21.21
Firefighter I	\$19.66	\$20.06
Confirmed FF	\$19.02	\$19.18
Probationary FF	\$17.75	\$18.59

12. The Union contends that even though there was agreement on the wage figures for literally all but one of the ranks in each of the comparable cities, the parties did not agree on the base wages for Bozeman. The Union argued that it was not appropriate to reduce the Bozeman wages by 4% due to the holiday pay structure there. The Union argued that the true measure of the Bozeman wages should thus include the additional 4% whether one uses an average or the median. The Union pointed out that until 1992 the Bozeman firefighters received no holiday pay but that Bozeman ended this practice and increased the base monthly wage by 4%. Thus, in reality, the Bozeman employees actually get holiday pay and the 4% should be included.

13. The Union asserted that the City should not use a median to calculate the appropriate comparable wage. Instead the Union asserted, the appropriate measure should be an average. The Union noted that the parties have agreed to most of the wage rates (with the exception of the Bozeman wage rates set forth herein) and argued that using the median results in a skewed result when compared to the comparison cities. An average keeps Helena firefighters where they have traditionally been when compared to the comparison cities whereas a median does not.

14. Moreover, the City included the City of Helena in the list for determining the median. It is not appropriate to include Helena on that list of comparables since it is at that point comparing itself to itself. Thus, not only is the City using the incorrect method, i.e. a median as compared to an average, it is not even applying the correct methodology for using the median. Accordingly, the City's number are skewed, as they were in the Axon award, and should be similarly disregarded.

15. The Union pointed to the criteria set forth in the statute, Montana Code 39-34-105 (5), which provides as follows: "In arriving at a determination, the arbitrator shall consider any relevant circumstances including (a) the comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services, (b) the interests and welfare of the public and the financial ability of the public employer to pay, (c) appropriate cost-of-living indices, and (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment." The Union asserted that it does not require that these criteria be applied with objective certainty nor does it define the weight to be given to each of them.

16. The Union asserted that the most important criteria is "the interest and welfare of the public is not served by a salary and benefit package for Helena firefighters that is substandard." The Union asserted that the parties agreed that the interest and welfare of the public is served best if Helena firefighters' wages are comparable to the wages paid to in other first class Montana cities. See, e.g. Union Exhibit 9, Axon Award at 21.

17. The Union took issue with the assertion by the City that it does not have the money to pay for the Union's requested increases. The Union pointed out the tautological reasoning of the assertion that the City "did not have this budgeted" and notes that if that were the determining criterion all a public employer would have to do is to set its own internal budget for what it offered and leave it at that – this would be the equivalent to simply disregarding the language of the statute cited above.

18. The Union further asserted that the City is in reasonably healthy financial shape and that there would be no untoward consequences if the Union's proposal were ordered. It would be only \$60,657.32 more than the City's offer. (The Union noted that the total cost of the Union's offer over the 2009 pay rates was \$67,732.52 but that the City must have the ability to pay for its own offer so the best measure is to look at the difference between the two offers to determine the true "additional cost" of the Union's proposal).

19. The Union asserted that even this modest actual additional cost on a budget of more than 1.742 million is not by any means an unreasonable request. Moreover, the Chief testified that at worst he would simply leave the vacant position unfilled for a short time to make up the additional cost to the City of the Union's request. There would be no "parade of horrors" that would occur either financially nor to public safety. Finally, the City did not raise this issue until the hearing and did not raise it at the mediation nor at any time prior to the hearing. Thus the City's argument in this regard should be viewed with considerable skepticism at best and should be rejected as without sufficient evidentiary support at the very least.

20. The essence then of the Union's argument is that the parties have agreed to most of the facts necessary to determine this issue and have agreed that the wages should be comparable to wages paid in Montana's other first class cities. The Union further argues that the law is firmly established that firefighters are hourly employees and that the hourly wages of the comparable cities should be used to determine this issue. Here, the Union asserted that if one uses the average of those hourly rates, the arbitrator should conclude that the Union's is the more reasonable of the offers and award its position in this matter as set forth above.

CITY'S POSITION

The City's position is for a 0.1% increase in wages for the bargaining unit members in 2010.

This results in a wage structure as follows:

POSITION	FY 10 salary
Battalion Chief - Suppression	\$5,650.28
Fire Marshal - Prevention	\$5,650.28
Captain	\$4,892.28
Lieutenant	\$4,495.69
Firefighter II	\$4,174.34
Firefighter I	\$3,988.85
Confirmed Firefighter	\$3,860.11
Probationary Firefighter	\$3,602.59

In support of this position the City made the following contentions:

1. The City noted that the wage provisions of the current agreement call for an adjustment pursuant to Section 12 as follows: "Effective July 1, 2009 (FY10), monthly wages will increase by CPI-U, US City Average, December 2008. An adjustment approved by the commission for any positive wage adjustment will be given." The City notes that this was done and a 0.1% increase was granted. The City asserted that this was all that was justified given the circumstances in place now.
2. The City further asserted that it conducted a wage study that showed the relative wages of the various positions within the Fire Department. This showed the Captains' pay was low so the City adjusted the wages for the Captains' position by \$73.70/month. The City further asserted that the remainder of the positions were either at or slightly above market and were thus not adjusted.
3. The City asserted that basic methodology for the wage survey was to compare the annual salaries paid by the City against the median of annual salaries paid by comparable jurisdictions, i.e. Bozeman, Great Falls, Billings, Kalispell, Missoula and Butte. The City agreed that the above referenced jurisdictions were the appropriate comparables to use to determine the wages for the Helena bargaining unit.

4. The City's methodology was to use monthly salaries and find the median, which included the City's wages for each position. The City asserted that using the median is the most appropriate measure since it maintains the relative position that Helena has been in over time when compared to the comparison jurisdictions. The City noted that when one compares the hours worked in the various comparison cities, it become obvious that an hourly number is not accurate since several of the cities require far fewer hours than Helena does. See City Exhibit 10. That exhibit shows the effect of using hourly figures and how the average becomes overly weighed because of the lower hours of the largest three cities.

5. The City asserted that the issue here is whether the arbitrator should accept the City's methodology of using the median based upon monthly wages or the Local's proposal to use the average hourly wage that excludes the City's wages in the calculation. The City asserted that its methodology is more appropriate here since it maintains the same relative position as Helena has had with respect to the comparison jurisdictions in the past.

6. The City compared the populations of the various comparison cities and noted that Helena's is 6th out of the seven cities yet its wages rank far higher than that. The City pointed to City exhibit 10 and asserted that this shows the incongruity of the Union's position. The City further asserted that the examination of the Union witnesses showed that the Union was in fact "playing games" with the numbers. The City noted that when considering the facts as shown on Exhibit 10, even if the monthly salary is constant for all six of the comparable cities, the City's monthly salary is higher than either the median or the average.

7. The City argued that the holiday pay for the Bozeman employees should be backed out given the history of that unit going back to 1992 when the Bozeman employees were given a 4% increase for their holiday pay. Helena fire fighters are given a specific holiday pay benefit as a part of their contract and are thus getting that "on top of" regular wages. Thus, it is appropriate to alter the figures from Bozeman. The City agreed with all of the Union's wage figures for the other cities.

8. The City noted too that the Union's position is heavily weighted in favor of the higher paid positions, i.e. 5.58% for the Battalion Chiefs and 4.08% for the Captains. The lower paid employees would receive far lower percentages. These figures are of course exacerbated in absolute numbers since the actual dollar figures would be so much higher for these high wage earners.

9. The City asserted that a monthly figure is a far more accurate measure than hourly figures. The City insisted that the employees like the predictability of a monthly figure since they work irregular schedules, especially given the Kelly Days. Further, the Fire Marshal and Deputy Fire Marshal work 2080 hours per year, as opposed to the 2434.93 worked by the other employees. Thus, using a monthly figure for comparison purposes is a far more accurate and sensible measure.

10. The City also noted that its position maintains the relative position with respect to the external comparison cities and should be adopted. Further, the City noted that the other cities' labor contracts were in virtually all cases negotiated for FY 2010 as a part of the multi year contract. Again, in virtually all cases, those agreements run from July 1, 2008 through June 30, 2010. See City exhibit 9. (Only Kalispell's contract for FY 2010 was not included.) These contracts were negotiated before the sudden and radical change in the nation's and Montana's economy, which occurred in the fall of 2008. Thus, the assumptions under which those agreements were negotiated have changed and would likely not be negotiated in the same way today. The economy of 2010 is frankly not the same as the economy of 2008 before the "crash."

11. The City also pointed to internal comparisons as well and argued that only two of the five collective bargaining units in the City received any increases at all. Police and Support Services Division received a pay increase for 2010 of 2% during the second year of a three-year contract and that was based on the salary survey. Here the Union is seeking an overall increase of nearly 4% which is simply not justifiable under any measure – internal or external.

12. The City argued that the prior awards of arbitrators do not control the result here. Moreover, there were very different circumstances involved in those cases and very different evidence offered by both sides. This case must rise or fall on the circumstances and the statutory factors present now; not on those that may have been in place several years and several contract rounds ago.

13. The City argued too that there is a finite amount of money available and that fire fighting services while important, do not somehow trump or take precedence over police or other public services provided. Thus, any increase in wages for the fire unit must come from somewhere and, not surprisingly, it will have to come from other services. The City cannot create additional revenue for itself as the Union seems to suggest. The City noted that under Montana Law it has only a very limited ability to increase taxes and thus fund any large increase as is proposed by the Union.

14. Moreover, the voters in Helena denied permission to increase funding for the fire Department in the 2008 election. The City provided evidence that the economy is both recessive and stagnate, not only in the City but nation-wide. As noted above, even the increase proposed by the City will be funded by one-half. Funding is a problem and even though the City could make the adjustment by keeping the vacant position open for a longer time this could result in decreased services and response times. Moreover, future increases in funding are unlikely to come any time soon.

15. The City noted that there was no evidence that the working conditions or job duties and requirements have changed nor was there any reason to justify the increase sought by the Union. Further, there was no evidence of any change in any of the comparison jurisdictions that somehow made their work different from what those positions have been required to do over time either. Thus, the Union has not met its burden of showing why a nearly 4% increase is justified in today's economy.

16. The City asserted that the ultimate goal is equality of treatment of these employees with respect to other Helena employees. Fairness in pay between the City's employees will be achieved best by awarding its position. The Union's position will achieve only the elevation of these employees over their peers within the City and in comparison to their peers in other Montana jurisdictions.

MEMORANDUM AND DISCUSSION

This is a total offer final package arbitration. The arbitrator must therefore select either the City's or the Union's total package. This limitation makes it difficult on occasion to select between positions as there are many times when one party's position is reasonable and justifiable in one respect while in some others another party's position may well also have considerable merit. When that is the case, as here, there is a temptation to find a figure somewhere in the middle of the two respective positions that reflects the relative merits of both parties' arguments.

With this type of interest arbitration however that option does not exist. The arbitrator must therefore select the most reasonable and justifiable position as a total package. As Arbitrator Axon noted, a total offer final package arbitration of this nature removes any power to modify or fine tune either side's position or to fashion an award that reflects the best of both arguments or conforms to the most appropriate evidence brought forth by either side. For better or worse, the arbitrator must select the least unreasonable option.

There were well-reasoned assertions made by both sides. Indeed, the case was quite well presented by the advocates and witnesses by both parties. There were also assertions made by both that lacked evidentiary support which made the decision here all the more difficult. Ultimately though, the question is how the statute and the evidence interplay to arrive at an award that best reflects the economic reality and statutory admonitions given to the arbitrator in this matter.

The parties agreed on the comparison cities to be used. These were Billings, Missoula, Kalispell, Butte, Great Falls and Bozeman. They agreed for the most part on the wage figures in those cities and on the comparable positions to which the Helena positions should be compared.

There was one exception to the agreement on the wage figures for Bozeman based on the question of holiday pay. The City argued that the wage figures should be reduced by some 4% because of holiday pay. There was very little evidence adduced at the hearing as to why the city reduced the Bozeman wages for comparison purposes here other than the somewhat bald assertion that the Bozeman firefighters holiday pay is somehow different than Helena's and therefore the 4% Bozeman firefighters receive should be "backed out" for purposes of wage comparisons.

The Union on the other hand asserted that until 1992 Bozeman firefighters did not receive holiday pay and were instead paid a separate check once per year to cover the holidays. After that they apparently received holidays off but if they worked the holiday they received a days pay for it, in effect receiving double time for it. This is apparently the same benefit granted to Helena firefighters as well. On this record the Union's position with regard to the 4% has merit. Thus, for purposes of wage comparison the Union's figures for Bozeman were used.

There was then a major disagreement on whether hourly wages should be used or monthly figures. The City argued that a monthly figure should be used since the wage figures are listed as monthly salary figures in the collective bargaining agreement. The City also pointed out the fact that the so-called Kelly Days can sometimes affect the monthly wages if hourly figures are used so the parties have agreed to place monthly figures in the agreement.

The Union on the other hand argued that firefighters are by law hourly employees; they are not exempt under the FLSA and are entitled to overtime based on an hourly wage. The fact that there are monthly figures placed in the agreement is more for convenience of both parties and so the employees can count on a regular paycheck that is unaffected by the vagaries of the sometimes unusual and irregular schedule of firefighters.

On this record the Union's assertions had greater merit. Firefighters are indeed hourly employees even though their wages are listed in the contract as monthly figures. They are certainly not "salaried" in the sense that their wages are considered monthly. This too was reflected in the Axon award; which, while not controlling here on the ultimate question of the appropriate wage, did set forth certain findings whose logic carried over to this matter. There was no evidence that the parties have changed the understandings that were in place at the time of that earlier award sufficient to change these employees status. Thus, an hourly figure should be used to determine the appropriate wage.

The City argued in this regard that the population figures in these various cities should have an impact on this discussion. There was little merit to this position. A city's population may be an interesting comparison but it is not a governing factor here. Population may well be a measure of *how many* employees may be needed to provide coverage for the services required by that City but does little to provide guidance on the question of the appropriate wage to be paid. That frankly may depend on the number of hours required to be worked, as discussed herein, but the number of hours required does not appear to correlate well to the size of the city.¹

Next there was a disagreement between the parties as to whether the median of the comparison cities should be used or the average should be used.² The Union asserted that the parties "have agreed that the interest and welfare of the public is served best if Helena firefighters' wages are comparable to the wages paid to in other first class Montana cities." Union Brief at page 11.

¹ As an example, the largest city in Montana is Billings with slightly over 100,000 people yet it requires 2272 hours of its employees as compared to the 2343.93 in Helena. Helena has a population of approximately 28,000 people. On the other hand, Kalispell has a slightly smaller population than Helena, with some 20,300 people, yet it requires 2756 hours of its employees. See City Brief at page 3 and Union exhibit 5. Thus, there was no real correlation between population and the number of hours worked. This was a consideration in determining the appropriate measure here, i.e. hourly versus median comparisons though. See also, City Exhibit 10 for an illustration of the effect of these figures on the hourly comparison wages.

² An average is derived by adding up a list of numbers and dividing by the number of figures on that list. Thus, if there are 6 other cities, the average of those cities is the total wages for a particular category divided by 6. The median on the other hand is derived by finding the middle number in the list - half the numbers will be smaller and half will be larger. To determine the median, place the numbers on the list in order from smallest to largest. If there is an odd number of numbers, the median is the middle number. If there is an even number, the median is the average of the two middle numbers.

That was not exactly the case. The quote comes from the Axon Award at page 21 and is a statement made by the arbitrator. It was not an “agreement” by the parties.

Certainly it was not a specific agreement made on this record. However, the parties were in apparent agreement that the Helena firefighters’ pay should be maintained at a relative level when compared to those other jurisdictions, at least when using an external comparability standard.

The Union argued that the prior award by Arbitrator Axon used hourly figures and used an average in order to maintain the position Helena has with respect to the other jurisdictions. Several distinguishing factors appear in that award however. First, the parties’ approach to the case was somewhat different in that the comparisons for the wages were the top Firefighter hourly base wages. The parties did not break down each individual category, i.e. Battalion Chef, Captain, Lieutenant, Firefighter I and II, Provisional and Confirmed Firefighter, as they did here. It was thus far easier to arrive at an average in that case.

Clearly, Arbitrator Axon used average hourly figures. See; page 20-21 of his award. What was also apparent was the crux of the decision to keep Helena where it was with respect to its ranking as compared to the comparison jurisdictions. Slip Op at page 20. Here that same general consideration is at work as well.

The parties were in apparent agreement that the goal is to keep Helena’s pay structure in line with the comparison jurisdictions; they differed on how to do that. As noted, the parties were both using fairly complex mathematical calculations to support their positions. The City applied a somewhat complicated and frankly mathematically confusing formula that compared the median salary to the population of those cities. As noted above however the population is not a good measure of salary. (Certainly, size of a city might affect the actual cost of living there and other quality of life factors but those were not strictly at issue here nor was there any evidence of how those factors played into this consideration).

Several factors were at work in making the determination of whether to use average figures as the Union suggests or median salary as the City suggests. First, the City's methodology of using Helena as a part of the median was inappropriate and resulted in a skewed figure for the median – the Union is correct – one should not compare oneself to oneself in determining a median. Thus the City's figures were incorrect in that regard. The Union's calculations, while not perfect, were a better measure of how Helena's wages compare to the comparison jurisdictions and were used.

Second, as noted above, the hourly figure is the better measure of the pay for firefighters and an average of those figures would result in the better measure of how Helena's wages compare to other jurisdictions.

Finally, a review of the wages paid for 2010 in the other jurisdiction shows that indeed they were granted increases in the range of approximately 4%. Some were lower but the Union's proposal is for a 3.89% increase overall and that certainly was far closer to the wage increases granted for 2010 in the comparison jurisdictions than the City's 0.1%. These factors weighed heavily in this decision.

It should also be noted that the bulk of the comparison jurisdictions had multi-year contracts with the 2010 wages already set in those contracts. The City argued that it is likely given the economic realities of the present time that those same wage increases might not be granted if those jurisdictions were negotiating anew for their 2010 wage rates.³ That is speculative at best even though there was frankly some intuitive logic to that argument. On this record however, the arbitrator was faced with the evidence of what the jurisdictions actually settled for and cannot ascribe or divine what might have happened under different facts. Obviously, this is a factor that the parties might well want to consider in the bargaining for future contracts but for now we are faced with the facts we have

³ City Exhibit 8 showed the cover pages and wage provisions of the comparison jurisdictions' wages for their respective contracts. Billings and Butte/Silver Bow County CBA's run from July 1, 2008 to June 30, 2010; Bozeman's and Missoula's CBA's runs from July 1, 2008 through June 30, 2012 as well. The parties provided only the 2005-2008 CBA for Kalispell and did not provide a copy of the CBA for Great Falls so it was not known exactly when those CBA's were negotiated or what period of time they covered. The parties were in agreement on the appropriate wage comparisons for those cities however.

Certainly too, there is some danger in a case where the comparison jurisdictions have already set wage increases for 2010, that Helena's will eventually fall too far behind if the City's proposal is awarded and that is a major concern.

Other factors were considered as well. Not the least of them was the fact that internally, most of the other employee groups were not given any increase at all. The Police and Support Services Division received 2% increases during the second year of a three-year contract and those were apparently based on the salary survey. See; City Exhibit 6. There was some evidence to suggest that these units were slightly underpaid when compared to the market and so they, like the Fire Captains, were granted a salary increase based on the salary survey done by the City. See City Exhibit 6. This certainly was a factor that mitigated in favor of the City.⁴

There was considerable discussion and disagreement about the City's ability to pay. The City argued that its ability to raise additional revenue is severely hampered by State law and economic reality. Moreover, the voters rejected a referendum recently that would have added revenue to the fire department. The City argued that they have already budgeted for their increase only and cannot now go back and change that figure.

There was some evidence to suggest that the financial straits of the City are not completely bad. And that the City is relatively healthy financially. There was insufficient evidence to suggest that the City was unable to pay for the increases or that it faces any sort of economic crisis or anything of the sort. The City is growing, even compared to the rest of Montana, See Union Exhibit 4. Thus, the increases sought by the Union, even though clearly larger than the City's proposal, will not result in a diminution of services or response times for the Fire Department.

⁴ It may well be academic but internal consistency is certainly a factor to consider in interest arbitrations generally. If there had been jurisdiction to award something other than the final offer of one or the other of the parties, this figure would have been given very strong consideration in order to arrive at a figure that was both appropriate internally and externally. As noted however, there was no such option.

Further, the argument that the City has already budgeted for this is somewhat tautological. If an employer can avoid a wage increase simply by failing or refusing to budget for it the notion of collective bargaining and interest arbitrations would be severely undermined. The question is, as always, not whether the City can pay for the increases or whether it has budgeted for it but rather whether the factors mandated by the statute make the increase appropriate or not.

Here the Union demonstrated that the City has the ability to pay for the increase and that it will result in an increase in cost of approximately \$67,732 over the City's proposal. Further, there was some evidence that the Department will simply leave open the now vacant position that is already open for a period of time to "make-up" the difference in the cost of the Union's proposal. The position has been vacant for some time without apparent difficulty (at least no such evidence is adduced on this record) so the cost to the City will be manageable and not unreasonable.

As noted at the outset, both parties made very articulated arguments and both positions had some logical incongruities. The statute sets forth the standard by which these cases are to be decided. As the Union noted, the statute provides only the broadest guidance to determine the most appropriate award. Indeed, in discussing the criteria to be applied here, the Union correctly pointed out that "the statute does not require that these criteria be applied with anything approaching objective certainty and the statute does not define the weight to be given to each of the criteria."

The statute Montana Statute, 39-34-103(5) provides as follows:

"(5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:

- (a) comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;
- (b) the interests and welfare of the public and the financial ability of the public employer to pay;
- (c) appropriate cost-of-living indices;
- (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment."

Thus the main guidepost is simply that the arbitrator “shall consider any relevant circumstances.” The statute goes on to provide a list of things the arbitrator might consider but the list is not exclusive.

Here many of the matters on the list were considered. There was certainly a comparison of the hours, wages and conditions of employment with employees performing similar services. This was the comparison to other Montana jurisdictions as discussed above. As noted, a comparison of the average hourly wages was considered the most appropriate comparison for purposes of comparing these wages. There was also a review of the other terms of employment, such as the holiday pay issue in Bozeman. The parties did not provide evidence of the other terms and conditions of employment in those jurisdictions and presumably were concerned only with the wages for those comparison cities and not how the Helena bargaining unit employees’ terms may have compared to the other cities.

There was also a comparison of the wages to the other employees generally. As noted above, internal consistency is a factor to be considered, and one that is “traditionally used in the determination of wages, hours and conditions of employment.” However, while fringe benefits and other terms of employment are best compared internally, wages are compared both to internal and external sets of employees. Here a factor that weighed heavily was the amount of the increases for 2010 given to the external jurisdiction employees. Certainly, as noted herein, if there had been jurisdiction to determine a different number, the 2% granted to the Police and Social Service employees within the City of Helena might well have changed the result here. On balance though, the fact that most other external jurisdictions were granted approximately 4% makes the Union’s position reasonable.

Consumer Price Index, CPI, considerations were also considered. While the CPI was somewhat lower than what the Union is seeking, the Union's request so not so unreasonable as to trump the other considerations here. The CPI-U was shown to be 2.72% for 2010. See City Exhibit 2.

The City was shown to have the ability to pay for the increase. While “can” should never be equated with “should” there was here a showing that the increase can and perhaps already has been absorbed by the Department in the vacancy that currently exists. Had there been a showing of a detriment to public safety or that there would be some other dire consequence either financially or on the operation of the Department by granting the Union's request the result might again have been different. On this record no such showing was made.

Finally, the City made what was essentially an equitable plea and asserted that fundamental fairness and one’s “gut” sense should govern here as well. While there is some pull to that argument, especially given the economic circumstances around the nation and the state of Montana, this is neither a statutory criterion nor is it one that is traditionally used to determine appropriate awards either in arbitration or in negotiations. Interest arbitrators, indeed arbitrators in general, should rule based on evidence and logic, argument and well-established rules of process and negotiations – they should in short rule with their heads rather than with their hearts and this case provides a good example of how that well reasoned admonition manifests itself. While there was some cogency to the claim that at this point in history even a small increase should be regarded as something of great benefit, the evidence and assertions demonstrated by a preponderance of the evidence that the Union’s position was more justified than the City’s on this record.

Accordingly, taking into consideration the factors listed by the statute and those traditionally used in the determination of interest matters it is determined that the Union’s proposal is awarded.

AWARD

The Union’s position is awarded on a total package final offer basis.

Dated: April 19, 2010

Jeffrey W. Jacobs, arbitrator