

BEFORE FACTFINDER LeROY H. SCHRAMM

IN RE the FACTFINDING BETWEEN

LOCAL 4432, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS and

The HEBGEN BASIN FIRE DISTRICT , MONTANA

FINDINGS AND RECOMMENDATIONS

Procedural Background

Local 4432 of the International Association of Firefighters (IAFF) and the Hebgen Basin Fire District (i.e., West Yellowstone, Montana and environs) are parties to a collective bargaining contract. Their most recent contract had an expiration date of June 30, 2020. Since then the parties have continued to operate under the terms of that contract. The parties negotiated in an attempt to reach agreement on a new contract but they have thus far been unsuccessful. They also attempted mediation which also was unsuccessful. Thereupon the parties requested a list of potential factfinders from the Montana Board of Personnel Appeals.

On August 27, 2020 the parties notified this factfinder that he had been selected by the parties to conduct the requested factfinding and on that same day I notified the parties that I accepted the assignment. A hearing was initially scheduled for November 23 and 24, 2020 in West Yellowstone. That hearing was eventually canceled and was rescheduled for December 28 and 29, 2020 in West Yellowstone. That hearing was convened on December 28 and took only a single day. The Fire District was represented by Ms. Cindy Walker, Attorney. The Union was represented by Ricky Walsh, IAFF Seventh District Vice President. Both sides presented witnesses who were sworn and were subject to cross examination. Both sides also presented

documentary exhibits. After the hearing the parties agreed to submit post-hearing briefs no later than January 22, 2021. Each party submitted their brief in a timely manner.

The Factfinding and Arbitration Statutes

Montana law prohibits firefighters from striking (MCA 39-34-105). In the place of a strike the legislature has provided, in successive stages, mediation, factfinding and binding arbitration to settle contract negotiation differences involving public employers and firefighters. The purpose of factfinding is to assist the parties in reaching voluntary agreement, thus avoiding arbitration. But because the parties are not legally bound to accept a factfinder's recommendations the possibility of arbitration always looms over a factfinding procedure. Therefore, it is reasonable for a factfinder to use the standards laid out in the firefighter arbitration statute to derive his recommendations. Those standards, found at MCA 39-34-103(5), are as follows:

- 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.

The firefighter arbitration statute also specifies that the parties are to submit to the arbitrator their final positions on each unsettled issue and the arbitrator is then to pick the position of one side or the other. The statute is not clear on whether the arbitrator must pick the entire package of one side or the other or whether he can pick one side's final position on one

issue and the other side's final position on another. Although this "issue by issue final offer arbitration" is not clearly mandated by statute it has been commonly agreed among labor relations practitioners that this is what was intended by the statute.¹ However, a factfinder is not so constrained. A factfinder can pick and choose from among the various portions of each side's demands and try and craft a package that is consistent with the statutory arbitration criteria and which seems to the factfinder best suited to meet with favor from the parties, thus avoiding arbitration and saving the parties the several thousand dollars each that arbitration would cost them; a not insignificant sum for a fire district and bargaining unit as small as Hebgen Basin (8 full time employees in the collective bargaining unit).

The Issues Brought to Factfinding

It is not exactly clear how many items are at issue between the parties. For example the Union presented a document headed "What If Offer From the Union May 7th" (Union Exhibit #2). That document contained demands on issues that were not explained at hearing nor were they discussed in the Union's brief. This includes such topics increasing certification pay and increasing stipends for cpr instructors. It is possible these matters have been settled or dropped prior to the factfinding hearing. But since the parties made no presentation on them I have no basis to render any opinion on them.

The issues on which the parties did bring forth testimony and arguments for and against include: (1) increases in base wages for firefighters and paramedics; (2) a housing stipend; (3)

¹This is in contrast to the police officer's arbitration statute which quite clearly mandates that the arbitrator pick one side or the other's complete final offer package. "The arbitrator shall decide the unresolved mandatory subjects contained in the *last best offer package*." MCA 39-31-504(3), emphasis added.

payment of overtime for mandatory meetings and assignments outside of an employee's normal work shift; (4) treatment of temporary workers and student interns; (5) language change on minimum staffing during the busier summer months; and (6) initiation of monthly payments to the Union's Medical Expense Reimbursement Program. Each of these will be discussed individually.

Changes to Base Wages

The current collective bargaining agreement (Employer Exhibit #1) establishes the pay for covered employees in Article 20 and Addendums A, D & E. The pay consists of a base hourly wage (Addendum A) plus longevity amounts (Addendum D) and certification pay (Addendum E). The Union demand is for a 2% raise to the base rate in year one; a 2% raise to the prior year base rate in year two; and a 3% raise to the prior year base rate in the third year of the CBA. The Fire District offer is a 0 (zero) percent raise to the base rate in year one; a 1% raise in year two; and a 2% raise to the prior year base rate in year three of the CBA.

Neither side presented what, in my opinion, were accurate or complete figures on the actual cost of the corresponding proposals and their effect on, not only the District's budget, but also on the resultant changes to each employee's income. To do that one must look not only at the base rate changes but also on the impact of the yearly longevity steps laid out in Addendum D. The parties made only passing reference to longevity at the hearing, so I can only assume that it will remain as is. The CBA says the longevity increments are contingent upon satisfactory performance appraisals. I will assume that regardless of this language that longevity steps are routinely given in all, or virtually all, instances. Because the bargaining unit only has eight employees it is a simple matter to apply the Union and District wage proposals to each employee

in the unit. I have done that on the following pages in Appendices 1, 2 and 3. But first, some explanations of how the Appendices were derived and some cautions about the numbers displayed therein. One, I have only included 7 employees in the calculations because one bargaining unit member has recently resigned and as of the date of the hearing had not been replaced. Second, I used as my starting point the salaries for each employee as listed in Employer Exhibit #3, to which the Union took no exception. Third, as noted above, I assume each employee will earn a longevity step each year. However, while Employer Exhibit #3 listed total salary it did not indicate how much of that was attributable to steps and at what step level each employee was. Fortunately, the Seniority List in Addendum C of the CBA gives each employee's date of hire, from which one can pretty much figure out at which longevity step each employee resides, with the limitation that no longevity was earned prior to 2009, when the District as presently constituted was formed. Even using those hire dates as a guide it is possible in some instances that I placed some employees either one step too low or one step too high on the longevity spectrum. This may result in some modest change in the numbers for some employees, but the overall level of wage increases should not change much as a result. Fourth, since the proposed percentage increases only apply to the base rate I reduced the listed salary in Employer's Exhibit #3 by the amount of the employee's longevity pay and applied the percentage increases to that reduced amount. Fifth, I assumed that each employee would work the same amount of overtime each year so that it was appropriate to increase even the overtime amount by the proposed percentage increases. Finally, even though it is not broken out, I am assuming the salaries listed in Employer Exhibit 3 included certification pay, which the current contract limits to a maximum of \$1200 yearly. Because it was not broken out the yearly percentage increases

were applied to the entire listed salary (minus longevity), including any certification pay.

However, because of the \$1200 limit this could effect the calculations by only a modest dollar amount, at most in the mere dozens of dollars over the full three years. And the effect would be less if an employee is not at the \$1200 threshold.²

The Union demand (2%, 2%, 3%) if compounded over three years would by itself amount to an increase of 7.2% over three years. However, when one calculates the effect of longevity steps the impact on employees is raises over the 3 years that range from 7.9% to 8.7% (see Appendix 1 at p. 17 below). The Fire District offer (0%, 1%, 2%), because it is smaller and back loaded compounds over three years hardly at all above 3%. However, the effect of longevity along with the percentage increases results in employee income increases over the three years that range from 3.8% to 4.7% (See Appendix 2 at p. 18 below). How does this compare to inflation in the recent past? Using the figures from the Montana Association of Counties the Consumer Price Index went up 2.4% in 2018, 1.8% in 2019, and 1.2% in 2020. Of course, we can not foresee the future but when the Bloomberg company surveyed a large group of economists about their expectation for inflation in 2021 the median number was 1.1%, continuing the trend of decreasing inflation over the past few years.

One can see that the Fire District offer results in actual pay increases that are closer to what inflation has been in the past and what is expected in the near future than the demands of the Union. Even as modest as the District's proposed increases are they probably exceed recent

²The precise wage calculations are admittedly something of a rough estimate for each employee, limited by the information presented to me. But even though the numbers may vary a bit from what would be calculated with perfect information, they do give one a pretty good idea of the effect of the respective offers on employee income, disregarding any contractual changes not brought to the factfinding.

past inflation and near term expectations of cost changes. However, as the Union emphasized at hearing, inflation rates are one thing, and the actual cost of living is another. And in that regard, West Yellowstone is one of the most expensive places to live in Montana. This is a subject that will come up again later when we look at the Union's demand for a housing stipend.

But price indices are only one criterion which state statute says is relevant for arbitrators to examine when looking at contract proposals. As noted earlier, two other listed factors are "hours, wages, and conditions of employment of the employees involved with employees performing similar services" and the "financial ability of the public employer to pay." With regard to the first factor it appears that Hebgen's general compensation package is somewhere in the middle of the nine other fire departments the parties agreed to use as comparators (see Union Exhibit #5 and Employer Exhibit #7). However, with regard to call volume Hebgen has a very much lower level than other departments used for comparison. In calendar year 2020 Hebgen responded to a total of 427 calls. On 121 days there were no calls (Employer Exhibit #4). Mitigating this factor somewhat is that Hebgen is the smallest of the comparator departments, so the ratio of calls per employee is not as dramatic as the raw numbers. Also, because Hebgen is some distance from a major medical facility ambulance calls, on average, may take longer than at other departments, although no evidence was adduced to support this otherwise reasonable speculation.

With regard to the ability to pay factor very little persuasive evidence was produced either way. The Fire District is funded by three main streams of income (see Employer Exhibit #8): a mill levy on district property (47% of total revenues); a portion of the resort tax collected by the Town of West Yellowstone (42%); and charges to users of the ambulance service (11%). No

evidence was produced about how these revenues are spent (e.g., how much on maintenance, how much on capital improvements, how much on administration, how much into a reserve fund; how much on insurance; how much on employee compensation; etc.). As a result I have no good way to evaluate the Union's bald assertion made at hearing that "they have the money."

However, District income prospects in the near term do not look rosy. The Town of West Yellowstone is built on tourism, both in summer and winter. This tourism generates a significant amount of revenue for the Town through a so-called resort tax authorized by state law. The impact of Covid 19 has had a negative impact on tourism. Resort tax collections for 2020 have been greatly reduce and prospects for much of 2021 don't look much better (see Employer Exhibit #9). Section 5b of the interlocal agreement between the Town of West Yellowstone and the Fire District (Employer Exhibit #2) says: "[T]he F.A [Town Financial Administrator] shall determine whether the R.T. [Resort Tax] collected for the current year . . . is an increase or decrease compared to the average of the previous five years. . . . If the R.T. collection for the current year is less than the previous years' five year average, the 1.5% increase shall not apply and the payment by the Town to the District shall remain the same as the prior year." (Employer Exhibit #2). Based on this language it is almost certain the District will get no increase in resort tax revenue over the next year or two. In addition, ambulance revenues have been going down over the last few years (Employer Exhibit #10); a trend that is not likely to be quickly reversed in the current economic climate.

Nothing at all was said at the hearing about the expected income from the mill levy on District property. Normally one would expect growth in that amount from year to year, but I am loath to make that assumption in a year when there has been so much economic disruption.

Because the prior CBA expired on June 30, 2020 we are already in the eighth month of the expected 36 month term of the CBA now under negotiation. Based on the incomplete information before me I am compelled to assume that the District's revenue will at best grow at a modest rate for at least the first half of the upcoming CBA term. Therefore, I find the District's wage offer, while extremely cautious and frugal, to be the more reasonable of the two competing base salary offers. However, because of the uncertainty in resort tax collections in the next year or two, and because I was presented no data on projected property tax collections, I suggest that if prior to the beginning of the third year of the new CBA the resort tax collections have risen to a point where the District's allotment will increase by 1.5% as specified by the interlocal agreement that the basic rate increase by 3% for the last year of the contract instead of 2%.

The Issue of a Housing Stipend

Because West Yellowstone has such a high cost of living, and because moderately priced housing is difficult to find in the community, the Union is proposing that the District pay any employee living within the District a \$250/month housing stipend in year 2 of the CBA and an additional \$250/month (\$500/month total) in year 3 of the CBA. Currently 6 employees live within the District and would be eligible for this stipend. Of course, while this may be denominated as a housing or a residency stipend when the money is paid to the employee it is indistinguishable as such and is merely one more component of the employee's taxable income. All employees already have residences, and while \$500/month would allow them to upgrade their housing if they wished, it could also be used for any other purpose, so it is really no different than any other raise to their income. The Union pointed to no other fire department that paid such a stipend, However, the Union pointed out that the Gallatin County Sheriff's Office pays their

deputy assigned to the West Yellowstone area a \$900/month living stipend. I don't find this persuasive. First, although both jobs can be classed as first responders, the jobs are dissimilar and the deputy himself handles 50% more calls per year than the entire Fire District staff. Second, the deputy is only one member of a larger staff, most of whom are posted in the populous northern part of the county, so the stipend can be seen as bringing some equity between purchasing power between employees in disparate parts of the county.

If one combines this stipend with the Union demands on the basic rate one finds that the 3 year income increase ranges from 15.9% to 17.7% (See Appendix 3 at p. 19 below).³ As noted in the prior section, the Department budget expectations for the near future are uncertain, and the raises brought about by the addition of the stipend represent actual salary increases well above any anticipated increase in the cost of living. Therefore, I cannot recommend adoption of the housing stipend.

Overtime Pay

The Union has proposed that overtime pay of one and one-half an employee's regular rate be given for any mandatory meetings or extra shift work required of the employee outside of the employees' regular shift. While such overtime may not always be required by the FLSA it does not seem unreasonable to compensate the employee at this rate in return for the employee's service during time that would normally be time off and away from the job. Also, if I understood

³ The Union seeks to give this stipend to only six unit employees because, due to a 2018 arbitration decision, they are the only ones required to abide by Article 7 of the CBA requiring employees to live within a 30 minute response time. However, no evidence was presented that even those employees exempt from this requirement have lower housing expenses than covered employees. Therefore, Appendix 3 applies the stipend to each employee while recognizing that is not precisely what the Union is asking for.

the testimony correctly, this doesn't happen frequently and it would not therefore be a costly item for the District. I recommend the Union position be adopted.

Treatment of Temporary Workers and Student Interns

The Union and the Fire District each propose a new CBA Article 31 to replace a prior Memorandum of Understanding dealing with the treatment of temporary employees. The proposals are almost identical although the District's clearly includes student interns under the new Article; an inclusion to which the Union does not apparently object. Both proposals allow, but consistent with law, do not mandate that temporary workers may join the Union. However, the Union proposal states: "They will have all benefits afforded the collective bargaining agreement." On the other hand, under the District proposal they "shall not be considered members of the bargaining unit and shall not be eligible for any benefits of the Collective Bargaining Agreement, including the grievance and arbitration provision." The Union has more or less agreed that they will not insist that their proposal goes so far as to mean that such employees are covered by the just cause discharge provision in the CBA and that they can, similar to probationary employees, be terminated "at the sole discretion of the employer." Nevertheless, the Union proposal, on its face, gives blanket coverage to temporary employees regarding all the other sections of the CBA.

The District specifically points to provisions such as eligibility for sick leave, vacation leave, holiday pay, uniform allowance, pension contributions, and the grievance process as items for which temporary workers should not be eligible. With regard to sick leave and vacation leave the District points to state law on making temporary state employees ineligible for such benefits.

While this state law does not specifically cover District employment, the District says it should be instructive and is a good guide to follow. Neither side gave any examples of how other fire departments have handled this issue. A couple of the comparator contracts do address the issue in a limited way. The Anaconda-Deer Lodge contract (Section 13) states: “The sick leave and vacation time provided to employees shall be as provided in State Law “ which could well be interpreted as including the eligibility provisions regarding temporary employees. The Miles City contract (Article 14, Section B) states in part: “Employees are not entitled to be paid for sick leave until they have been continuously employed for 90 days.”

The Union points out that the CBA’s recognition clause (Article 1, Section A) makes the Union “the exclusive bargaining agent for all employees who are or may perform bargaining unit work under the union’s jurisdiction.” This presumably covers the temporary workers and interns. But even if they are included under the recognition clause that does not mean that they have to automatically be covered under the CBA. The Union and the District, for example, agreed to exclude paid volunteers from coverage (Article 1, Section B) even though they may do bargaining unit work. And even if temporary workers are deemed to be within the bargaining unit and covered by the CBA that does not automatically mean they are covered without exception by every clause in the contract. They can, upon the agreement of the parties be excluded from some or all of the sections mentioned by the employer, as noted above, and also some others, such as call back pay and health insurance coverage.

The Union proposal is entirely too broad and, I think, could lead to unintended consequences such as a temporary worker or intern filing a grievance and taking it to arbitration as to whether they are entitled to some benefit like payments for health insurance. Therefore, I

recommend the District's language on temporary workers and interns. As an alternative, if the parties wish, some language such as the following would avoid any unintended consequences.

“The Union and the Employer agree that temporary employees and student interns are members of the collective bargaining unit, but as such, they are only intended to be covered by any provision of the Collective Bargaining Agreement that explicitly and unambiguously extends the benefit of that provision to such employees.”

Minimum Staffing

Currently, minimum staffing for firefighters and paramedics is 2 full time employees at work 24/7. This is authorized by Article 9, Section K of the CBA. However, during the busier middle part of the year the District has also been assigning a third person to be on staff from 8 AM to 8 PM, seven days a week. The District now proposes to memorialize the current practice with explicit contract language. The Union objects to the inclusion of this language. The basis of their objection is that adding this third staff person results in current staff being saddled with unreasonably high levels of overtime and that if the District wishes to increase minimum staffing in this way an additional employee should be hired. I confess, I do not really understand the need for this contract change. The current contract language speaks only to “minimum” staffing, which seems to indicate that the District may opt for staffing at a higher level. Article 3, Section E reserves to the District the right of “determining the . . . personnel by which the employer operations are to be conducted.” Now it may not be prudent management for an employer to subject employees to hours of unwanted overtime. But neither should an employer expect a union to bless with contract language a practice that creates dissatisfaction among its members. As stated above, I may be totally missing the boat on this issue, and I noted my confusion at the

hearing, but the proposed language apparently reflects an already ongoing practice which appears to be allowed by the current language. Therefore, I concur with the Union position on this issue and recommend that the Employer's proposed language not be adopted. This, of course will not address the Union's root problem with the issue.

The Medical Expense Reimbursement Program (MERP)

The Union has requested that the District Contribute \$75/month for each employee, beginning in year one and continuing in year two and three, into a Medical Expense Reimbursement Program. The MERP the Union has in mind is run by the Washington State Council of Fire Fighters Employee Benefit Trust. The contribution would go to the Trust, on a before tax basis, on the employee's behalf and after the employee retires the money could be drawn out by the employee on a tax free basis to pay post retirement health expenses. That is about all that was said regarding the MERP at the hearing. This left many questions unanswered. For example, since the money is going to stay with the Trust for several years, in some cases decades, do the earnings on that money accrue to each employee's separate account and, if so, what has been the past record of earnings? What happens if an employee is not an IAFF member or if their membership lapses? What happens if the employee leaves the profession? Can he/she withdraw or transfer the money? Why is making the money available only for post-retirement expenses preferable to using the same amount of money in a health reimbursement plan that allows the employee to use tax free earnings to pay for current health insurance plan co-pays and deductibles? A sort of a bird in the hand instead of a bird in the post retirement bush. Is tying up this money for years wise for the employee since no one knows what the nature of health insurance plans and laws will be like several years down the road? I tried to get an answer to

some of these questions but if a member of the public goes to the Trust's website the person is given the message: "Sorry, but you do not have permission to view this content." In light of all these unanswered questions I cannot recommend that the District begin making MERP payments as the Union requests.

A Miscellaneous Issue

In the final sentence of the Union's Post-Hearing Brief the Union noted that the employer was requesting that "probationary employees be placed into an at will status." The District Post-Hearing Brief did not mention this issue nor do I recall it being discussed at hearing. I am unsure how this issue arises. The current contract creates a six month probationary period (Article 12, Section A). It states that a probationary employee "may be laid off, discharged, or otherwise terminated at the sole discretion of the employer." Although it doesn't use the term "at will" the language used is a classic definition of "at will" employment.

Conclusion

My recommendations on each of the matters presented to me as being at issue are highlighted in each of the sections above and need not be repeated here. On the economic issues (i.e., basic rate, stipend and MERP) I was motivated by the fact that the Town's collection of the resort tax is unlikely to recover for a year or two and thus the District's resort tax proceeds are likely to be frozen.. If one combines the Union's demands on the three noted economic items the result is a three year increase in payments on behalf of each employee ranging from 17.1% to 19.1% (see Appendix 4 at page 20 below). This is probably two, three or maybe four times what the inflation rate is expected to be over this time period. It is possible that the District could bear such increases without sacrificing other priorities but nothing brought forward at hearing

demonstrated that and I am reluctant to assume that with no supporting evidence.

Dated this 10th day of February, 2021

/s/

LeRoy H Schramm
Factfinder

Appendix 1

Union Wage Demand (2%, 2%, 3%, with longevity included)

<u>Employee</u>	<u>2020 Wages</u>	<u>2021 Wages</u>	<u>2022 Wages</u>	<u>2023 Wages</u>	<u>3 year %</u>
Egging	\$74,109	\$75,729	\$77,379	\$80,157	8.2%
Gallagher	\$63,767	\$65,180	\$66,620	\$69,074	8.3%
McBirnle	\$73,733	\$75,904	\$77,633	\$80,139	8.7%
Mitchell	\$74,448	\$76,635	\$78,377	\$80,905	8.7%
Polansky	\$75,025	\$76,814	\$78,488	\$80,973	7.9%
Stoker	\$66,413	\$67,808	\$69,372	\$71,910	8.3%
Zimmerman	\$70,808	\$72,512	\$74,102	\$76,455	8.0%

Appendix 2

Fire District Salary Offer (0%, 1%, 2% with longevity included)

<u>Employee</u>	<u>2020 Wages</u>	<u>2021 Wages</u>	<u>2022 Wages</u>	<u>2023 Wages</u>	<u>3 year %</u>
Egging	\$74,109	\$74,253	\$75,135	\$77,100	4.0%
Gallagher	\$63,767	\$63,911	\$64,690	\$66,446	4.2%
McBirnie	\$73,733	\$74,469	\$75,449	\$77,164	4.7%
Mitchell	\$74,448	\$75,214	\$76,202	\$77,931	4.7%
Polansky	\$75,025	\$75,313	\$76,207	\$77,867	3.8%
Stoker	\$66,413	\$66,557	\$67,362	\$69,172	4.1%
Zimmerman	\$70,808	\$71,096	\$71,948	\$73,522	3.8%

Appendix 3

Union Wage Demand With Living Stipend Added by Year 3 (\$6000)

<u>Employee</u>	<u>2020 Wages</u>	<u>2023 Totals</u>	<u>3 year %</u>
Egging	\$74,109	\$86,157	16.3%
Gallagher	\$63,767	\$75,074	17.7%
McBirnie	\$73,733	\$86,139	16.8%
Mitchell	\$74,448	\$86,905	16.7%
Polansky	\$75,025	\$86,973	15.9%
Stoker	\$66,413	\$77,910	17.3%
Zimmerman	\$70,808	\$82,455	16.4%

Appendix 4

Union Wage Demand With MERP & Living Stipend Added by Year 3 (\$6900)

<u>Employee</u>	<u>2020 Wages</u>	<u>2023 Totals</u>	<u>3 year %</u>
Egging	\$74,109	\$87,057	17.5%
Gallagher	\$63,767	\$75,974	19.1%
McBirnie	\$73,733	\$87,039	18.0%
Mitchell	\$74,448	\$87,805	17.9%
Polansky	\$75,025	\$87,873	17.1%
Stoker	\$66,413	\$78,810	18.7%
Zimmerman	\$70,808	\$83,355	17.7%

CERTIFICATE OF MAILING

On the 11th day of February, 2021 a copy of the foregoing Finding and Recommendations and Appendices was sent electronically by the undersigned via pdf to:

Ricky J. Walsh
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/s/
LeRoy H. Schramm