

National Academy of Arbitrators

Navigating the Crossroads:
*Innovative Insights in Public and
Private Sector Interest Arbitration for
Collective Bargaining in Canada and
the United States*

MODERATOR & PANELISTS

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Overview & History



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- The Boston Police Strike of 1919
 - The War Labor Board
 - The 1970s
 - Baseball

Thirty-one states and numerous other political subdivisions currently have interest arbitration for public employees.

What employer could resist a claim of inability to pay if such claim would become... the basis of a binding arbitration award that would relieve it of the grinding pressures of arduous negotiations?

The Arbitration of Wages, University of California Press, Berkeley and Los Angeles (1954).

U.S. versus Canadian Systems



Analyzing Employer's Ability to Pay




THE EMPLOYER'S "ABILITY TO PAY" CASE

- **Is There Clear Evidence of the Community's Overall Poor Economic Condition?**
- **Is There Convincing Evidence of the Employer's Inability to Raise the Revenues Necessary to Pay for Increased Wages and Fringe Benefits**
- **Has There Been a Significant Reduction in Revenues?**
- **Is There Evidence of Employee Layoffs and Program Reductions?**
- **Is There Evidence That Vital Programs Are Clearly Threatened by Any Increase in Wages?**
- **Has the Bargaining Unit in Question Borne a Proportionate Share of Programmatic Cuts or Layoffs?**
- **What Do the Remaining Statutory Factors Show to be an Appropriate Wage Increase?**

UNION PRESENTING THE EMPLOYER'S ABILITY TO PAY

A Union's Ability to Pay Case

- **Should a Labor Organization Make an Affirmative Case on Ability to Pay?**
 - **Has the Union Successfully Challenged the Underlying Assumptions in the Employer's Budget?**
 - **Has the Union Presented Adequate "Costing" Information?**
 - **Did the Union Participate in the Budget Process?**
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THE COST OF LIVING

- **Getting Started – Which Index to Use?**
- **Frequency of Use of the CPI and PCE Deflator**
- **Availability of Information About Each Index**
- **Arguments in Favor of Discounting the CPI**
- **The Substitution Argument**
- **The Housing Component Argument**
- **The Medical Component Argument**
- **Regional Costs of Living**

In the public sector, with the necessity of continuing to provide adequate public service as a given, 'going out of business' is not an option, and an employer's *inability* to pay can be the decisive factor in a wage award notwithstanding that comparable employers in the area have agreed to higher wage scales...

Elkouri & Elkouri, *How Arbitration Works*, 6th ed., 2003.

When expenditures are at a relatively high level, selection of the union final offer may result in the employer having to cut programs or staff to save monies... such an outcome may be adverse to the role some arbitrators see themselves playing in the process.

Capturing Arbitrator Decision Policies Under a Public Sector Interest Arbitration Statute
Gregory G. Dell'Omo *Review of Public Personnel Administration* 1990; 10; 19.

What may be needed, however, is a clearer expression from arbitrators as to the type of evidence required to prove inability to pay or a more specific emphasis/definition of this factor in the arbitration statutes. But this may be easier said than done because of the difficulty and sensitivity attached to defining ability to pay and its application across different and complex cases.

Capturing Arbitrator Decision Policies Under a Public Sector Interest Arbitration Statute Gregory G. Dell'Omo *Review of Public Personnel Administration* 1990; 10; 19.

This point was made clear when one of the most experienced arbitrators participating in the study was asked to define ability to pay and s/he simply stated, "I can't tell you what it is, but I know it when I see it."

Capturing Arbitrator Decision Policies Under a Public Sector Interest Arbitration Statute Gregory G. Dell'Omo *Review of Public Personnel Administration* 1990; 10; 19.

Selecting Comparable Jurisdictions



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- The Importance of Population of the Comparable Jurisdictions.
 - Physical Proximity to the City or County Under Study.
 - Presence in a Major Metropolitan Area (MSA).
 - The Number of Employees.
 - Physical Area of Jurisdiction.
 - Historical Comparable Jurisdictions.
 - Other Criteria Which Have Been Used to Select Comparable Jurisdictions.

In short, both the County and Guild want what they want, but have not provided evidence that would satisfy the elements set forth in RCW 41.56.465. While excellent policy arguments were made, the Panel was not provided with a “comparison of wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of like personnel of like employers of similar size on the west coast of the United States...”

Lewis County, PERC Case No. 23135-I-10-0543 (2011).

Total Compensation Analysis



...“[t]otal compensation” goes beyond salary, it is the complete pay package for any group of employees. This amount includes all forms of money, benefits, services, and other “perks” employees are eligible for at the City of Aurora. Total compensation can be defined as all of the resources available to employees which are used by the employer to attract, motivate, and retain employees.

City of Aurora, 77-390-L-00279-10-CHCA, 127 BNA LA 1773 (2010).

At the City of Aurora, firefighters enjoy a total compensation package that far exceeds the value of their base salary alone, and which includes both direct and indirect compensation for services performed. Wages are a form of direct remuneration, while fringe benefits such as health insurance and pension contributions are a form of indirect remuneration.

The following components of total compensation could be analyzed for a law enforcement bargaining unit:

- **Wages**
- **Incentive or Bonus Pay**
- **Premium Pay for Education or Certification**
- **Retirement Costs**
- **Insurance Premiums**
- **Vacation Costs**
- **Holiday Costs**
- **Other Compensatory or Leave Time Costs**
- **Attendance and Wellness Bonuses**
- **Costs for Conversion of Accrued but Unused Leave**
- **Clothing, Uniform, Cleaning, or Equipment Allowances**

Sometimes, total compensation analysis will be explicitly required by statute. For example, Oregon Revised Statute 243.746(4)(d) requires an arbitrator to examine the following in making an award:

The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.

In making comparisons, it is inappropriate to focus only on salaries. Total compensation must be considered and must include both the percentage wage and benefit increases and the overall compensation package in these jurisdictions during the contract.

City of Albany, NY PERC, IA 2014-019 (Kowalski, 2018).

More important is the question of how the total compensation in the target jurisdiction measures against that in the comparable jurisdictions. Comparative total compensation analysis involves reducing the most important of the usual panoply of benefits to dollar values. The most consistent way of doing this is to view the cost to the employer for providing such benefits.

Role of Past Practice in Arbitration



Handling Non-Economic Issues



Preparing for Interest Arbitration



How do you WIN in Interest Arbitration?

- Legal Tactics
- Emotional Tactics
- Political Tactics
- Dirty Tricks

The submission of the budget to the fact-finder or arbitrator along with testimonial evidence explaining the format of the budget. Make it simple!

A description of the various funds in the employer's budget, along with identification as to which funds are dedicated or earmarked funds.
Create a simple "cheat sheet" for the arbitrator.

Tips

- Never present a case without an expert witness with letters after his/her name.
- The IAFF model

Researching & Selecting the Arbitrator



The most important factor in winning an interest arbitration is the selection of the arbitrator.

To select a good arbitrator (for a particular case) you need a(n) ~~good~~ experienced attorney.

