

Interest-Arbitration---2023-Trends-and-Insights

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SPEAKERS

Matt Greer, Paul Denham, Heidi Parker, Emily Martin, Gary L. Bailey



Matt Greer 00:11

Welcome, welcome, welcome to the PERColator Podcast. In this episode we dive deep into nationwide trends and interest arbitrations from 2023. Co-host Emily Martin prepares an annual written report with several union employer and neutral colleagues from around the country as part of their participation in the American Bar Association's Labor and Employment Law Sections State and Local Government Bargaining and Employment Law Committee. Join her, union lawyer Gary Bailey, employer lawyer Paul Denham, and neutral Heidi Parker, as they discuss how arbitrators decide such issues as wages and ties of high CPIs, recruitment and retention issues and tight labor markets, drug testing policies in light of legalized cannabis, and scheduling issues. As background or reminder, interest arbitration is a statutory process available to certain groups to hire a third-party neutral to decide issues in their contract negotiations that they reach impasse on. The process can vary greatly state by state, which is why the report prepared by Emily, Gary, Paul, Heidi, and Brenda is so important. We thank them for sharing the work with us. Enjoy the episode.



Emily Martin 01:30

Hi, everybody. Thanks for joining me today. I have Gary Bailey, Paul Denham, Heidi Parker, and here in spirit, Brenda Pryor so our committee is going to be presenting at the American Bar Association's annual mid-winter for the Section of Labor and Employment Laws Committee on State and Local Government Collective Bargaining and Employment Law. I think that's the name of our committee, is it, Gary? Yeah, sure. So every year we get together, and we geek out about public sector labor law, and our committee itself likes to talk about interest arbitrations and strikes. But we were kind of tasked with the idea of doing an annual report. So I asked our committee, or at least Heidi, Gary and Paul, to kind of summarize what you find in your decisions, that looked interesting. What did you learn about in terms of interest arbitration decisions across the country. I can go first. I did the West Coast. And there really wasn't much. There was only two decisions that came out of Oregon. And Oregon is a baseball style arbitration. That means that the arbitrator has to either pick the union's last, best, and final package or the employer's. So the key is to try to get as much as you can, without tipping the balance and making them choose the other side. One of the decisions had only one issue in

dispute, and it was wages, 3% and 3%, or 5% and 5%. Anybody want to make a guess which way the arbitrator went? Five percent and 5%. They looked at the CPI numbers, and this was for Lincoln County along the coast in Oregon and said, you know, retaining employees is important, especially with such high CPI numbers. Actually, the arbitrator quoted somebody saying there's other factors. I think it's because the Oregon coast is beautiful. So I think that's a factor when it comes to retention for people living in that area. The only other case that came out of the West Coast was in the city of Ashland, which is in Oregon, and it is famous for its Shakespeare Festival. So it sounds like according to the arbitration award, people are back going to the festival, seeing plays. And the only two issues were the contribution to health care. The city wanted to change status quo, moving it from a 95% employer pay to a 90% for the firefighters. And both the firefighters and the city had proposed adding a longevity bonus. The firefighters wanted more money than the city. The arbitrator said that he liked the city's longevity offer better. But when it's tied to changing status quo, that was a harder hill to climb on. And it wasn't justified in light of the external comps. So the union won again. So that's the whole thing from the West Coast, which isn't that surprising that it's hard to change status quo. And there's a lot of inflation out there. So, Paul, what did you find?

P

Paul Denham 04:39

You're echoing your report about wages. I looked at most of the Midwest states and their arbitration awards. Gary did take Ohio off my hands, which is still technically in the Midwest. We were just trying to reallocate work. In terms of your question about which proposal won in terms of wages, it's consistent in the Midwest as it was out in Oregon, in the sense that one recurring theme that came up throughout most of these awards, which considered increased wages is 40-year high inflation. Not every award necessarily gave the union all of their final proposals, especially those states, which allowed individual year, consideration year over year for final wage proposals. That being said, in the materials, I summarized an award by Arbitrator Kundrat in Minnesota related to St. Paul firefighters in Minnesota, as well as a Illinois award with Barry Simon, involving the Mattoon firefighters, Ed Ben in the village of Bartlett in Illinois, Arbitrator Charles Ammeson in Michigan related to St. Clair County Sheriff Department, as well as Amedeo Greco in Wisconsin related to the Milwaukee Deputy Sheriff's Association. All of those arbitrators at some point give some nod to high CPI. In fact, some of the arbitrators even repeated themselves with respect to or repeated each other with respect to 40-year highs and CPI at the time. The other theme that is interesting that came up in an award - it came up in multiple awards, but it really was focused on Arbitrator Ben's Illinois award related to the city of Chicago - that award is actually pretty notorious with respect to an issue related to arbitration of discipline, or serious discipline and discharge. That matter has been politically kicked back and forth to the arbitrator a few times. I'm not going to talk about that aspect of the award. Within the initial award, one of the things that Arbitrator Ben actually awarded is a one-time retention bonus of \$2,000 to all police officers on the September 1st each year after their 20th year of service. Why I think that's notable is in that particular situation, the FOP produced evidence about how the patrol officers in Chicago are struggling with retention issues. In particular, they produce data showing that there had been a 12.9% decline in officers from 2019 to 2023. And Arbitrator Ben, who traditionally is a pretty not-going-to-change-the-status-quo-unless-you-show-me-something-is-broken sort of arbitrator actually found that to be compelling, and found that there is a need to award the one-time bonus at 20 years. You know, recruitment and retention issues seem to also come up a lot in these police cases as well as you know, just based on my personal practice in terms of these sorts of negotiations. And then the last award that I really thought was interesting is in Illinois, there appears to be its interest arbitration award over recreational cannabis. Illinois legalized recreational cannabis a few years

ago. As part of that statute, it was amended to basically give the nod to law enforcement agencies and fire departments to implement their own rules and regulations that could prohibit the use and drug testing, positive drug testing for recreational cannabis. That being said, that same statutory provision also said that those sorts of policies are subject to collective bargaining. In this particular situation, there was a poor drug testing policy which didn't say anything one way or the other related to drug testing for recreational cannabis. The fire district decided to then create a policy which banned positive drug tests for recreational cannabis. At that point, the union demanded bargaining. They did bargain. They actually negotiated something where recreational cannabis would be allowed and you could drug test positively for it. However the fire district, then the trustees, refused to ratify the TA. So, queue interest Arbitrator Marvin Hill. I think Arbitrator Hill was greatly influenced on the fact that there had been a TA that the fire district was essentially backing out on. That being said, some of the more philosophical issues, so to speak, related to drug testing related to cannabis. The fact that unlike alcohol which metabolizes in your system, cannabis can stay in your system for weeks, if not a month. Those sorts of issues for the first time were actually analyzed within an arbitration award. So I found that to be interesting as well.

E

Emily Martin 10:22

Yeah, that's interesting. Thanks. Heidi, did you find anything interesting in Florida? Or where did you, what cases did you look at?

H

Heidi Parker 10:32

Florida is always interesting. They're always throwing something in to make everybody think. So in Florida, there was - I have a college faculty case, school police, and healthcare. Those are the industries. There were three awards in 2023, that were that were decided in 2023. In Florida, they have special magistrate recommendations, and often times, the parties skip this special magistrate process and schedule right to put the hearing on, so that I'm sure plays into how many decisions there are. So in the college system, it looks like the wages are behind other areas. One of them was Broward College, and faculty made second to the last, I believe, of other colleges in Florida. The issue in that case was primarily wages and the ability to work extra pay, so all of the proposals kind of centered around those issues. Jeanne Charles was the arbitrator and she did a really good job of balancing, in my opinion, management's, you know, concerns about limiting or controlling pay assignments. And labor's concern over the wages. In the health care area, it looks like COVID is still a factor for the workplace. And the issue in that case, this was SEIU and the Public Health Trust of Miami Dade County. I don't know what that means other than it's a healthcare system. And so there was an issue about a remote work assignment that everybody wanted and, or that some people wanted, and the issue was over seniority and selection of those assignments. And the way COVID comes into play is interesting. Prior to COVID, there wasn't as much of a need for bargaining over remote work assignments. It was in a policy somewhere and it wasn't really an issue before. And so after COVID, it became more of an issue for the union and more of a demand on the employer for remote work assignments. So that played into the arbitrator's recommendation to require the employer to bargain the issue. And there was some arguments about waiver which really weren't applicable, so the decision or the recommendation was really about having a requirement to bargain. Then, a third case was Palm Beach County PBA. And this is also a Florida thing. The Marjory Stoneman Douglas Act requires the schools to have a police officer there and some of

the schools have summer school. So when the law was first passed in I think 2018, I don't think that the schools were putting police officers on campus in the summer. Over the time that that act has been in play, there's been, you know, how are we interpreting this, how has it been applied? And I think it's only been in the last year or two that they've said OK, if there's students there and they're there for instructional reasons, there has to be a police officer there. So the issue within this Palm Beach County case had to do with staffing and scheduling. Those are the issues that were primary in these cases.

E

Emily Martin 15:05

Yeah, that really helps. You know, in Washington, we never get any school cases, we never get any health care cases. We don't have a community college which in our decisions, if in our interests, our decisions aren't met, you know, we don't have a magistrate step as well. So it is really interesting to hear about how the different states operate in different ways. Oregon is baseball, you have to pick one package or the other. In Washington, the arbitrator can do kind of what they want. They can pick one or the other. But we don't get to hear about the different types of industries. So that's really interesting. And Paul, that's really interesting to hear about what's going on in Chicago as well, because it wasn't on my radar that such a big decision was coming through. But Gary, what did you find? Anything fun?

G

Gary L. Bailey 15:53

Looking through a number of decisions in New York and New Jersey and in Ohio, I thought there was one that really kind of stood out. It had to do with police scheduling. The city of Bayonne has a fairly good sized department, 138 officers. They are presently working a schedule where they work four consecutive nine-and-a-half hour days, and have four consecutive days off. That's kind of a strange schedule. I've never heard that kind of schedule before. When they came to the bargaining table, the city proposed they wanted to change that to a 12-hour day, with no change in the schedule, to four straight 12-hour days followed by four days off. And I've never heard of that before. Most 12-hour schedules I know, you work either three days or two days, then have two days off or three days off. But never have I ever heard you have to work 48 hours in four days like that. As a regular schedule, God forbid, you have to get called in for overtime. Anyway, the police department there - and Paul talked a little bit about the problems in policing right now with retention and recruitment, because so many police officers, seasoned officers are leaving the profession - the department there in Bayonne, the average length of service was six years. So that means you got a lot under six years, with a few more than six years, of course. A very young department. They submitted 14 issues actually to the arbitration, which doesn't surprise me. I think sometimes in a younger department, there'll be more issues. There's less likely to compromise. They haven't been involved in the union to know how to compromise. So off they went, and this particular issue the union put on I thought was a pretty good case. The city argued, you know, by working these hours, you're gonna work more hours, which means you're gonna make more money. So you should be really happy. You're gonna make a lot more money doing this kind of schedule. The union brought in expert testimony, really to the point where they had an expert come in and evaluate that and said it's going to promote burnout, it's going to decrease productivity, there's going to be safety issues. And you're asking police officers who have to make life and death decisions on that fourth day, especially when they've got to be tired of working. So you're really creating perhaps a public safety issue by having this kind of a schedule. So why do you want to do it? And the city was

like, well, the reason is, is we proposed it, we think we need less officers. Less officers can work a schedule like this and still have the manpower. Current schedule, we need more officers. And they got the supervisors union to agree to it. And by doing so, they argued about the continuity of supervision. You know, they have to have the supervisors on the same schedule as the rank and file, which I found not to be true at all. In fact, even the union had one of the sergeant's testify, yeah, we've been working it for the last year, and we've had no problems. But that was the big argument for the city: you have to have the same group. And the manpower issue: we have to hire 40 more officers if we keep the current schedule. Interesting, when the employees testified for the union about how this schedule was going to create a lot of problems with their home life, was going to create issues with raising their kids, it was going to be a burnout, and they can't imagine how anybody could work this particular schedule. Kudos to the city attorney who then cross examined them and said, "Haven't you applied to get a promotion to work the 12-hour shift as the supervisor?" And they all went well, yeah. Okay, well, that was a nice move on their part, I have to say. The arbitrator adopted the city's proposal with a few modifications really, but emphasized the issue of continuity of command, and probably maybe did more of an argument than the city attorney did about saying listen, especially in a young department, continuity of command is probably incredibly important. If you have all these young officers, you need continuity of command, which I think is an interesting thing from the arbitrators perspective, because I think this issue is very difficult for arbitrators. Well, it should be difficult for arbitrators. You're being asked to decide things like, I asked the arbitrator, "What the heck do you know about continuity of command? You don't know anything. You're an arbitrator, how do you know anything about the importance of continuity of command?" I think, in most cases that I've ever seen arbitrations over the schedule, I think arbitrators are exceptionally deferential to the chief of police. When the chief of police testifies on the chief, and this schedule is better than the other one, we got to have this schedule, is the arbitrator ever going to stand up and say, "Nah, you don't know what you're talking about, chief. You're absolutely wrong"? And in this particular case, at least with the expert testimony, and originally the direct testimony of the union, I thought they were headed down the right path. I think the cross examination and the people they chose to testify hurt the union a little bit. In fact, when you look backwards, as we all do after we litigate a case and lose, we say maybe those those are the people we shouldn't have put on the chair to testify. They have to admit that they were going to work a 12-hour shift. I think when it comes to scheduling, the union had testified that their schedule was the main draw to get people to come to their police department over other ones. I think that's the real issue. When we talk about the retention and we talk about recruitment, I know places where people these days are looking at the schedule even before they're looking at the bottom line of money. They're looking at scheduling, because it affects my everyday life. I can be part of picking up the kids, might see the kids even at dinner or breakfast. Or how much interaction am I going to have with my children, how much interaction am I going to have with my spouse and our friends and the schedule and picking? And I think there's a lot of officers who take that into consideration greatly before they figure out okay, and how much more money and how much less money. Because of that, I think this issue we're gonna see more arbitrations over. But I think the unions have to figure out how to, I'll say it, have the courage to look at an arbitrator and say, listen, you can make this decision without being a police chief on why this schedule, if it's used over in this town and this town and this town, is okay here. I think one of the problems in Bayonne was they were working a schedule nobody else worked, and they were gonna go to a schedule no one else worked. That doesn't help. But I think in the future, you're gonna see a lot more scheduling issues, because I think hours of work, that regular shift schedule, is becoming a big issue in police. And if you're trying to retain and recruit, I think that is a major issue. I will tell a story, I recently had a department that lost a guy after one day. He came in and he talked to the other officers. Oh, thank God, you're here, you're the bottom of the seniority list. Guess what, the last guy on the bottom of

the seniority list, worked 16 days in a row. Because we're so far low on manpower, he worked 16 days in a row. And the guy walked in the chief's office and say, "Am I going to work 16 days in a row?" And she goes "well...". And he goes well, okay, that's my answer. I was looking for absolutely not. Why am I going to keep working here, I quit. I'll go somewhere else. And he got a job two weeks later somewhere else. It doesn't matter how much sometimes you're making. The quality of life, I think as the old bald man in the group here, is becoming a bigger issue with the younger police officers. Quality of life is important and the schedule issue is going to be a challenge to unions going forward in all jurisdictions to figure out how to argue a schedule that everybody can live with, even though a chief may not have ever worked it before and is not sure, and so therefore he's going to take the position you can't do that here. The last time I had a scheduling thing, the chief said, "I can't work officers under the schedule like this, I can't do it." My cross examination was so you got your resignation ready if you lose this case, because you say you can't do it? I bet we can find somebody else to become the chief of police who can work it. I bet there's like three people who will take it and he'd probably take less money to be the chief of police and do the job. So I think this is a very interesting case, but I think we're gonna see a lot more of these.

E Emily Martin 24:47

Well, there's scheduling and there's also overtime. I know we've seen that in Washington State a lot, not just for police officers, but corrections as well.

G Gary L. Bailey 24:54

Yeah.

E Emily Martin 24:55

Correctional officers. I've seen a lot of cases about that. I think in Washington, there was a lot of settlements. And perhaps settlements that were higher than we've seen in the past, just because that was going on with the high CPI. But you don't get to see the details that went into settlement. So I always love this report to find out what's going on across the country. And what I might be able to use as a mediator to talk to parties about don't be so sure, or have you seen this idea over here? You know, what's going on in other places. It could be really helpful.

G Gary L. Bailey 25:37

I think what's not an issue, which is interesting in these issues, is people asking for more time off. When you're at low manpower, you don't want more time off, because you can't get what you've got now. So why should I ask for more time off when I can't even get the time off I've got coming now? So to me, that whole overtime and scheduling is going to become really important in departments, I think that alone. And I know that's not even just police departments. All the departments and government that are having manpower issues, figure it out.

E

Emily Martin 26:10

Scheduling and being able to actually use your leave, or use some of your leave, as money goes so far. But you know, at a certain point, you need to have a life.

P

Paul Denham 26:21

Maybe on the flip side of what Gary's talking about, though, is I've found more and more departments, police departments are implementing lateral-hire sort of policies. And when I first started hearing about this five, six years ago, I'm like, to Gary's point, it's really a win win. Unions will allow the department to pay higher levels on the step scale, but when it comes to seniority and whether they're bidding on the night shift/day shift, usually they have to start at zero in their new department. And when I first started seeing these things come about, I'm like, why would anyone after seven, eight, nine years, where they're just about ready to start working days, even if it's for a little bit more money, go to a different department? And I don't know if it just the nature of the the economy being where it is, but a lot of departments are not having issues finding lateral transfer recruits.

E

Emily Martin 27:23

Are they offering bonuses? We are seeing bonuses here, like big bonuses for recruitment.

P

Paul Denham 27:28

Some bonuses for the most part. Though, I think, just based on the fact that you're going from a department that might pay less, you'll get the bonus and the nature of more pensionable salary moving forward.

E

Emily Martin 27:44

Interesting. Well, thank you. And I'm looking forward to seeing you in Mexico. And we're going to have the best panel where it's going to be awesome. And we're going to have Brenda with us and while she can't be a part of the podcast today, I do want to give a shout out to FMCS because they have their own podcast. I think it's called Revolutionary and they have some incredible guests. So, anyone listening to this podcast looking, for other podcasts, should check that out as well. So, that's pretty exciting as well. But good to see you. I'm excited for our panel, and we're going to have a great time and if anybody is thinking about getting involved in a bar association activity, the American Bar Association Section of Labor and Employment Law, State and Local Committee is like the best. So we are number one, not that I'm biased in any way. Thank you so much.