

Fact-finding Report and Recommendations, Orange County & Orange County Attorneys Association

Background

Subsequent to an unsuccessful mediation process, the Orange County Attorneys Association (OCAA) requested Fact-Finding pursuant to Government Code Section 3504.(a) on October 29, 2012. By letter of November 13, 2012, PERB's Notice was sent indicating that Steve Danley would be the Employers panel member, Bernadette Cemore would be the Exclusive Representatives panel member, and Tony Butka would serve as the neutral Chair.

The Panel met at the Orange County Hall of Administration on December 10, 2012, at 9am.

As background information, the Chair observes that Parties often believe that the Fact-Finding procedures under the Meyers-Milias-Brown Act are designed to determine who is right and who is wrong. Actually, the purpose of the entire Act is:

"3500. (a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."

So, even though the statute provides a set of eight criteria to be used by the Panel, the underlying purpose of this exercise is to assist the parties in reaching an agreement to their labor dispute. With that in mind...

The Dispute:

Initially, the County listed seventeen (17) items in dispute prior to the Fact-Finding:

1. Term
2. Premium Pay
3. Reemployment of employees on Disability Retirement
4. Merit Increases within Range
5. Leave Provisions
6. Annual Leave

7. Mileage Reimbursement
8. Disciplinary Action
9. Layoff Procedure
10. Workers Comp Supplemental Pay
11. Nondiscrimination
12. Insurance
13. Employee Retirement Contribution
14. Salaries
15. Extra Help Positions/Employees
16. Catastrophic Leave Side Letter
17. Educational & Professional Reimbursement

After a preliminary meeting of the Panel and discussions with each party, both sides whittled down their list into a more manageable six (6) items, and they are to be commended for their efforts. Those revised issues are:

1. Employee Retirement Contribution -
2. Merit Increases
3. Salary Increases
4. Layoff Provisions
5. Advisory Arbitration
6. Term of Agreement

Analysis

1) **Retirement:** Clearly the issue of Retirement contributions and plans is the largest driving force behind the parties dispute. And it is equally clear that there is no simple solution to resolve their dispute.

Orange County is not immune to the statewide public sector problem of significantly decreased revenue streams coupled with significantly increasing pension costs. Specific examples to Orange County include:

- \$75M VLF lawsuit with State
- Moody's recent ratings cut in County Pension Obligation Bonds from \$Aa2 to Aa3
- Property Tax Administration lawsuit loss
- (for a full list see others in County handout binder)

Unique to Orange County, however, is the patchwork of pension pieces, depending on the hire date and/or choice of the employee:

- (a) Until 2005 there was a 401(a) plan available to which was capped & frozen,

- (b) There was a differentiation between rates in the plans between employees hired prior to and after September 20, 1979,
- (c) The majority of non-safety County employees were provided with an enhanced 2.7% @ 55 retirement plan but had to pay the difference (referred to as "Reverse Pickup") between the previous plan and the enhanced plan.
- (d) (this does not apply to Attorneys as they never previously agreed to 1.62 plan; as a result, new employees as of Jan 1 will get the PEPRA 2@62 plan

Currently, looking at all of the (non-safety) bargaining units in the County, there is a small percentage of employees who have chosen the 1.62@65 retirement formula rather than the 2.7@55 formula. Only two bargaining units, the Attorneys and ASFSCME's Management Unit, did not agree to the 1.62 @ 65 plan so they are only covered by the 2.7@55 formula. During its current negotiations with all bargaining units, the County has requested all bargaining units who are not currently paying the full employee's share of retirement costs (i.e., Pickups 1 & 2) to do so. The first group to reach agreement is the Orange County Managers Association, who will pay Pickup 1 in January 2013 and Pickup 2 in July 2013. Needless to say, this has implications for the County's bargaining position that all employees are to pay the full member contributions (Pickups 1&2) effective the first pay period after Board adoption of an agreement.

There are differences, however, in the unit composition of these two bargaining units. To illustrate the difference, if you look at the practical implications of this proposal in comparing the Attorneys Unit with the Administrative/Management Unit, the range of increased costs to Tier II employees under the County's proposal would be:

Administrative/Management Unit:	3.56% - 10.52%
Attorneys Unit	5.42% - 11.33%

These are not trivial amounts. To somewhat offset the impact of the increased costs, the Panel is recommending that the increased costs be phased in, with one-half of the increases coming with the mid-February pay period, 2013, and the other one-half of the increases effective July 12, 2013.

2) **Merit Increases:** Merit increases, which are defined as salary increases within a range, are not automatic, and require an affirmative recommendation of the Department Head. Under the current Memorandum of Understanding, these increases may be granted for between one (1) and four (4) steps within a range

The County's position is that new hires should not be eligible for raises until they have worked for 2080 hours (one year), as opposed to the current practice of becoming eligible after 1040 hours (six months). Further, the County proposes to change from a 1-4 Step system (2.75% - 11.0%) to 1-2 step system (2.75% - 5.5%) within the range.

At hearing, the Association argued that the range of merit increases be lessened to no more than three (3) steps maximum, eliminating the 4th step currently available.

The Panel recommends that the Employers position on Merit Increases be granted.

3. Salary Increases: It is clear that the parties have had limited discussions regarding salary increases. It appears that the Employers position is for a 2.5% one time lump sum payment, and the OCAA's position has been for a 2.5% increase for 2012/13 and a formula based on a blend of property tax revenues and Prop. 172 sales tax revenues in any succeeding years.

The 2012/13 fiscal year is already half over and the County will soon be starting the fiscal 13/14 budget deliberations. And the issue of wage increases, if any, are inexorably tied to what a settlement agreement would look like as to employee retirement contributions over the term of the agreement. For fiscal year 2012/13 a salary increase is simply not realistic.

As a partial recognition of the relatively higher cost to employees in this unit of the new employee contribution rates to retirement, we recommend that the 2.5% amount once offered be split 50/50 between a lump sum and an amount applied to base compensation.

4. Layoff Provisions: The County proposes to eliminate seniority from the current three criteria for order of layoff (performance status, past performance, and length of continuous service with the County). Evidently bargaining over layoff terms is done on a unit by unit basis, as opposed to having a charter provision or Civil Service Rule applying to all employees equally.

Other than indicating that this proposal has been made to all bargaining units in the County, there is no evidence that the employer has had difficulties with this bargaining unit over the issue of layoffs.

Further, the County has at least two major areas of flexibility under the current contract language to allow a significant amount of flexibility in using criteria other than strict seniority to determine who will be laid off:

- The expired agreement clearly states at Article XI Section 1(b) [Layoffs] that:

"This procedure shall not apply to employees who have special Or unique knowledge or skills which are of special value in the operation of County business.", and

- Section (2) of the same Article does not assign any particular weight or order to the three enumerated criteria for layoff:

*"...shall be laid off in an order based on consideration of
(1) employment status,
(2) past performances,
(3) length of continuous service within the County."*

It would seem to be premature for the County to modify a fairly flexible layoff system in the absence of a demonstrated need.

5. Advisory Arbitration: Currently the Memorandum of Understanding contains final & binding arbitration. The County proposes to carve out disciplinary actions and to make that section of the Agreement subject to advisory arbitration.

The rationale for the proposed change is that "The County has been victimized by past arbitration decisions in other units which appear to be irrational, unfair, and unreasonable." [see County Binder J].

On the other hand, in the Attorneys bargaining unit there is no such claim of adverse decisions, and the MOU language provides for fairly standard language on exclusions, joint submissions, just cause, and strike lists to select the arbitrator.

In light of there being no problems with the current structure of the grievance & arbitration procedure for the Attorneys bargaining unit, is not reasonable to modify the existing Memorandum of Understanding.

At the same time, it would seem that something may be amiss in the existing grievance and arbitration machinery, certainly from the County's view. As a suggested interim solution, we would urge the parties to include a mediation step prior to arbitration, triggered by either party.

The reason for such step is for a number of reasons. First, currently the Mediation & Conciliation Service Division of the Public Employment Relations Board provides such a service at no cost, and even private mediation services are not that costly as compared to an adverse arbitration decision.

Second, a mediation step provides the opportunity for both parties to have an outside observer take a look at their dispute, evaluating the strengths and weaknesses of each sides position, and possibly resolving the dispute on a mutually acceptable basis. Even if the exercise does not resolve the matter, both sides will be better prepared in their selection of an arbitrator and preparation for hearing.

Finally, if the mediation step does not work for the parties, it is easily removed from the agreement without fundamentally changing the finality of the arbitration procedure.

6. Term of Agreement: The term of agreement is usually a relatively straightforward issue. In this case, the County wants the agreement to expire on June 27, 2013, and the Association wants the agreement to expire on June 26, 2014.

Neither side provided a great deal of detail on the rationale for their position, so the Chair is assuming that the Association's position of a two year agreement was predicated on their obtaining a full agreement for the term with no contract reopeners.

During the course of these proceedings, it has become clear that Orange County faces a number of fiscal challenges which could adversely impact their Strategic Plan in the very near future. For example, the outcome of the VLF litigation is not predictable, how the ratings agencies will treat the Pension Obligation Bonds in light of the changes to employee retirement contributions is not known, and the short term impact over the lost litigation regarding Property Tax Administration may not be fully factored in at the moment.

As a result, it seems clear that even if the parties could agree to a multi-year framework, the County would insist on economic reopeners during the term of the agreement, thus defeating the Association's interest in a longer agreement.

In short, there are simply too many unknown economic variables to allow much certainty in a longer agreement. Thus it makes realistic sense that the term of agreement start with June 17, 2011 (the expiration of the prior agreement) and expire with the end of the 2012/13 fiscal year, in this case July 12, 2013 (which would be the effective date of the second increase in employee retirement contributions).

Recommendations

Employee Retirement Contributions: Employees to pay the full cost of the employee share of retirement costs (Pickups 1 & 2), with one-half of the increases effective February 1, 2013, and the other one-half of the increases effective July 1, 2013.

Merit Increases new hires should not be eligible for raises until they have worked for 2080 hours (one year), as opposed to the current practice of becoming eligible after 1040 hours (six months). Further, the County proposes to change from a 1-4 Step system (2.75% - 11.0%) to 1-2 step system (2.75% - 5.5%) within the range.

Salary increases: 2.5% upon the effective date of agreement, split 50/50 between a lump sum and an amount applied to base compensation

Layoff Provisions: No change to current agreement

Advisory Arbitration: No change to the current binding arbitration language, but add a mediation step in the grievance/arbitration language prior to arbitration, with the provision that mediation takes place only if either side requests it.

Term of Agreement: June 17, 2011 through July 12, 2013.

Respectfully submitted: on this 18th day of February, 2013, by:


Tony Butka, Chair

County of Orange and
Orange County Attorneys Association
(Case No. LA-IM-115-M)

Association Representative to Factfinding Panel
Bernadette Cemore

Partial Dissent to the Findings of Fact and Recommended Terms of Settlement:

While as the representative of the Orange County Attorneys Association (OCAA) to the Factfinding Panel, I agree with some portions of the Findings of Fact and the Recommended Terms of Settlement (the Report) drafted by the Impartial Chairperson, there are several very significant points with which I disagree and for that reason I am providing this partial dissent.

The Report does not appear to recognize that OCAA agreed, at the County's request, to the County's paying a portion of employee retirement in lieu of a salary increase offered and paid to other bargaining units. The decision on the part of the County in the 2000 negotiations between the parties to offer to begin paying the remaining portion of the employee retirement contributions effective June of 2002, was a County proposal no doubt because beginning to do so was a benefit to the County. While there was also some benefit to the attorneys in the bargaining unit, that financial benefit to the bargaining unit was offset for the attorneys by the County's not paying the attorneys a 3 ½% across the board raise which was paid at that time to other bargaining units of County employees. In actuality the County's proposal was a wash for the members of the bargaining unit—they did not get a raise of 3 ½% in their wages, but the County began making the remaining portion of the employee retirement contributions thereby resulting in more money in their paychecks.

Thus, the County has had the benefit it derived from proposing that it would assume responsibility for making the employee contributions at the very least because all attorneys in the bargaining unit have a salary which--since the time that the change was made--is roughly 3 ½% lower than it would otherwise have been. This is a benefit which the County will continue to "enjoy" going forward as it will continue to pay the members of this bargaining unit less in comparison to other bargaining units. The benefit the County derives from the attorneys' lower salaries will now be compounded in its effect by the County's "change of philosophy" reflected in the County's making the demand that OCAA's bargaining unit members begin making the employee contributions. In essence, the County has derived "the benefit" of making the employee contributions while OCAA members receive 3 ½% less across the board in their salaries and now due to a "change in philosophy", the County wants OCAA members to begin making the employee contributions, but certainly is not offering to increase the pay of all the members by 3 ½% in light of the employees assuming the responsibility for the

contributions (which was the bargained for exchange at the time that the County proposed making the retirement contributions on behalf of the attorneys).

In the initial go round of bargaining the County had taken the position that the obligation on the part of the attorneys to begin paying the retirement contributions would be phased in over a two year period. As the Report recognizes the financial impact on the members of the bargaining unit is extremely significant. After the hiatus in bargaining, the County's new bargaining spokesperson took the position that perhaps not all of the contributions would have to be paid immediately, however at the time of the County's last, best, and final offer on August 24, 2012, the County's final proposal was that the attorneys begin immediately making all contributions upon ratification of the agreement. The Report recognizes that this demand is unrealistic and inconsistent with the County's position with other bargaining units. However, the Report does not recognize that merely postponing the second pick-up until July, 2013 is still problematic when the attorneys—who have forgone raises and agreed to furloughs—are receiving no real or even token offsetting increase in their salaries.

The position of the County coming into the factfinding process that OCAA's members should not receive any basebuilding increases to their salaries and the County's insistence that attorneys should be artificially limited henceforth in the amount of a raise (or the steps) a newer attorney was entitled to receive is not recognized in the Report as the serious problem that these proposals represent. Despite the fact that nontopped out attorneys only receive a steps/raise based upon their particular departments' assessment of their performance, the County nonetheless is desirous of putting a limit on the steps/raise an attorney receives based on the quality of their job performance. This County proposal—particularly when combined with the County's position of no base building raise for this bargaining unit—demonstrates that the only desire of the Board is to unnecessarily and unjustifiably cut or limit the compensation of the attorneys. Given that steps/raises are only given to attorneys based upon a supervisor's assessment of their performance, it is clear that the Board does not support the basic concept of rewarding exemplary performance. This is evident since the Board is unwilling to permit the managers of the attorneys to determine the amount of the attorneys' step increases/raises even in circumstances where the attorneys' supervisors have complete control over the amount of an increase the attorney receives and that increase is explicitly tied to the quality of the attorneys' job performance. This change will be extremely significant to the attorneys in the bargaining unit and I must dissent from the Report's recommendation that the step increases be limited to 2 steps and that new hires will only be eligible for a step increase after 2050 hours.

To help offset the financial hit the County wished the attorneys to take and in keeping with OCAA's willingness to be a responsible partner with the County in addressing its financial concerns, OCAA proposed to the County to condition any across-the-board increases in salaries upon the County's financial condition as part of the bargaining prior to the hiatus and proposed the concept again after the hiatus. In the summer of 2012, OCAA put forward a more specific formula for calculating whether or not there was an improvement in financial conditions which would trigger an obligation to share the

increased revenue with the employees of the County, and this concept was summarily rejected by the Board of Supervisors without any attempt to explore the potential for establishing a formula the parties could agree upon. Rather, the County rejected the concept without any discussion and announced the parties were at impasse in August of 2012. This conduct again reflects a total lack of desire to reach an agreement and instead a desire on the part of the County to cut the compensation of attorneys.

OCAA has repeatedly demonstrated that it wishes to be a partner with the County in addressing the County's financial concerns, however, it is extremely problematic that the Board of Supervisors first delays negotiations, then repeatedly changes its positions and refuses to honor prior commitments and engages in regressive bargaining. OCAA has sought, and I believe, that its members should receive 100% basebuilding raises to offset the financial hit the attorneys would be taking upon having to pay the retirement contributions, and that raise should be greater than 2 ½ % assuming the County's financial picture has in fact improved, which all data indicates that it has and that it is in fact continuing to improve.

The combined actions of the Board in substituting the County's obligation to pay the employee contributions to retirement for a 3 ½% raise and now deciding there has been a change in philosophy has resulted in the salaries of all the attorneys being depressed by 3 1/2%, which is further exacerbated by the requirement the attorneys now begin making the employee contribution to retirement. This loss in income on the part of the attorneys is further compounded by the other change in philosophy of the Board whereby attorneys' pay increases are from the Board's perspective no longer going to be base building. All of these shifts in positions on the part of the Board make for a very unsettling environment for the attorneys and for OCAA. It is not sound labor relations to fail to honor prior agreements, to constantly change "philosophies" particularly when OCAA has repeatedly taken steps to assist the County in addressing its fiscal concerns. Such conduct on the part of the Board creates unnecessary uncertainty going forward and breeds skepticism and distrust. For all of these reasons I believe that the Report's recommendation that only half of a 2 ½% increase to attorneys should be base building should at the very minimum be altered to reflect that 100% of the increase should be base building. Otherwise, attorneys for the most part will experience a loss in salary that amounts to between 4% and 10% based upon the precise amount of the retirement contributions they will have to begin making. Even making the 2 1/2% increase all base building still greatly harms the pocketbooks of the attorneys. Such a decrease in salaries coming on top of rounds of furloughs and prior postponements of raises is not supported by the County's fiscal picture and will wreck havoc on the family and personal finances of the members of this bargaining unit. Imposing such a financial hit when in fact the fiscal picture of the County is looking up, is simply not wise in the long term if the County desires to recruit and retain the kind of attorneys who are capable of doing the extremely important work performed by the several departments and offices employing the attorneys who work for the County.