

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

CITY OF OMAHA, NEBRASKA, a)
Municipal Corporation,)
)
Petitioner,)
)
v.)
)
OMAHA POLICE OFFICERS)
ASSOCIATION,)
)
Respondent.)

CASE NO. 1400

OPINION AND ORDER
AS TO ARRAY

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

JUN 22 2016

CLERK

This matter was heard by the Commission on January 26 and 27, 2016, on the issue of determining the array to be used for wage and working condition comparisons, before Commissioners Blake, Spray, and Partsch. This is the first opportunity for the Commission to hear a case under the amendments to Neb. Rev. Stat. § 48-818 adopted by LB 397 (2011). Petitioner was represented by its attorneys, A. Stevenson Bogue and Bernard J. in den Bosch. Respondent was represented by its attorney, Michael P. Dowd. Post-trial Briefs and Reply Briefs have been submitted.

Upon order of the Commission this case was bifurcated under Commission Rule 15(D), whereby the issue of the array is heard prior to and separate from the determination of wages and terms and conditions of employment. This phase of the case is to select the array of cities to be compared with the City of Omaha for the purpose of determining the wages and conditions of employment of the bargaining unit employees represented by the Omaha Police Officers Association for the contract year commencing December, 2014.

Petitioner and Respondent agree on two of the cities to be included in the array: Oklahoma City and Tulsa, Oklahoma.¹ Petitioner presented six additional cities based upon each being one-half to twice the population of Omaha and located in Metropolitan Statistical Areas (MSAs) of one-half to twice the size of the Omaha MSA:

City	Miles from Omaha	City Population	MSA Population
Wichita, KS	256	388,413	641,076
Madison, WI	361	245,691	633,787
Milwaukee, WI	433	599,642	1,572,245
Memphis, TN	531	656,861	1,343,230
Louisville, KY	583	612,780	1,269,702
Nashville, TN	609	644,014	1,792,649
Omaha		446,599	904,421

(See Exhibit 2)

These six cities all meet the criteria set forth at Neb. Rev. Stat. § 48-818(2)(c)(ii) being not more than double nor less than one-half of the population of Omaha. Since Omaha is within a metropolitan statistical area, they also each meet the requirement of Section 48-818(2)(c)(3) of being in an MSA of not more than twice or less than one-half the population of the Omaha MSA. They are all therefore presumed to provide the same or similar working conditions as found in Omaha. All six of these cities presented by the Petitioner were first shown to meet the statutory job match criteria set forth at Section 48-818(2)(a). We therefore apply the presumption that all six of the Petitioner’s proposed cities provide the same or similar working conditions as found in Omaha.

The Legislature adopted the current statutory framework in 2011, by passing LB 397. The application of that new statutory framework has not been undertaken by the Commission prior to this case. One purpose of LB 397 was to establish predictability in the Commission’s

¹In listing the criteria for the commission to adhere to when establishing an array, the Legislature also provided, “Nothing in this subdivision (2)(b) of this section shall prevent parties from stipulating to an array member that does not otherwise meet the criteria in such subdivision. . .” Neb. Rev. Stat. § 48-818(2)(b)(iv).

decisions. This may have been largely the result of lack of understanding by some that the Commission does not independently search for evidence to establish an array or to determine wages and benefits. If there is perceived inconsistency, it is largely due to the fact that the parties before the Commission submit their evidence, enter into stipulations, and make the arguments they each deem relevant in that particular case. It may or may not be similar to the evidence submitted by a different union and a different employer in a different case, and it may not be similar to the evidence submitted in the last case or next case involving the same union and employer.

Petitioner in this case relies primarily on the statutory presumption to support its six proposed cities, citing the Legislature’s strong desire for predictability as promoted by the statutory framework enacted in LB 397. Respondent on the other hand submits five different cities, claiming that none of the six proposed by the Petitioner can survive the Respondent’s evidence challenging the presumption. Section 48-818(2)(c)(ii) provides that the presumption applies unless the evidence establishes substantial differences which cause the work or conditions of employment to be substantially dissimilar. It also allows for inclusion in the array of employers located in MSAs that do not meet the population limits where the evidence establishes that there are substantial similarities which cause the work or conditions of employment to be similar.

The five cities proposed by Respondent are:

City	Miles from Omaha	City Population	MSA Population
Kansas City, MO	166	470,800	2,071,133
St. Paul, MN	295	297,640	3,495,176
Denver, CO	485	663,862	2,754,258
Fort Worth, TX	591	812,238	6,954,330
Cincinnati, OH	625	298,165	2,149,449

Omaha		446,599	904,421
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(See Exhibit 1)

Respondent also argues for consistency, citing the Commission's decision in *City of Omaha vs. Omaha Police Union, Local 101*, 16 CIR 189 (2009)(Case No. 1175), and arguing that we should treat our array decision in that case as stare decisis. This argument must fail for two reasons. First, the array selection is a determination of fact, based upon the evidence submitted to the Commission by the parties in the particular case. See *Lincoln County Sheriff's Emp. Ass'n vs. County of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984). The cities submitted by these parties in this case are not the same cities that were submitted in 2008. In 2008, the parties agreed on inclusion of St. Paul. In 2008, the Respondent proposed Columbus, Ohio as a comparator, but not Kansas City, Missouri, and Petitioner proposed Kansas City, Missouri, and also Lincoln and Des Moines. See *Professional Firefighters Ass'n of Omaha, Local 385 vs. City of Omaha*, 16 CIR 408 (2011), wherein it was argued there was no evidence in the record supporting exclusion of a city when it had been included in the array in a previous case between the parties. The Commission in that case noted that the burden of proof is on the moving party to prove the inclusion of the city in the array.

The second problem with Respondent's reliance upon the decision of the Commission in 2009 is found in LB 397, adopted in 2011. It establishes guidelines for the Commission to follow, including the presumptions and the manner of overcoming the presumptions, as well as the requirements at Section 48-818(2)(b) that:

"The Commission shall adhere to the following criteria when establishing an array:

- (i) Geographically proximate public employers and Nebraska Public employers are preferable for comparison;
- (ii) The preferred size of an array is seven to nine members. . . .

- (iii) If more than nine employers with job matches are available, the Commission shall limit the array to nine members, based upon selecting array members with the highest number of job matches at the highest job match percentage.”

There are additional required criteria which are not factors in this case.

Of particular importance in this case are the statutory geographical proximity and population criteria for selection of the array. Petitioner argues that if the population criteria is met, it establishes an automatic presumption of similarity which can be overcome only in the event the evidence establishes a substantial dissimilarity of actual working conditions, and that the population parameters should almost always be deferred to unless a very high level of dissimilarity of work is shown. Petitioner also posits that the geographical proximity preference can also be overcome only by showing a very high level of dissimilarity.

Petitioner’s expert witnesses, Mr. Essman, and Mr. Cripe, both testified that the level of violent crime in a city is relatively unimportant in determining similarity of working conditions, as all cities have violence and violent crime, and all have gang-related violent crime. Mr. Essman testified that he had not analyzed violence because the statutory population criteria of Section 48-818 took it out of his hands by recognizing that larger cities will have more violent crime than smaller cities. The testimony of Mr. Cripe can be fairly summarized as suggesting that police work is police work. He testified that all police work in all of the cities they surveyed was very similar. Mr. Cripe saw no substantial differences to override the population presumptions. He testified that all police officers deal with violent crime, but that the density of crime or level of gang activity would affect only the few officers directly involved with those issues. He did not connect these crime elements to a difference in working conditions or wage rates.

The Respondent, on the other hand, submitted substantial evidence in an attempt to show that all of the six contested cities proposed by Petitioner failed to have similar working

conditions to Omaha, and that the Respondent's five proposed cities all do have similar working conditions.

The job match evidence establishes that police officers in all of the cities proposed by both parties deal with protecting lives and enforcing laws, investigating crime, responding to disaster and emergencies, arresting suspects, etc. Exhibit 7 in this case lists well over 100 officer job duties which, with a few minor exceptions, are performed by officers in all surveyed cities. However, the Respondent's evidence was persuasive that the prevalence of violent crime, as well as its density of location and level of relationship to gang activities, must be considered when analyzing the working conditions of police officers. While the evidence underscored the fact that all police officers in all cities must deal with violent crime, the level of crime and the risks and stress involved in dealing with it, together with such factors as weather and the organization of special units to deal with crime, can have a substantial effect on working conditions. In short, while the description of duties of a police officer is a necessary part of the analysis, and while the description of duties can be virtually identical, the working conditions can be substantially different.

Much of the Respondent's evidence of working conditions in the various proposed array cities was through testimony by members of the bargaining unit who testified as to their opinions of such conditions in those cities. These witnesses were long experienced police officers, who traveled through the various cities and submitted forms to knowledgeable personnel employed by each city. The witnesses would personally interview such personnel, tour the city with local police personnel, and make independent judgments as to how the conditions should be measured against the conditions in Omaha. They would then fill in the working condition forms accordingly. Their testimony, together with their exhibits, indicated that they did not change any

of the information other than as necessary when there was not an exact fit for a certain condition, or when their experience in the proposed city convinced them that the question was not accurately understood. The witnesses then submitted the results as exhibits at trial and testified as to their opinions regarding the comparator cities.

Petitioner objected to such testimony on the basis that Neb. Rev. Stat. § 48-818(2)(c)(g) requires such evidence to be accompanied by an affidavit by the employer or another person with personal knowledge demonstrating the affiant's knowledge and competency to testify. The applicable language of the statute, as adopted by LB 397, as relied upon by Petitioner, is as follows:

“(g) The Commission shall receive evidence relating to array selection, job match, and wages and benefits which have been assembled by telephone, electronic transmission, or mail delivery, and any such evidence shall be accompanied by an affidavit from the employer or any other person with personal knowledge which affidavit shall demonstrate the affiant's personal knowledge and competency to testify on the matters thereon. The Commission, with the consent of the parties to the dispute, and in the presence of the parties to the dispute, may contact an individual employed by an employer under consideration as an array member by telephone to inquire as to the nature or value of a working condition, wage, or benefit provided by that particular employer as long as the individual in question has personal knowledge about the information being sought. The Commission may rely upon such information gained in such inquiry for its decision. Opinion testimony shall be received from the Commission based upon evidence provided in accordance with this subdivision.”

Petitioner's position seems to be that the Commission may now receive evidence of working condition array members only if it is collected by telephone, electronically, or by mail, together with the affidavit of competency and knowledge by the person providing this information, or by the Commission gathering such evidence by telephone.

Prior to LB 397, the method employed by the parties to find working conditions in an array was very much like the methods used by Petitioner and Respondent in this case.

Commission Case No. 1175, *supra*, involving the same parties as Petitioner and Respondent, the Petitioner relied largely on the testimony of Paul Essman as an expert consultant who admitted that he gave no consideration to the working conditions under which officers performed their duties, and that he solely based his decision on whether to include at least one city solely on proximity and size as compared to Omaha. The Respondent however presented considerable differences in working conditions. Much of that evidence related to the various factors involving crime rates, with a strong focus on the level of gang activities. In that case, the Petitioner argued that Kansas City, Missouri should be included, and Respondent argued against inclusion of Kansas City. Now the Respondent argues for including Kansas City, and the Petitioner argues against. We do not have the evidence before us from 2009, and we can only assume that the relevant conditions for comparison have changed.

One of the criticisms of the Commission's proceedings prior to LB 397 was that the formal rules of evidence made the gathering of evidence too expensive for all but the largest employers and bargaining units. To create an affordable and streamlined method of obtaining credible evidence is shown by the very language of Section 48-818 to be one of the primary goals behind the adoption of LB 397.

Neb. Rev. Stat. § 48-818(2)(g) as amended by LB 397 requires opinion testimony to be received based upon evidence provided in accordance with that subsection. We do not read subsection (g) as requiring that the relaxed methods of gathering evidence are the only permitted methods to gather and present evidence of working conditions to the Commission. Subsection (g) states that: "The Commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than those adopted by rules pursuant to Section 48-809." Subsection (g) goes on to require that "the Commission shall

receive evidence related to array selection, job match, and wages and benefits which have been assembled by telephone, electronic transmission, or mail delivery, and any such evidence shall be accompanied by an Affidavit from the employer or any other person with personal knowledge.” It also allows the Commission to obtain such evidence by telephone so long as the individual in question has personal knowledge about the information being sought. It provides that opinion testimony shall be received by the Commission based upon evidence provided in accordance with that subsection. Petitioner’s position seems to be that the Commission can only receive such evidence if it is obtained from the employer or person with personal knowledge in the proposed array city, accompanied by their affidavit as to personal knowledge. We find that subsection (g) must be read to provide that the Commission is not required to follow the formal rules of evidence, and that the Commission must receive such evidence gathered and presented by the methods set forth, but that it does not require evidence to be presented at trial only by such methods. Further, subsection (g) acknowledges that the Commission may receive evidence complying with rules adopted pursuant to Section 48-809.

This case illustrates problems inherent in our evidence-based determinations. The same parties may look at the same cities differently in each disputed array case. Their different viewpoints may be based on different facts, but of course there is also the possibility that a party argues for or against inclusion of a city in the array based upon whether the party believes inclusion to be beneficial or harmful to its desired result, with the evidence regarding that city presented and argued accordingly. LB 397 has done little to solve such problems encountered in this system. In an effort to provide evidence to the Commission in an efficient manner, the parties in any case attempt to provide the evidence through opinions. Few, if any, witnesses would be experts with respect to all working conditions in all cities. Either a witness with

extensive knowledge of conditions in the city which is a party to the case attempts to learn enough about the working conditions in the cities proposed for the array to provide the Commission with an opinion as to how those conditions compare with the party city, or else a witness with extensive knowledge regarding how to put together a survey of working conditions obtains information from people in the array cities who each know their own city but may or may not understand the questions, and may or may not take time to complete the survey accordingly, and who may or may not know anything about how the information relates to working conditions in the party city. Either method has more than adequate room for manipulation and error. However, the alternatives would be to simply look at a map and ask how much public employers are paid in the seven (or eight or nine) nearest cities within any given size comparison limits, or to require testimony by witnesses who have true expertise in the party city and also in all the array cities for which they are providing information.

Neb. Rev. Stat. § 48-809 provides that the Commission may adopt reasonable regulations governing its proceedings. Rule 37 of the Commission states that “In any case before the Commission in which the Nebraska Rules of Evidence are required to not be observed, unless otherwise required by the Industrial Relations Act, the Commission shall admit and give probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and excluding competent, irrelevant, immaterial and unduly repetitious evidence....”

Respondent’s working conditions evidence was presented as opinions of expert witnesses. This is the type of evidence heard by the Commission many times in the past. Such witnesses are subject to cross-examination and the Commission is able to observe the witnesses and judge the weight and credibility to be given to their testimony. We do not find LB 397 to be

read to exclude such evidence, but only to provide reasonable alternatives to such evidence. We therefore determine that such evidence was properly received in this case by the Commission.

As to other factors affecting work or working conditions for law enforcement officers, the evidence contains numerous other elements for comparison, but the parties did not focus their presentations or arguments on those elements, and we find that the evidence does not establish substantial differences which cause the work or conditions of employment to be different. The Commission concludes that the Respondent has met the burden of establishing that the statutory presumption of similar working conditions may be overcome with particular evidence regarding violent crime and how it affects working conditions of police officers, and that the level and nature of such crime in a city, and the manner of dealing with such crime, can be of such significance that it can result in substantial differences which cause the work or conditions of employment to be different. In this case, the evidence shows that violent crime in the City of Memphis, Tennessee, is so rampant that it creates a working environment and employment condition that is not generally found in Omaha. To the other extreme, Madison, Wisconsin, was presented as having very little violent crime, which also created a working environment and working conditions very different from the experience of most police officers in Omaha. Petitioner's witness, Police Chief Todd Schmaderer, testified that both the high crime rate of Memphis and the comparatively low crime rate in Madison are substantially different from Omaha.

Input Point	Violent Crime	Murder	Rape	Robbery	Aggravated Assault
Madison, WI	846	7	83	226	530
Memphis, TN	11,399	140	501	3,285	7,473
Omaha, NE	2,458	32	180	723	1,523

(Excerpt, See Exhibit 8)

The Respondent met its burden of proving the substantial dissimilarity of working conditions in Memphis and Madison. Therefore, Memphis, Tennessee, and Madison, Wisconsin, will not be included in the array.

As to the cities of Milwaukee, Wichita, Nashville and Louisville, we do not find that the evidence meets the burden of establishing substantial differences sufficient to overcome the statutory presumption of similarity.

The next question we must answer is whether the evidence establishes substantial similarities which cause the work or conditions of employment in any of the Respondent's proposed array cities to be similar to Omaha.² Respondent's expert witnesses visited the proposed array cities and testified that the work or conditions of employment in each of the Respondent's proposed array cities are sufficiently similar to that of Omaha. We find the opinions of these witnesses to be credible. We find that the evidence does meet the burden of establishing adequate similarity in all five cities.

This leaves Oklahoma City and Tulsa, Oklahoma in the array, to be joined by five to seven of the nine eligible cities. Pursuant to Section 48-818(2)(b)(ii):

"If more than nine employers with job matches are available, the Commission shall limit the array to nine members, based upon selecting array members with the highest number of job matches at the highest job match percentage."

We find no significant difference in job matches in these cities. In this respect, the witnesses who describe police work as very similar in all cities were correct as to each of the remaining cities.

² See, § 48-818(2)(c)(iii)(B): "The presumption created by subdivision (2)(c)(iii)(A) of this section may be overcome in situations where evidence establishes that there are substantial similarities which cause the work or conditions of employment to be similar, allowing the commission to consider public employers located within a metropolitan statistical area even if the metropolitan statistical area population in which that employer or employers are located is more than double or less than one-half the metropolitan statistical area population of the public employer before the commission. The burden of establishing sufficient similarity is on the party seeking to include a public employer pursuant to this subdivision (2)(c)(iii)(B) of this section.

We must then turn to the preference for proximity to Omaha. In doing so, we are not required to use nine array members, as the statute provides for an array of seven to nine comparator cities. Giving priority to geographical proximity, we do not include Cincinnati and Nashville, both of which are over 600 miles from Omaha. We also do not include Fort Worth, Texas, which is part of an MSA almost eight times that of the Omaha MSA and which is almost 600 miles from Omaha. While we are aware that Cincinnati and Fort Worth were included in the array in Case No. 1175, we follow the statutory preferences established in 2011 for proximity and for MSA populations more similar to that of Omaha's. We are also mindful that in Case No. 1175 our Petitioner argued for inclusion of Kansas City, Missouri in the array and it is now our Respondent who argues for including Kansas City, Missouri. Again, we must base our array determinations on a case by case basis, based upon the evidence presented in the case by the parties.

[INTENTIONALLY LEFT BLANK]

Therefore, the array in this case shall be:

Kansas City, MO
Wichita, KS
St. Paul, MN
Tulsa, OK
Oklahoma City, OK
Milwaukee, WI
Denver, CO
Louisville, KY

ALL THREE COMMISSIONERS ON THE PANEL CONCUR IN THIS RESULT

DATED this 22nd day of June, 2016.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

By 
William G. Blake, Commissioner