

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS, AFL-CIO/CLC,)
LOCAL 2085)

Complainant,)

vs.)

CITY OF BETHANY,)

Respondent.)

CASE NO. 00155

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter came on for hearing before the Public Employees Relations Board (PERB or the Board) on the 20th day of May, 1991 on Complainant's Unfair Labor Practice (ULP) Charge. The Complainant appeared by and through its attorney, James Moore. The Respondent appeared by and through its counsel, David Davis.

The Board received documentary and testimonial evidence. The Board also solicited and received post-hearing submissions (Proposed Findings of Fact, Conclusions of Law, and supporting briefs) from both parties.

The Board is required by 75 O.S. 1981, §312, to rule individually on Findings of Fact submitted by the parties. The submission of the Complainant is treated as follows:

1. Proposed Findings of Fact Nos. 1-4, 7, 9, 13-16, are substantially adopted by the Board.

2. Proposed Findings of Fact Nos. 5, 6, 8, 10, 11, 12, 17, 18, and 19 are accepted in part as modified herein and rejected in part.

The Board treats the submission of the Respondent as follows:

1. Proposed Findings of Fact Nos. 1, 2, 5, 6, 8, are substantially adopted by the Board:

2. Proposed Findings of Fact Nos. 3, 4, 7, 10, are accepted in part, as modified, and rejected in part.

3. Proposed Findings of Fact Nos. 9, 11, & 12 are rejected as irrelevant or unnecessary for this Board's decision.

FINDINGS OF FACT

1) The Complainant, the International Association of Firefighters, Local 2085, (the Union) is, and was at all times material herein, the duly certified and acting labor representative and bargaining agent for all Bethany firefighters except probationary employees, the Fire Chief and one Administrative Assistant.

2) The City of Bethany is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma, which operates under a charter form of government.

3) While operating under the 1985-86 Collective Bargaining Agreement (City Exhibit #2), the City of Bethany (the City) and

the Union began negotiations for a successor collective bargaining agreement (CBA) for the year 1986-87. (Record p. 65)

4) As part of the negotiations toward a 1986-87 CBA, the City submitted a proposed change to the grievance arbitration procedure wherein the Chief of the Fire Department would be substituted for a neutral arbitrator and his finding would be final and binding on the parties. (Union Exhibit #2) This change represented a significant departure from prior contract procedures. (Record p.93, 97-98)

5) The City refused to withdraw the proposed grievance arbitration procedure and negotiations ceased for Fiscal Year (FY) 1986-87. No interest arbitration was held for that year. (record p.15)

6) In March 1987, the parties began negotiating again for FY 1987-88. The Union initially proposed changes to the grievance arbitration procedure in the contract to "put it back in line with the statute". (Testimony of Fred Moore, Record p. 46).

7) The City submitted a counter proposal which would have limited the effect of an arbitrator's decision regarding disciplinary penalties to that of only a recommendation to the City Manager which he could then reject. (Union Exhibit #2).

8) Fred Moore, the chief negotiator for Local 2085 for FY 1987-88, informed the City that the City's proposed change was not a proper subject for negotiations. Mr. Moore requested the City to remove the subject from the bargaining table so the parties could negotiate on other items. (Union Exhibit #5) (Record pps. 23, 61).

9) During negotiations for FY 1987-88, the City also proposed changes in the prevailing rights clause of the contract to delete the statutory language of the Fire and Police Arbitration Act (FPAA). (Record p. 25, 11 O.S. §51-111). The City proposed substitute language which attempted to reconcile an apparent conflict between the specifically negotiated Management Rights reservations found in Article VI of the CBA and the statutory Prevailing Rights language. The City's proposed changes made explicit the City's the right to make changes in the workplace, unilaterally, pursuant to its rights outlined in the Management Rights section of the CBA, after giving affected employees five (5) days notice of any changes. This proposal represented a significant departure from prior contract language but was an attempt to clarify the City's rights as reserved in the Management rights sections while adding the explicit requirement of notice to the Union. (City Exhibits #5 & #8, Record pps. 46, 94, & 106).

10) Although willing to set aside the issue of the grievance and arbitration procedure temporarily (Union exhibit 4), the City insisted that their proposed grievance arbitration procedure would be a part of the FY 1987-88 contract. (Record pps. 28 & 48).

11) The Union suspended negotiations and refused to meet further based upon the City's insistence that its proposed changes to the grievance arbitration procedure be included in the FY 1987-88 contract. (Record pps. 27 and 48). The Union's refusal to continue negotiations reflected its belief that statutory rights

would have to be sacrificed in order to reach an agreement on mandatory subjects of bargaining. (Record p. 33).

12) Negotiations resumed in May of 1987. Based upon correspondence from the City, the Union, at that time, believed the City had withdrawn its proposals regarding the grievance arbitration procedure and arbitration. (Record p. 34, Union Exhibits #8 & #9)

13) After bargaining resumed in May of 1987, the City proposed another grievance arbitration procedure which was similar to its prior proposal (Union Exhibits #11 & #1, section 14). Instead of making the arbitrator's decision subject to being overruled by the City Manager, the City's latest proposal essentially excluded the issue of punishment or penalties for disciplinary actions from the grievance procedure and the authority of the arbitrator. (Union Exhibit #15).

14) This new proposal by the City relative to the grievance arbitration procedure and its prevailing rights language caused the Union to declare impasse on June 10, 1987. (City Exhibit #7, Union Exhibit #12, Record pps. 38-39)

15) At the time impasse was declared, there were 14 unresolved issues between the parties, including the grievance arbitration procedure and the prevailing rights language. (City Exhibit #17, and Record p. 77)

16) During impasse, but prior to arbitration, the parties continued to negotiate, and agreement on the grievance procedure issue and prevailing rights issue was reached, a collective

bargaining agreement drafted, but the membership of the Union failed to ratify the agreement. (City Exhibit #9, Record pps. 78-79)

17) The parties proceeded to impasse arbitration on December 14, 1987. The grievance procedure issue was not submitted to arbitration. (City Exhibit No.8)

18) The issue of prevailing rights was submitted to arbitration, and the January 10, 1988 award essentially implemented the City's proposed prevailing rights language and granted the City the right to modify departmental rules and regulations in accordance with its specifically reserved Management Rights, with amended notice and recognition of the Union's right to grieve such decisions. (City Exhibit #8, pps. 8-11)

CONCLUSIONS OF LAW

1) The Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S. §51-104(b).

2) In an administrative proceeding before the PERB, the charging party has the burden of persuasion by a preponderance of the evidence as to factual issues raised in its ULP charge. 11 O.S. Supp. 1990, § 51-104(6)(C).

3) The Fire and Police Arbitration Act, (FPAA) 11 O.S 51-111, provides, in regard to grievance arbitration procedures in a CBA, as follows:

Every such agreement shall contain a clause establishing arbitration procedures for the immediate and speedy resolution and determination of any dispute which may arise involving the interpretation or application of any provision of such agreement or the actions of any parties thereunder. In the absence of such negotiated procedure such dispute may be submitted to arbitration in accordance with the provisions of Sections 51-107 through 51-110 of this title...

4) The FPAA provides that the parties to a Collective Bargaining Agreement may negotiate the procedures which the parties will use to discuss grievances preceding arbitration, but the FPAA did not envision, nor does it permit, the removal of entire classes of grievances or issues from the grievance arbitration process. The FPAA, through the provisions of §51-111 and other sections, seeks to accord to permanent members of a fire or police department all the rights of labor, but to protect the public health, safety and welfare it also withdraws from that labor force the right to strike or to engage in any work stoppage or slow down. City of Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977). Where the right to strike has been removed, other procedures for the resolution of grievances and for the enforcement of contract terms must exist or there could be no balance between the rights of labor and of management. The Oklahoma Supreme Court has recognized that when the Legislature took away the right to strike they also expressed, through §51-111, "the clear legislative intent for any disputes arising from the interpretation or application of the binding agreement to have an "immediate and speedy resolution" by required mediation." (emphasis added) Harris, 561 P.2d 1358-1359.

In Harris the Supreme Court recognized that without an effective procedure for resolving grievances arising under the CBA through arbitration, the terms of that CBA become unenforceable and the general intent behind the FPAA and behind collective bargaining in general is frustrated. For grievance arbitration is one way for labor to achieve dispute resolution and to enforce the negotiated and agreed terms of the CBA with management; striking is another. In the private sector, the right to strike is given up as a means of enforcing the contract terms in exchange for the right to grievance arbitration. In the private sector this quid pro quo is accomplished in the CBA itself, and to the extent that grievance arbitration is not included to cover an area of grievances under the contract, labor retains the right to strike. In essence grievance arbitration and the right to strike can be viewed as necessarily either/or methods of enforcing the terms of a CBA. For every issue between management and labor, for every potential violation of the CBA, there will be either the right to grievance arbitration or the right to strike. In Oklahoma, the right to strike has been statutorily denied to police and firefighters under the FPAA; it has been removed as a method of enforcing the terms of a CBA. Necessarily, then, grievance arbitration must be provided by law as the means of enforcing the terms of a properly negotiated and binding CBA, or a CBA would be essentially unenforceable.

5) Certainly the FPAA does encourage the parties to collective bargaining to remain free to shape the structure of their relationship through negotiations, in accordance with this

principle, the FPAA does provide that the parties are free to negotiate the procedures to be used to reach arbitration; these preliminary procedures are mandatory subjects of bargaining. The scope of this subject does not, however, extend to include removal of a class of grievances or penalties from the arbitration process entirely. The freedom of the parties to structure their relationship cannot extend to eliminating grievance arbitration as the means of dispute resolution under the CBA for the reasons set out above. Removal of a class of grievances from the arbitration process entirely is, therefore an illegal subject for bargaining.

6) The Board concludes that by proposing the removal of a class of grievances from the grievance arbitration process and by requiring the Union to negotiate to impasse over this removal of discipline and penalties from the arbitration process, the City of Bethany did bargain in bad faith in violation of 51-102(6a)(5) and thereby committed an unfair labor practice.

7) The FPAA, §51-111 provides, in regard to prevailing rights, as follows:

All rules, regulations, fiscal procedures, working conditions, departmental practices and manner of conducting the operation and administration of fire departments and police departments currently in effect on the effective date of any negotiated agreement shall be deemed a part of said agreement unless or except as modified or changed by the specific terms of such agreement.

(emphasis added). The FPAA, therefore, provides that parties may negotiate modifications and exceptions to the Prevailing Rights provision of the Act.

8) The City of Bethany and the Union had already negotiated an exception or modification to Prevailing Rights before the incidents giving rise to this ULP occurred. This negotiated exception was in the Management Rights provision of the CBA, found in Article VI, in which the City explicitly reserved, among other rights, the right to "establish, modify, and enforce Fire Department rules, regulations, and orders."

During bargaining in 1987, the City proposed and insisted upon a change to the statutory Prevailing Rights language which was contained in the CBA. Through this proposed change to the statutory language the City sought to clarify that the rights already reserved to it in the Management Rights clause were not part of the continuing prevailing rights under the CBA or the statute. The proposed change made it clear that the rights and privileges currently enjoyed by the Union would remain in force and effect, subject to the rights which the City had reserved in the Management Rights section of the CBA to modify department rules. The City's proposed change to the Prevailing Rights language also added the requirement that the City give notice to affected employees within five (5) days.

9) The intent behind the Prevailing Rights provisions of §51-111 is clear. The assurance that, in the absence of negotiated changes or reservations, the relationship between the parties and their conduct toward one another will not change obviates the necessity to negotiate in minute detail about issues which are not currently the subject of controversy. The Prevailing Rights

provision in §51-111 also ensures that one party's rights or privileges will not be sacrificed by unilateral action of the other party unless that right or privilege has been bargained away in exchange for something else.

Here the parties had already negotiated and agreed to an exception or modification of the Prevailing Rights provision; they had agreed, through the Management Rights provisions of Article VI, that the City retained the right to make some unilateral changes during the term of the CBA without further negotiations. The Management Rights clause thereby explicitly reserved some subjects from the purview of the Prevailing Rights language of the CBA and the statute. It is only reasonable to assume that in the course of negotiations which yielded the Management Rights language of the CBA that the Union received some right or concession in exchange for agreeing to that language. This type of negotiated change was envisioned by the FPAA. see the underlined language of §51-111 above.

10) The language proposed by the City during negotiations in 1987, and ultimately implemented by Arbitrator Scheldler with some modification in January of 1988 (see Finding of Fact #18), really did nothing more than specify the manner in which changes made pursuant to rights already specifically reserved by the City in the Management Rights clause, rights conceded to the City by the Union through negotiations, would be implemented.

11) This Board finds that the modifications to the Prevailing Rights clause which the City of Bethany proposed and which Arbitrator Schedler implemented are in accordance with the general freedom granted under the FPAA to parties engaged in collective bargaining to shape the structure of their relationship and did not, therefore, exceed the scope of permissible exceptions under §51-111. The Board, therefore, concludes that the City did not violated 11 O.S. 51-102(6a)(5) and did not commit an unfair labor practice by requiring the Union to bargain to impasse on the proposed modifications to the Prevailing Rights clause.

CEASE AND DESIST ORDER

The City of Bethany is hereby ordered, pursuant to 11 O.S. §51-104b(c) and consonant with the Findings of Fact and Conclusions of Law entered herein, to cease and desist from bargaining in bad faith by proposing upon and insisting upon illegal bargaining proposals which attempt to remove a class of grievances from the grievance arbitration procedure. Furthermore, this Cease and Desist Order shall be posted in a prominent location within the Bethany Fire Department for no less than thirty (30) days after the date of issue.

Dated this 9th day of January, 1992

James G. Carter
CHAIRMAN

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PARTIAL DISSENTING OPINION

ELLIS, C: I dissent to that part of the majority decision which finds the Respondent/City ("Respondent") guilty of bargaining in bad faith in violation of the Fire and Police Arbitration Act (FPAA). 11 O.S. §51-102(6a)(5).

The basis of my colleague's majority decision is that the Respondent, during collective bargaining with the Complainant/Union ("Union"), made (a) proposal(s) relating to a grievance resolution system which did not satisfy the following requirements of 11 O.S. §51-111 (§111):

Every such agreement shall contain a clause establishing arbitration procedures for the immediate and speedy resolution and determination of any dispute which may arise involving the interpretation or application of any of the provisions of such agreement or the actions of any of the parties thereunder.

and that the proposal was insisted on by the Respondent to impasse.

The achievement of the foregoing statutory goal is not exclusively dependant upon the terms of the collective bargaining agreement. §111 further provides that:

In the absence of such a negotiated procedure such dispute may be submitted to arbitration

in accordance with the provisions of §51-107 - 51-110 of this title, except that the arbitration board shall be convened within ten (10) days after demand therefore by the bargaining agent upon the corporate authority or authorities.

Thus, the statute assures the attainment of its goal by its own terms, independent of the provisions of the collective bargaining agreement negotiated by the parties. This method recognizes, and therefore sanctions, the possibility that parties bargaining in good faith on this mandatory subject may agree to a grievance resolution system that does not fully achieve the goal of the statute or, may not agree on any such system at all. This is particularly true in view of the fact that the obligation to bargain does "not * * compel either party to agree to a proposal or require the making of a concession". 11 O.S. §51-101.

When an agreed system of grievance resolution does not provide the aggrieved party the full benefits guaranteed by the statute, the contractual grievance system is, to that extent, supplemented by the statute. Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977); IAFF, Local 2359, v. City of Edmond, 619 P.2d 1274 (Okla.App. 1980). It is within the authority of the arbitrator hearing the grievance to apply the terms of the collective bargaining agreement to the extent that it applies, if at all, and the terms of the statute to the extent that it applies, if at all. Garner v. City of Tulsa, 651 P.2d 1325 (Okla. 1982); Association of Classroom Teachers v. Independent School District No. 89, 540 P.2d 1171, 1176 (Okla. 1975).

The majority opinion seems to create a situation where the terms of a grievance resolution system are mandatory subjects of bargaining to the extent that they meet or exceed the requirements of §111 and are illegal subjects to the extent they fail to meet those requirements. The dividing line may not be clear in every case and such a rule would create a dilemma for the parties and unnecessarily burden the bargaining process.

In the case where a party makes a collective bargaining proposal relating to the procedure, remedy, or other aspect of a grievance resolution system which is later found not to meet the minimum requirements of §111, some evidence that such a proposal was made and urged for the purpose of avoiding reaching agreement is necessary to support a finding of bad faith bargaining. I do not find any evidence to support such a finding in this case.

The city withdrew several proposals to which the Union objected in an effort to reach agreement with the Union on this issue. Although the Union "declared" impasse over the issue, an actual impasse did not exist (or, if it did, it was broken shortly thereafter) because the parties continued to bargain over the matter, it was finally resolved, and the grievance resolution issue was not one of the approximately thirteen issues submitted to interest arbitration. In fact, the only delay occurring in the bargaining process relating to this issue was the suspension of negotiations caused by the Union on the mistaken belief that the §111 grievance/arbitration rights can be waived by contract.

I conclude that the proposals made by the Respondent are not illegal per se and that there is no evidence that the Respondent made those proposals for the purpose of avoiding agreement with the Union. I would accordingly find that the Respondent is not guilty of a refusal to bargain in good faith in violation of 11 O.S.A. §51-102(6a)(5).

Charles Ellis

Charles Ellis, Member

Jan. 7, 1942