

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

INTERNATIONAL ASSOCIATION )  
OF FIRE FIGHTERS, NO. 2284, )  
 )  
Complainant, )  
 )  
vs. ) Case No. 204  
 )  
THE CITY OF McALESTER, )  
 )  
Respondent. )

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND CEASE AND DESIST ORDER

This matter comes on for decision before the Public Employees Relations Board ("PERB" or "the Board") on the request of the parties, International Association of Fire Fighters, Local 2284 ("the Union") and the City of McAlester ("the City"), who ask the Board to address certain issues relating to the statutory duty to bargain in good faith in the post-impasse arbitration environment. The City appears by and through its attorneys, Lynn Paul Mattson and Charles S. Plumb; the Union appears by and through its attorney, James R. Moore. The parties have waived their rights to an evidentiary hearing before the Board and have agreed that this matter may be decided on stipulated facts and exhibits, as supplemented by the arguments and authorities contained in their briefs. (See, Transcript of Stipulations of Fact and Exhibits dated May 15, 1989. Since that time the City has made Application to Supplement the Record by the Addition of Proposed Exhibits "W" and "X." The Union has not objected. The Exhibits are deemed admitted.)

### STIPULATED FACTS

(Note: Findings 10, 16, 19, and much of 13 were not stipulated to by the parties. Those findings flow, rather, from the extensive documentary exhibits offered by the parties.)

1. The Union is the exclusive certified bargaining agent for certain employees of the City of McAlester Fire Department.
2. The City is a municipal corporation organized pursuant to the laws of the State of Oklahoma.
3. The City and the Union are parties to a collective bargaining agreement ("CBA") entered into pursuant to the terms of the Fire and Police Arbitration Act ("the FPAA" or "the Act"), codified at 11 O.S. 1981, §§ 51-101, et seq. as amended (All references herein are to the FPAA, unless otherwise noted.)
4. The parties have negotiated several CBA's over the years, the last for the period January 1, 1986 through June 30, 1987 (Even though this appears to be a multi-year agreement, it will be referred to as the Fiscal Year 1986-87 CBA).
5. With regard to a CBA for Fiscal Year 1987-88, the parties bargained to impasse. After utilization of the statutory impasse arbitration procedure, §§ 51-106 through 51-

108, arbitral findings and recommendations were issued (A copy of those findings and recommendations were admitted into evidence.)

6. The City declined to adopt the Fiscal Year 1987-88 arbitration findings and recommendations, and thereafter the parties continued to operate under the terms of the last executed CBA between the parties. (See Finding 4, above.)
7. The parties met and bargained in an effort to reach agreement on a Fiscal Year 1988-1989 CBA. The parties were unable to reach agreement and bargained to impasse.
8. In a letter dated July 15, 1988, the City identified twenty-six (26) unresolved issues and informed the Union it desired to submit those issues to interest arbitration pursuant to § 51-106. The contract issues which were unresolved in the Fiscal Year 1987-88 arbitration (See Findings 5 and 6, above) were also among the Fiscal Year 1988-89 issues submitted for arbitration.
9. Prior to final submission of the case to the arbitration panel (including specifically argument and authority for their respective positions), the parties narrowed the issues.

The City unilaterally conceded the Union's position on 14 of the unresolved issues, and the Union unilaterally conceded the City's position on 8 of the unresolved issues. Accordingly, the Fiscal Year 1988-89 arbitration was to consider 12 [sic] identified, unresolved issues.

10. The impasse panel met on March 27, 1989 at which time the neutral member's position on the submitted issues was made known to the other panel members. On March 28 and 29 the City asked the Union to return to the bargaining table. (See, Defendants Exhibits "1" and "2" to Joint Exhibit "J.") The Union declined. There is little doubt that the Union took the position that, absent indications the impasse could be broken, it had no duty to participate in post-impasse bargaining, other than through its participation in the impasse panel.
11. On April 3, 1989, Mr. P. M. Williams, the neutral member of the statutory impasse arbitration panel issued proposed findings and recommendations, from which the City dissented.
12. On April 10, 1989, the McAlester City Council considered and declined to adopt the arbitral

findings and recommendations referred to in Finding 10 and 11.

13. The Union appointee also dissented to Mr. Williams' findings and recommendations. The City first learned of the Union's intent to dissent from certain of the neutral arbitrators non-substantive findings and recommendations at a meeting with Union representatives subsequent to the City Council's rejection of Mr. Williams' Findings and Recommendations. The City alleges that the Union impasse panel representative's "dissent," dated April 10, 1989, reversed his previous acquiescence in the findings and recommendations of the neutral member, Mr. Williams. Although there is no direct evidence to support this theory, the indirect evidence, considered as a whole, leads to the conclusion that the Union representative's "dissent" was a tactical maneuver designed to cloud the City's April 10 rejection of the impasse findings and recommendations. See, Joint Exhibit "G," in which the Union Representative dissents only from "Paragraph (A) concerning Item #17 of the Background and Content of the Record, p. 4." See also, Supplemental Exhibit "W," in which

the Union representative acquiesces in the May 29, 1989 Findings and Recommendations of the neutral member, which appear not to differ substantially from those of April 3, 1989. On the other hand, Exhibit "W" also reflects the Dissent of the City's impasse representative to what seem to be purely procedural non-substantive aspects of the May 29th report.

14. Since April 10, 1989, the parties have informed each other that neither has any new contract proposals for the Fiscal Year 1988-89 CBA. Thus, the parties remain at impasse on a successor agreement.
15. On April 11, 1989, the City informed the Union it was unilaterally implementing its last offer (that is, adopted its bargaining position immediately prior to interest arbitration as a basis for determining terms and conditions of employment on the issues disputed between the parties.)
16. On April 13, 1989, the Union filed, in State Court for Pittsburg County, an Application for Temporary Restraining Order seeking to block the City's unilateral implementation of contract terms. An evidentiary hearing was conducted on the same date and the Application

was denied (the pleadings and hearing transcript were received as evidence by the PERB.)

17. On April 19, 1989, the neutral interest arbitrator issued a further letter to the other two members of the impasse arbitration panel implying that the panel's activities were not complete and that the panel retained jurisdiction over the dispute.
18. Neither the City nor the Union had any information or reason to believe, as of May 16, 1989, that the impasse arbitration panel would alter or amend its April 3, 1989, findings and recommendations (See, Finding 10, above).
19. On May 19, 1989, the 3-member impasse arbitration panel met again, "withdrew" its April 3, 1989 Report, and issued new findings and recommendations, which concluded, inter alia, that the parties should resume bargaining for a 1988-89 CBA. (See, Exhibit "W.")

#### ISSUES

In light of the foregoing facts, the issues jointly presented by the parties are:

1. Whether under the circumstances described in the Finding of Facts, the City's unilateral

implementation of its last proposal on April 16, 1989, constituted a violation of 51 O.S. 1981, §§ 51-102(5) and 51-102(6a)(5)?

2. Whether the Union was under an obligation to participate in bargaining after the City invoked the interest arbitration procedure?
3. Whether the Union's conduct estops it from asserting a violation of the Act?

The City raised several affirmative defenses in its Answer to the Complaint. The defenses not encompassed by these issues, framed jointly by the parties, are deemed waived.

#### PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this dispute pursuant to § 51-104b and 75 O.S. 1981, §§ 309, et seq.
2. The unilateral changes made by the City (on nine contract articles and four rules and regulations) from the terms and conditions of employment prevailing prior to the impasse arbitration involved mandatory topics of bargaining under the Act. This conclusion flows not from any stipulation or argument of the parties but rather inferentially from the mutual willingness of the parties to bargain those issues to impasse and to submit them to

interest arbitration. (See, Finding No. 8 above). The Board should further note that neither party, otherwise vigilant and vigorous in protecting its position, has treated the issues involved as anything other than mandatorily bargainable.

3. (a) The City's unilateral implementation of its previous bargaining proposals, announced the day after it rejected what it regarded as the impasse arbitration panel's findings and recommendations, is violative of §§ 51-102(6a)(1), 51-102(6a)(5) and 51-105. This conclusion is consistent with the one reached by the Board in IAFF Local No. 2551 v. City of Broken Arrow, PERB Case No. 159, which presented similar facts as this case.
- (b) The City's conduct in this regard is not excused by its initiation of and participation in one brief negotiating session minutes after the rejection of the impasse arbitration panel's findings noted in Conclusion No. 3(a). Section 51-

108 envisions a resumption of bargaining after rejection of the impasse panel's report, not a pro forma effort to ascertain whether the other party has changed its position.

- (c) The City's conduct in this regard is not excused by the Union's apparent eleventh-hour effort to avoid a majority recommendation of the impasse arbitration panel report by filing a "dissent" on non-substantive issues. The City has made it clear that it believed it had the right to act on the neutral member's findings and recommendations without regard to the Union appointee's position. See, Exhibit "X."

4. The Union is not "estopped" from bringing the instant ULP charge by its refusal to participate in collective bargaining sessions during the pendency of impasse arbitration proceedings. The City has cited no authority for this proposition nor has any been disclosed by independent research.

- 5 (a) Section 51-105 ("Evergreen") flatly prohibits unilateral changes in contractual terms and conditions of employment; existing terms remain effective until a successor agreement is reached. The Board has previously declined, and declines today, to find that Evergreen impermissibly infringes on the rights and duties of municipal employers under the Oklahoma Constitution (specifically Art. 18, § 3; Art. 10, § 20; and, Art. 10, § 26). See, IAFF Local No. 2551 v. City of Broken Arrow, PERB Case No.159.
- (b) The City's unilateral change in terms and conditions of employment which are mandatory subjects of bargaining is not excused by inadequacies in the impasse arbitration panel's report, real or perceived. No authority is offered for this assertion, other than the statutory arbitral criteria of § 51-109, nor has any been disclosed by

the Board's independent research. Furthermore, the Board has serious doubts about its jurisdiction to review the work of impasse arbitrators, except insofar as they may attempt to usurp the statutory functions of the PERB, a circumstance not present here.

- (c) Both parties have a mandatory duty to participate in good faith in the statutory impasse resolution procedures described in §§ 51-106 et seq. Compare, ACT of Oklahoma City v. Independent School Dist #89 of Oklahoma County, 540 P.2d 1171 (Okla. 1975) (describing the statutory right to teacher collective bargaining as counterbalanced by the duty to use statutory impasse resolution mechanisms as a means of resolving disputes over the terms of the CBA.) Such participation will ordinarily satisfy the duty to bargain in good faith imposed by § 51-102(6a)(5), absent a compelling

change in circumstances, not present here, that has the actual effect of dissipating the previous impasse. This is not to say that the parties do not have a duty to work to resolve the impasse. They do. It is to say, rather, that after impasse the focal point of those efforts is the impasse arbitration panel, not a resumption of the collective bargaining sessions that produced the impasse. The parties may, of course, resume "ordinary" bargaining at any time after impasse is declared if they believe it would be beneficial to do so. In fact, they are required to do so after the City rejects the impasse panel's report. Section 51-108. Just as impasse arbitration is a surrogate for collective bargaining, it is also a substitute for self-help or other unilateral action by either side. That is the underlying teaching of FOP Lodge No. 93 v. City of Tulsa, PERB Case No. 126. In

this case, it was not a ULP for the Union to decline to participate in post-impasse bargaining when there was no evidence that such sessions would be productive. Particularly, it was not a ULP for the Union to refuse offers to meet and confer after the impasse panel had arrived at findings and recommendations apparently favorable to the Union but before its report was acted upon by the City Council (the period March 27 through April 10, 1989).

**CEASE AND DESIST ORDER**

The Board, having found that the unilateral changes by the City of McAlester in mandatory terms and conditions of bargaining violate §§ 51-102(6a)(1), 51-102(6a)(5), 51-105, and 51-108, hereby orders the City of McAlester, from and after the date of this Order, to cease and desist from implementation of any terms and conditions of employment described in these Findings of Fact and Conclusions of Law.

Both parties are ordered to resume bargaining in good faith, in the context of current bargaining efforts if such bargaining is

presently occurring, and to report to the Board, not later than August 15, 1989, as to their compliance efforts.

Respectfully submitted,

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