

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

LOCAL 2839, INTERNATIONAL)
ASSOCIATION OF FIREFIGHTERS,)
)
Complainant,)
)
vs.) Case No. 00248
) (Consolidated with
CITY OF OKMULGEE,) Case No. 00250)
)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

This matter came on for hearing before the Public Employees Relations Board (PERB or the Board) on November 14, 1991, and was deliberated upon by the Board on March 14, 1992, on the Complainant's Unfair Labor Practice (ULP) charge and the Respondent's counterclaim also alleging a ULP. The Complainant appeared by and through its attorney, James R. Moore and Respondent appeared by and through its attorney James R. Polan. The Board received documentary and testimonial evidence; the Board also solicited and received post-hearing submission (Proposed Findings of Fact, Conclusion of Law and supporting briefs) from both parties.

The Board is required by 75 O.S. 1991 312 to rule individually on Findings of Fact submitted by the parties. The submittal of the Complainant is treated as follows:

1. Proposed findings 1-9 are substantially adopted by the Board.

2. Proposed findings 10-14 are accepted in part, rejected in part.

Respondents submissions are treated as follows:

1. Proposed findings 1, 2, 3, and 6 are substantially adopted by the Board.

2. Proposed findings 4, 5, 7, 8 and 9 are adopted in part and rejected in part by the Board.

3. Proposed Findings 10, 11, 12 and 13 are rejected by the Board.

4. Proposed Finding No. 14 is rejected by the Board as unnecessary to a determination of this matter.

FINDINGS OF FACT

1. IAFF, Local 2839, is the collective bargaining agent for the eligible firefighters employed by the City of Okmulgee and has been during all times material to this action.

2. City of Okmulgee is a statutory council-manager form of municipal government governed by City Charter and has been during all times material to this action.

3. The parties to this action have been parties to various collective bargaining agreements during all times material to this action. The parties have engaged in collective bargaining since 1981. (Tr. 27).

4. For at least the past 21 years the promotional system in effect in the Okmulgee Fire Department was that the senior person in the next lower rank was promoted to the vacancy in the

next higher rank unless that person were unqualified for the promotion. (Tr. 23, 153, Union Ex. 3).

5. In collective bargaining for FY 1988-89, the city proposed a change in the promotion system in the Fire Department. (Tr. 31-32). That change would have granted promotions based upon point totals accumulated for various criterion. Those criteria were a written test, performance evaluations, experience, leadership qualities, and an oral evaluation. (Union Ex. 2). Under this proposal, the person with the highest point total would be promoted regardless of seniority. (Id.).

6. The Union rejected the city's proposal to change the promotional procedure and the collective bargaining agreement remained unchanged with respect to promotions. (Union Ex. 3).

7. In January and February of 1989, the city attempted to unilaterally implement its promotional procedure which had been rejected in bargaining (Union Ex. 3). The Union grieved the unilateral change and the parties submitted the dispute to binding grievance arbitration. On June 20, 1989, the arbitrator, Elvis C. Stephens, issued an award on the dispute in FMCS No. 89-12989. (Id.). In his award the arbitrator rejected the city's argument that it had the right to determine a new promotional system. (Id. at pp. 6-7). He found that the most senior employee had always been promoted in the past and that even when junior employees had applied they later withdrew from consideration when it was found that a more senior employee had applied. (Id. at p. 7). Finally, the arbitrator found that

promotional procedures were working conditions which had to be negotiated and the city's unilateral implementation of the new promotional system (Union Ex. 2) violated the collective bargaining agreement. (Id. at p. 8).

8. The arbitrator also stated that the city had the right to determine if the senior employee is qualified for the position and to refuse to promote an unqualified person. (Union Ex. 3 at p. 8.)

9. After the Stephens arbitration award, the parties executed a new collective bargaining agreement which did not change any element of the promotional system. (Union Ex. 1).

10. On March 19, 1991, the city posted a notice in the Fire Department that a vacancy existed in the rank of Assistant Fire Chief and it was seeking applicants. (Union Ex. 7, Tr. 35-36). The notice was signed by Abe McIntosh, the city's personnel director, and it stated that the promotion would be based on a variety of criterion, not including seniority or a written examination. (Id.). The new system was very similar to the system which the city attempted to unilaterally implement in 1989 and which the arbitrator found violated the contract. (Compare Union Ex. 2, the 1989 system, and Union Ex. 7, the 1991 system; see also personnel director testimony, Tr. 116-121).

11. The proposed criteria were not implemented by the City. (Tr at 46,98).

12. Pursuant to this notice of vacancy, the City received two applicants for the position of Assistant Fire Chief -- the

most senior firefighter from the step below, Chet Munds, and less senior firefighter, Terry Ballard. (Tr 41-42, 112).

13. Shortly after the notice was posted the Union filed a grievance over the new promotional criteria. (Union Ex. 9). The city denied the grievance at every step of the procedure. The Union decided against arbitrating the grievance because Arbitrator Stephens had already found that a very similar system violated the contract two years earlier. (Tr. 70).

14. While the Union's grievance over the change in the system was pending, the parties also began bargaining for FY 1991-92. During the course of those negotiations the city proposed changing the contract to allow it to promote based on the various criterion very similar to those attempted to be implemented in 1989 and which it had again proposed to implement with its March 19, 1991, notice. (Union Ex. 4, Tr. 37-8). The Union again rejected the city's proposed changes and the parties submitted the matter for interest arbitration which had not been completed as of the hearing of this matter. (Tr. 30).

15. Although in negotiations the parties discussed the changes the city desired, there was no agreement to make changes. (Tr. 102-03).

16. After Terry Ballard applied for the Assistant Chief position the Union President, Jack Kolakowski, gave Ballard a copy of the arbitration award on promotions and suggested that he get some independent advice on whether he would be able to keep

the Assistant Chief position if the grievance were upheld. (Tr. 73-74).

17. After meeting with Kolakowski, Ballard met with the City Manager, Dave Harris, and asked for some assurance that he would not lose the job promotion if the promotion grievance was sustained. (Ballard depo. p. 18). The City Manager refused to give Ballard any such assurances and, based on the Manager's statements, Ballard then withdrew his application. (Ballard depo. p. 24).

18. Since March, 1991, the Assistant Fire Chief position has been vacant. Since Ballard withdrew his application, Chet Munds has been the only remaining applicant and in fact has been "temporarily assigned" to but not promoted to the position. (Tr. 44).

PROPOSED CONCLUSIONS OF LAW

1. The Public Employees Relations Board has jurisdiction over the parties in the subject matter of this labor dispute pursuant to 11 O.S. Supp. 1986 51-104(b).

2. Issues involving promotion procedure constitute mandatory topics of bargaining and require good faith bargaining and refusal to bargain constitutes an unfair labor practice pursuant to 11 O.S. 51-102(6a)(5).

3. Refusal to comply with an arbitrator's award is an unfair labor practice pursuant to 11 O.S. 51-102 (6a)(1) and 51-102 (6a)(5).

4. The board finds that the current negotiated procedure for promotion is in conformity with provisions of 11 O.S. 10-120. The procedure negotiated by the parties bases promotion upon merit and fitness as required by 10-120. The parties have determined, for a period of many years, that merit and fitness is best determined by seniority (unless disqualified) and the board will not substitute its judgment for that of the parties.

5. The City has not implemented a new promotion plan and therefore has not committed an unfair labor practice under the FPAA but any implementation thereof would constitute an unfair labor practice under the provisions of the FPAA (11 O.S. 51-102 (6a)(1) and 51-102 (6a)(5)).

6. In an administrative hearing before the PERB, the Charging Party has the burden of persuasion by a preponderance of the evidence as to the factual issues raised by its unfair labor practice charge. 11 O.S. Supp. 1986 51-104(c). Relative to the unfair labor practice charges filed by the City of Okmulgee (Case No. 250), the city has failed to meet its burden.

OPINION

This Board has previously held (International Association of Firefighters, AFL-CIO/CLC, Local No. 1969 v. City of Miami, PERB Case #00153) that arbitration is strongly favored not only by this Board but by Oklahoma Courts as a method to resolve labor disputes. See Garner v. City of Tulsa, 651 P.2d 1325 (Okla. 1982); Voss v. City of Oklahoma, 618 P.2d 925 (Okla. 1980); City of Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977). This

Board will normally defer to arbitration where the issues involved are contractual. See Firefighters Local 2784 v. City of Broken Arrow. PERB Case #00104.

The Board today holds that the proposed promotion policy is sufficiently similar to the previous arbitration that to allow implementation would be to substitute this Board's judgment for that of the arbitrator. To allow an unsuccessful party in arbitration to make small changes and proceed to implement a policy which has been previously arbitrated would act to frustrate the purposes of arbitration. The Board will only substitute its judgment on rare occasions and only on those issues of law incorrectly addressed by the arbitrator and will certainly not substitute its judgment when such an act would thoroughly disrupt the process of arbitration.

The Board is persuaded that failure to comply with an arbitration award may constitute an unfair labor practice under the FPAA. (See e.g. Clatsop Community College Faculty Association vs. Clatsop Community College, Case No. UP-139-185, ___ National Public Employment Reporter (NPER) OR-17050 (Oregon Employment Relations Board, ERB, June 24, 1986) See also IAFF, Local 1969 v. City of Miami, PERB Case No. 0153.

The Respondent has come remarkably close to committing an unfair labor practice by its seeming unwillingness to accept the binding award in arbitration. However, fact remains that implementation of the promotion policy has not in fact taken place. The Board therefore does not find that an unfair labor

practice has occurred but does find that actual implementation of the promotion policy would constitute an unfair labor practice under the FPAA. The Board takes the city at its word or at least the implications of its legal arguments (See City's proposed Conclusion of Law, and Reply Brief of City, pp. 1-2) that such a violative policy will not be implemented.

The Board finds that the City has failed to meet its burden of proof relative to its ULP charge leveled against Complainants. The Board is persuaded by the evidence presented by the Complainant on the issue and therefore dismisses the City's charges.



JAMES G. CASTER
CHAIRMAN

DATED Aug. 27, 1992

KAREN L. LONG Concurs
CHARLES T. ELLIS Concurs in the Result