

**BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD**

**STATE OF OKLAHOMA**

CITY OF ARDMORE, OKLAHOMA, )  
 )  
 Complainant, )  
 )  
 vs. ) **PERB Case No. 00317**  
 )  
 INTERNATIONAL ASSOCIATION )  
 OF FIRE FIGHTERS, LOCAL )  
 1881, )  
 )  
 Respondent, )

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER OF THE PERB**

**THIS MATTER** came on for hearing before the Public Employees Relations Board ("PERB" or the "Board") on the 12th day of May, 1995, on Complainant's allegation of Unfair Labor Practice ("ULP"). Specifically, Complainant asserts that the Respondent violated 11 O.S.1991, § 51-102(6a) (1), (2), (3), (4) and (5), by reason of the Respondent's alleged refusal to arbitrate unresolved issues in the FY 1995/1996 Agreement; by the Respondent's alleged decision to "contract out" fire department services beginning July 1, 1995; and by the City Manager's alleged contacting directly members of the bargaining unit on subjects of bargaining. Complainant appeared by and through its attorney of record, James R. Moore. Respondent appeared through its attorney of record, Anthony Zahn.

The Board received documentary and testimonial evidence and exhibits. The Board noted stipulations of facts. The Board also solicited post-hearing submissions of proposed Findings of Fact, Conclusions of Law and briefs in support.

The Board is required by 75 O.S.Supp.1994, §312 and its rules to rule individually on

Findings of Fact submitted by the parties. The submitted Proposed Findings of Fact of the Complainant are treated as follows:

1. Proposed Findings of Fact Nos. 1, 2, 3, 4, 5, 6 and 7 are substantially adopted by the Board.

2. Proposed Findings of Fact 8 is rejected.

The submitted Proposed Findings of Fact of the Respondent are treated as follows:

1. Proposed Findings of Fact 1, 2, 3 (in part), 4, 5, 6, 7, 8, 13 (in part), 14 (in part), 15, 16, 17 and 18 are substantially adopted by the Board.

2. Proposed Findings of Fact 3 (in part), 9, 10, 11, 12, 13 (in part) and 14 (in part) are rejected.

#### **STIPULATIONS OF FACT**

The following facts were stipulated prior to the hearing in this action:

1. The City of Ardmore (the "City") is a municipal corporation and charter city existing pursuant to the laws of the State of Oklahoma. (Stipulation #1.)
2. The IAFF is the exclusive bargaining agent for certain employees of the Ardmore Fire Department, City of Ardmore. (Stipulation #2.)
3. Pursuant to the provisions of the Fire and Police Arbitration Act, 11 O.S.1991, §§ 51-101 et seq., the City and the IAFF negotiated the Agreement, which is effective for Fiscal Year 1994/1995. (Stipulation #3.)
4. The Union was represented in those negotiations by experienced negotiating counsel. (Stipulation #4.)
5. Pursuant to those negotiations, the IAFF specifically agreed to Article 4, Management

Rights, Section 1, which reads in part:

Management officials of the City retain the rights in accordance with applicable laws and regulations but not limited to the following:

\* \* \* \*

To determine the methods, means, procedures and personnel by which such operations are to be conducted, including the right to contract existing and future work of the Ardmore Fire Department.

(Stipulation #5.)

6. The IAFF gave the City timely written notice requesting a meeting for collective bargaining purposes pursuant to the provisions of §§ 51-105 and 51-112 of the FPAA.

(Stipulation #7.)

7. Representatives of the City and the IAFF met and conferred on three occasions in an attempt to negotiate a collective bargaining agreement for FY 1995/1996. (Stipulation #8.)

8. In a February 16, 1995, Special Session, the City Commission of Ardmore (the "Commission") unanimously voted not to renew the Agreement. The vote was to be effective at 12:00 midnight on June 30, 1995, when the current Agreement expires. (Stipulation #14.)

9. Following the meeting of the Commission on February 16, 1995, Kevin Evans, City Manager of Ardmore (the "City Manager"), distributed to the President and Vice-President of the IAFF (both members of the IAFF's bargaining team) the package of information that had been distributed to the press and public at the meeting of the Commission. (Stipulation #15.)

10. The City advised the IAFF that it was willing to meet and confer with representatives of the IAFF concerning the effects of the decision to privatize the work of the Ardmore Fire Department. (Stipulation #18.)

11. The current Agreement between the City and the IAFF will expire of its own terms on June 30, 1995. (Stipulation # 19.)
12. The attorney for the IAFF, in a letter dated March 8, 1995, notified the City Manager of the IAFF's Request for Arbitration of all issues unresolved for Collective Bargaining for FY 1995/1996. (Stipulation #20.)
13. On March 15, 1995, the City filed a Petition for Declaratory Judgment and Motion for Temporary Injunction" in the District Court of Carter County, State of Oklahoma, petitioning for declaratory relief in the form of a determination by that Court of the parties rights and obligations under the 1994/1995 Agreement and further seeking to enjoin the IAFF from proceeding with the arbitration until such time as the rights and obligations of the parties are determined by that Court. The City requested that the Court determine that the City is not obligated to proceed to arbitration with the IAFF over the terms of a collective bargaining agreement for FY 1995/1996 nor with respect to the decision of the City to contract out the services of the Ardmore Fire Department. (Stipulation #22.)
14. The City amended its Petition to ask that the current ULP charge be deferred pending resolution of the dispute by the District Court. (Stipulation #23.)
15. The Public Employees Relations Board (the "PERB") was created by § 51-104 of the FPAA. 11 O.S.1991, §§ 51-101 et seq. The PERB is empowered to prevent any person, including the bargaining agent and corporate authorities, from engaging in any unfair labor practice. (Stipulation #24.)
16. On March 16, 1995, the City advised the representatives of the IAFF of the City's proposals with respect to the effects of contracting out the Ardmore fire services and requested

to meet and confer with the IAFF concerning those effects. (Stipulation #26.)

17. The parties met and conferred concerning the effects of the decision to contract out on March 27, 1995. (Stipulation #27, in part.)

### FINDINGS OF FACT

1. At a negotiation meeting held between the parties, no proposals were submitted by the IAFF, nor did the IAFF indicate which sections of the Agreement they wanted to discuss during negotiations. The City did indicate those sections of the Agreement it wanted to negotiate changes.

2. At a February 13, 1995, meeting, the City proposed, among other things, the conversion of the Ardmore Fire Department from a 24 hours on/ 48 hours off to three (3) 8-hour shifts in what the Commission believed to be in the best interest of the community and citizens of the City and to obtain a more productive work force.

3. During the February 13, 1995, meeting, the IAFF refused to negotiate with respect to the 8-hour shift and the augmentation of the full-time fire fighters with volunteer fire fighters.

4. The City took the position that it was not required to negotiate with respect to the use of volunteers if the volunteers were not going to replace any members of the bargaining unit, but simply augment their services.

5. The IAFF took the position that if the City was serious about the proposals, the IAFF would take responsive action and that the IAFF would not discuss the 8-hour shifts or augmentation by volunteers.

6. The IAFF and the City were engaged in bargaining for a FY 1995/1996 Agreement when the City announced that it had decided to contract out all fire department services. According

to the City's announcement, all fire fighters would be replaced by other employees doing the same job at the same locations with the same equipment. The plan did not involve any change in scope or direction of the Fire Department.

7. The City had never bargained with the IAFF over the decision to replace all fire fighter jobs for FY 1995/1996 before it announced its decision.

8. The City refused to bargain its decision about contracting and replacing all fire fighter jobs even though the IAFF submitted a proposal to the City for that purpose.

9. The City announced in February, 1995, that it would no longer bargain with the IAFF for a FY 1995/1996 agreement because it had decided not to "renew" the existing Agreement. The existing Agreement expires June 30, 1995.

10. On February 16, 1995, the City Manager communicated in advance to the President and Vice-President of the IAFF the fact that he proposed to distribute a memorandum explaining the City's decision not to renew the Agreement with the IAFF and to seek proposals for contracting the future services of the Ardmore Fire Department.

11. Following the meeting of the City Commission of February 16, 1995, the City Manager met with the President and Vice-President of the IAFF. The City Manager advised them that he intended that a memorandum regarding the actions of the Commission would be made available directly to individual members of the bargaining agent the next day, which it was.

12. The City Manager gave the IAFF copies of the memorandum and supporting documents which had been distributed to the public and press at the Commission meeting of February 16, 1995.

13. After the City announced it would not renew the existing Agreement, the IAFF requested

interest arbitration according to the requirements of the FPAA. At the time it made the request, all prerequisites had been met for making the request.

14. The City must name an interest arbitrator to sit on the arbitration panel to decide unresolved issues left from bargaining. The City was requested on March 8, 1995, to name that member. It has failed and refused to do so as of May 12, 1995, the date of the hearing herein.

15. The IAFF requested a list of arbitrators according to the statutory procedure for obtaining a neutral interest arbitrator. The City refused to strike the list as required by statute.

16. On March 16, 1995, the IAFF filed the instant unfair labor practice charge with the PERB.

17. No agreements were reached at a meeting on March 27, 1995, to negotiate the effect of the decision to contract out, but the IAFF indicated that it would have more specific proposals after it had reviewed the City's Request for Proposals (the "RFP").

18. On April 28, 1995, the parties met and conferred concerning the terms of an agreement for FY 1995/1996. At that meeting, the IAFF offered to negotiate most of the items on which it understood the City based its decision to contract out, but made no specific proposals on any of those items.

19. The City agreed to respond to those proposals at a meeting to be set by mutual agreement and held after the City had received the responses to the RFP's.

20. The City's proposals regarding the effects of contracted services related to the effective date of the contract, the encouragement of the successful contractor to hire a majority of its fire fighters from the members of the IAFF, that the successful contractor would be required to comply with the terms of the Fire Fighters Pension and Retirement Act, 11 O.S. § 49-105.3,

and proposals with respects to unused leave as of June 30, 1995, and the opportunity for the IAFF to make a proposal for providing the services.

21. On April 3, 1995, the District Court of Carter County issued its Order denying the City's requested temporary injunction, but made no determination of the merits.

### CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S.1991, § 51-104b.

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 Unfair Labor Practice ("ULP") charge. 11 O.S.1991, § 51-104b (C). See, e.g., Prince Manufacturing Co. v. United States, 437 F.Supp. 1041 (1977); Gourley v. Board of Trustees of the South Dakota Retirement System, 289 N.W.2d 251 (S.D.1980).

3. The State of Oklahoma has established minimum standards for employment relationships between municipalities and employees of municipal fire and police departments. Title 11 O.S.1991, § 51-101, provides, in part:

A. The protection of the public health, safety and welfare demands that permanent members of any paid fire department or police department in any municipality not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to such employees of other well-recognized rights of labor such as the right to organize, to be represented by a collective bargaining representative of their choice and the right to bargain collectively concerning wages, hours and other terms and conditions of employment; and such employees shall also have the right to refrain from any and all such activities.

B. It is declared to be the public policy of this state to accord to the permanent members of any paid fire department or police

department in any municipality all of the rights of labor, other than the right to strike or to engage in any work stoppage or slowdown.

4. "Collective bargaining" is defined as:

[T]he performance of the mutual obligation of the municipal employer or his designated representatives and the representative of the employees to meet at reasonable times, including meeting appropriately related to the budget-making process; to confer in good faith with respect to wages, hours and other conditions of employment, or the negotiation of an agreement, or any question arising thereunder; and to execute a written contract incorporating any agreement reached if requested by either party. Such obligation shall not, however, compel either party to agree to a proposal or require the making of a concession.

11 O.S.1991, § 51-102(5).

5. "Unfair labor practices" are defined to include action by municipal authorities:

(1) interfering with, restraining, intimidating or coercing employees in the exercise of the rights guaranteed them by this article;

(2) dominating or interfering with the formation, existence or administration of any employee organization or bargaining agent;

\* \* \* \*

(5) refusing to bargain collectively or discuss grievances in good faith with the designated bargaining agent with respect to any issue coming within the purview of this article; or

(6) instituting or attempting to institute a lock.

11 O.S.1991, § 51-102(6).

6. Arbitration is authorized to resolve unresolved issues in contract negotiation. 11 O.S.1991, §§ 51-106 et seq., as amended.

7. Fire fighters and police officers are granted the right under the FPAA to engage in concerted action for mutual aid and protection. Fire Fighters Local 2551 v. City of Broken

Arrow, PERB Case No. 104 (1986). This is supported by the weight of federal decisions of a similar nature. See, e.g., NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), NLRB v. J. Weingarten, 420 U.S. 251 (1975).

8. The conflict between the supremacy of state law and the exercise of municipal power under its charter is resolved by determining whether such law pertains to general matters of the state and its government or pertains to municipal affairs. Oliver v. City of Tulsa, 654 P.2d 607, 609 (Okla.1982). See, also, A.G. Opin. 72-112.

9. Although municipal authorities generally retain the right to make the final decision in the terms and conditions of municipal employment, the privilege of collective bargaining powers by fire fighters and police officers is a matter of statewide interest. Midwest City v. Cravens, 532 P.2d 829 (Okla.1975).

10. Municipal authorities have a mandatory duty to bargain with absolute good faith. Stone v. Johnson, 690 P.2d 459, 463 (Okla.1984).

11. As applicable to determining the import of the FPAA in conjunction with the decision of the Commission to contract out duties of the Ardmore fire department, the PERB notes applicable rules of statutory construction. The primary rule of statutory construction is to determine the legislative intent of a statute in light of its general purpose and object. TXO Production Corp. v. Oklahoma Corporation Commission, 829 P.2d 964 (Okla.1992). Construction must be done in such a way as to make every word and sentence operative rather than render statutory provisions nugatory. TWA v. Mckinley 749 P.2d 108 (Okla.1988).

12. The PERB has little doubt that the decision of the Commission to contract certain services of the City was predicated to some extent upon the on-going inability of the City and members

of the Ardmore fire department to co-exist peacefully. At its deepest level, this matter raises the question of whether as a matter of law a municipality may seek to undo union activities by not maintaining police or fire department employees (ignoring as not relevant here potential problems with investing in non-municipal employees governmental powers). However, the resolution to this case does not require a determination of this question.

13. The current Agreement shall expire at midnight, June 30, 1995. The City has announced that thereafter the City intends to use the services of a contractor to provide fire protection services.

14. The City bases its authority to contract out services in language contained within the current Agreement. In City of Del City v. Fraternal Order of Police, 869 P.2d 309 (Okla.1994), the Oklahoma Supreme Court determined that the "evergreen" provision of the FPAA, 11 O.S.1991, § 51-105, violates the Oklahoma Constitution's prohibition on municipalities incurring debt beyond the fiscal year's tax revenues. See, also, City of Tulsa v. Public Employees Relations Board, 845 P.2d 872 (Okla.1990). As such, the contracting out provision of the Agreement shall expire with the rest of the Agreement on June 30, 1995.

15. The parties do not dispute that on July 1, 1995, there will be fire fighters on duty in the City of Ardmore.

16. Pursuant to the provisions of the FPAA, the City is under a mandatory duty to bargain with the IAFF with absolute good faith for a contract for the period from July 1, 1995, through June 30, 1996.

17. It may be that the FY 1996 contract will contain a contracting out provision. It may be that it will not. That notwithstanding, the IAFF has proven by a preponderance of the evidence

that the City does not have current authority to contract out labor for the FY 1996 period.

18. The United States Supreme Court, upon facts and law significantly similar to the present case, has determined that an employer commits an unfair labor practice by refusing to bargain the replacement of all employees with an independent contractor. Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203 (1964). This board, under the facts presented and uncontroverted in this matter, cannot ignore this determination.

19. The PERB concludes that the City of Ardmore has not negotiated with absolute good faith for FY 1996, as is required of it. It may well be that services ultimately will be contracted out. However, the City must first bargain this subject. By failing and refusing to so bargain and by failing and refusing to comply with its statutory duties in arbitration, the action of the City constitutes a violation of 11 O.S.1991, § 51-102(6a)(5). The action of the City likewise constitutes a violation of 11 O.S.1991, § 51-102(6a)(1) and (2), in that the action interferes with the rights of the fire fighters affected and interferes with the existence of the employee organization.

20. The PERB concludes that the IAFF has not met its burden of proof in its allegations that the City improperly contacted members of the IAFF, and that allegation should be dismissed.

21. In the event the City were to go through with its decision to contract out fire department services as it has announced, the result would be, effectively, a lock-out of the current fire fighters represented by the IAFF and protected by the FPAA.

22. A lock-out is defined as:

[A] cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms[.]

Iron Molders Local 125 v. Allis-Chalmers, 166 F. 45 (7th. Cir. 1908). It is applicable to this

case. The City may not want more desirable terms from the IAFF, but it is uncontroverted than it seeks better terms. The result of contracting out under the conditions found and concluded by the PERB is, effectively and where it has not properly been bargained, a lock-out in violation of 11 O.S.1991, § 51-102(6a)(6), which this board is empowered to prevent through a cease and desist order.

23. Although not raised as an allegation by the IAFF, it is an inescapable conclusion that the City should be ordered to cease and desist from taking action which would lead to a violation of 11 O.S.1991, § 51-102(6a)(6).

### ORDER

The City of Ardmore is hereby ordered, pursuant to 11 O.S.1991, § 51-104b (c), and consonant with the Findings or Fact and Conclusions of Law entered herein, to cease and desist from refusing to bargain with absolute good faith the FY 1996 contract with the IAFF, including the proposal to contract out fire department services in the City of Ardmore.

The City is further ordered to cease and desist from refusing to comply with all applicable and appropriate procedures related to arbitration, including but not limited to naming its interest arbitrator and striking the list of arbitrators.

The City is further ordered to cease and desist from taking any action which interferes with the rights of fire fighters exercised pursuant to the FPAA or which interferes with the existence of the employee organization.

The City of Ardmore is ordered to cease and desist from undertaking any action concluded herein to constitute a lock-out prohibited by 11 O.S.1991, § 51-102(6a)(6).

To allow the PERB to monitor this situation, pursuant to 11 O.S.1991, § 51-104b(C),

the PERB further orders the City of Ardmore to provide the PERB with monthly reports of the extent to which the City has complied with this Order.

Allegations of the IAFF of violation of 11 O.S.1991, § 51-102(6a)(3) and (4) are dismissed.

This Order shall be posted prominently within the Ardmore Fire Department for not less than thirty (30) days.

  
Chairman

Dated this 20<sup>th</sup> day of June, 1995

JRJ/jj:Ardmore2.ord