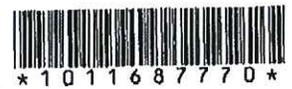


... to Judge Robert M. Higgenbotham
sent by 2-2010



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

City of Norman, Oklahoma,

Plaintiff/Appellee,

v.

Case Number: 105599

Fraternal Order of Police, Lodge 122,

Lower Court Case Number:
CJ-2006-1069

Defendant/Appellant,

and

Lower Court: CLEVELAND

Public Employees Relations Board,

Respondent Agency.

STATE OF OKLAHOMA
CLEVELAND COUNTY J.S.S.
FILED In The
Office of the Court Clerk

FEB 09 2010

DOCKET _____ PAGE _____ RECORDED
Rhonda Hall, Court Clerk
DEPUTY

MANDATE

Pursuant to Rules 1.183 and 1.16, Oklahoma Supreme Court Rules, 12 O.S. Supp. 1997, Ch. 15, App. 1, on the 4th day of February, 2010, the Honorable Chief Justice Edmondson directed the Clerk of the Supreme Court to issue mandate in the above styled and numbered cause.

On the 6th day of October, 2009, the Supreme Court of the State of Oklahoma promulgated an Opinion in the above styled and numbered cause. Appeal was taken from the District Court of CLEVELAND County. On appeal, the following judgment was entered:

REVERSED

Costs of \$0.00 are taxed and allowed pursuant to 12 O.S. 1991 §978 and Rule 1.14(a), Oklahoma Supreme Court rules, 12 O.S. Supp. 1997, Ch. 15, App. 1.

Therefore, the District Court of CLEVELAND County, State of Oklahoma, is ordered to enter of record the judgment of the Supreme Court of the State of Oklahoma. The District Court of CLEVELAND County shall issue process or take further action as required by the Opinion issued.

MICHAEL S. RICHIE
Clerk of the Appellate Courts

By Polly Engelbert, Deputy

fr

ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT - 6 2009

MICHAEL S. RICHIE
CLERK

City of Norman, Oklahoma,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 Fraternal Order of Police, Lodge 122,)
)
 Defendant/Appellant,)
)
 and)
)
 Public Employees Relations Board,)
)
 Defendant.)

Case No. 105,599

Rec'd (date)	10-6-09
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APPEAL FROM THE DISTRICT COURT
OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE ROBERT M. HIGHSMITH, TRIAL JUDGE

REVERSED

James R. Moore
Sue Wycoff
MOORE & VERNIER, P.C.
Oklahoma City, Oklahoma

For Defendant/Appellant

Tony G. Puckett
Ronald T. Shinn, Jr.
MCAFEE & TAFT, P.C.
Oklahoma City, Oklahoma

For Plaintiff/Appellee

OPINION BY JERRY L. GOODMAN, JUDGE:

Fraternal Order of Police, Lodge 122 (FOP) appeals the trial court's January 25, 2008, Order. The issue on appeal is whether the District Court erred in reversing the Public Employees Relations Board's (PERB) June 8, 2006, order finding City of Norman, Oklahoma (City) had engaged in an unfair labor practice. Based upon our review of the facts and applicable law, we reverse the District Court's order and reinstate the PERB's order.¹

FACTS

In 2004, City and FOP began negotiating a collective bargaining agreement (CBA) for the fiscal year beginning July 1, 2004, and ending June 30, 2005 (FY 2004-2005). The parties conducted eight (8) negotiation sessions from January 2004 through August 2004.

On July 15, 2004, the parties agreed to meet for mediation. The City's municipal unions, the International Association of Firefighters, Local No. 2067 (IAFF), and the American Federation of State, County and Municipal Employees, Local No. 2875 (AFSCME), attended the mediation session. A representative of the Federal Mediation and Conciliation Service (FMCS) was also present. At 11:30 p.m., City's representative, Mr. Bryant, offered the unions a one and one-

¹ FOP's motion to strike City's Answer Brief is denied.

half percent (1.5%) wage increase beginning January 1, 2005, *inter alia*. The unions were informed they had until midnight, approximately a half-hour, to accept the offer or it would be withdrawn. The IAFF accepted the offer that night. The AFSCME accepted the offer two (2) months later. FOP rejected the offer. The one and one-half percent (1.5%) wage increase was later presented to and accepted by non-union City employees.

Subsequent to the mediation, the parties met for their final negotiation session. City did not offer a wage increase. When the parties were unable to reach an agreement, the parties proceeded with impasse or Interest Arbitration.² On August 16, 2004, each party submitted their Last Best Offer (LBO) to the interest arbitration board.³ FOP proposed a two percent (2%) wage increase and some concessions on health insurance. City proposed no wage increase, a freeze in merit increases, and changes in health insurance coverage that would allow City to adjust health insurance premiums during the FY 2004-2005.⁴ A hearing was

² City had previously requested interest arbitration.

³ Title 11 O.S.2001 and Supp. 2004, § 51-108(A)(2) defines Last Best Offer as: "At least seven (7) days before the date of the hearing the corporate authorities and the bargaining agent shall submit to each other and to the arbitration board members a written arbitration statement listing all contract terms which the parties have resolved and all contract issues which are unresolved. Each arbitration statement shall also include a final offer on each unresolved issue. The terms and offers contained in the arbitration statements shall be known collectively as each party's last best offer."

⁴ City's LBO at Article 32, Section 2 provides, in part: "b. The City may determine the health and dental benefits coverage offered employees, and to revise such coverage on an annual basis in the interests of the City as a whole including the right to contract with an insurance carrier to provide health insurance benefits to employees if the City determines that doing so is a better option fiscally. Benefits for said insurance will be addressed in negotiations each year for a new Agreement for the succeeding fiscal year. ..."

subsequently conducted on August 24 and 25, 2005, wherein City asserted it did not have the "revenues available" to fund FOP's LBO. The arbitration board ultimately selected FOP's LBO. City declined to take the matter to a vote of the people as allowed under the statute and the Arbitrator's award became final.

On August 19, 2004, FOP filed an unfair labor practice charge with PERB, asserting City had violated the Fire and Police Arbitration Act (FPAA), 11 O.S.2001, § 51-101 *et seq.*, by bargaining in bad faith. More specifically, FOP asserted City had bargained regressively by presenting an LBO that was worse than an earlier offer and that City's proposal on insurance benefits included a "waiver of the duty to bargain" on "mandatory" subjects of bargaining. A hearing was held before PERB on September 8, 2005. City asserted it did not make a regressive offer, arguing evidence of the earlier offer it made at the July 15, 2004, mediation session was inadmissible as a confidential settlement offer made during the course of mediation. Even if evidence of the offer was considered, City asserted FPO could not prove it had bargained in bad faith by merely offering a LBO that was lower than a previous offer. City argued its economic circumstances had changed and it could no longer afford the previous offer or FOP's LBO.

With respect to the second charge, City asserted it did not include in its LBO a proposal to reserve to management the right to make unilateral changes in health

insurance. However, assuming it did, City argued this was not evidence of bad faith as it was lawful for the City to make a proposal that gives it the right to make changes to insurance during the CBA term so long as the City was willing to bargain on the topic during any subsequent year's bargaining sessions.

In an order filed on June 8, 2006, PERB held the July 15, 2004, mediation offer was admissible. In addition, PERB found "City's LBO was a regressive [LBO] not made in good faith. ..." PERB further found the City had attempted to force upon FOP in its LBO a proposal on health insurance that would give City the unilateral right to change benefits and premiums and that this amounted to an improper forced waiver of the duty to bargain on a mandatory subject of bargain. City was ordered to cease and desist from bargaining in bad faith.

On June 30, 2006, City filed a petition for review of PERB's decision in District Court. The District Court ultimately reversed, finding PERB's decision to be affected by error of law, contrary to the weight of the evidence, and arbitrary in application of rules and procedures. FOP appeals.

STANDARD OF REVIEW

Our review is governed by the Administrative Procedures Act (APA), 75 O.S.2001, § 250 *et seq.* "Generally, an administrative decision . . . should be affirmed if it is a valid order and the administrative proceedings are free from

prejudicial error to the appealing party." *City of Tulsa v. State ex rel. Pub. Employees Relations Bd.*, 1998 OK 92, ¶ 12, 967 P.2d 1214, 1219; *see also* 75 O.S.2001, § 322. When reviewing the record, the court may not substitute its judgment for that of the agency, but rather must inquire only whether the agency's decision was based on a consideration of relevant facts and whether there was a clear error of judgment. *City of Tulsa*, 1998 OK 92, at ¶ 12, 967 P.2d at 1219; *Anderson*, 1998 OK CIV APP 89, at ¶ 9, 964 P.2d at 940. This Court applies the same standard of review as that applied by the District Court. *City of Tulsa*, 1998 OK 92, at ¶ 12, 967 P.2d at 1219. We may set aside the agency's decision only if we determine one or more of the grounds listed in 75 O.S.2001, § 322 are shown, and we may not disturb the decision unless our review leads us to a firm conviction the agency was mistaken. *See Anderson v. State ex rel. Crawford*, 1998 OK CIV APP 89, 964 P.2d 937; *Carpenters Local Union No. 329 v. State ex re. Dept. of Labor*, 2000 OK CIV APP 96, 11 P.3d 1257.⁵

⁵ Section 75 O.S.2001, § 322 provides, in pertinent part:

(1) In any proceeding for the review of an agency order, the Supreme Court or the District or Superior Court, ... in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant ... have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- d) affected by other error of law; or

In the process of review, the administrative agency's findings are "presumed correct in matters it frequently adjudicates and in which it possesses expertise." *MCI Tele. Corp. v. State*, 1991 OK 86, ¶ 22, 823 P.2d 351, 358. "A presumption of validity attaches to the exercise of expertise when the administrative agency is reviewed by the judiciary... The rationale for this rule is that courts do not possess the specialized knowledge, training, experience or competency to substitute opinions for the judgment of qualified experts." *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 1981 OK 29, ¶ 10, 626 P.2d 316, 320.

ANALYSIS

The FPAA, 11 O.S.2001, § 51-101 *et seq.*, provides a "strong policy of requiring absolute good faith in bargaining ... to counter-balance the absence of the right to strike and the absence of the availability of binding arbitration." *Stone v. Johnson*, 1984 OK 76, ¶ 16, 690 P.2d 459, 463. The FPAA requires cities to meet at reasonable times and confer in good faith with police representatives for collective bargaining purposes. 11 O.S.2001, § 51-105. The obligation to bargain

(e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, ...; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or

(f) arbitrary or capricious; or

(g) because findings of fact, upon issues essential to the decision were not made although requested.

collectively does not "compel either party to agree to a proposal or require the making of a concession." 11 O.S.2001, § 51-102(5). Refusing to bargain collectively in good faith is an unfair labor practice.⁶ 11 O.S.2001, § 51-102(6a)(5). The burden of proof in an unfair labor practice is on the charging party. 11 O.S.2001, § 51-104(b). It is appropriate to consider federal labor law in the construction of the FPAA. *Stone*, 1984 OK 76, at ¶ 14, 690 P.2d at 462.

FOP asserts several proposition of error on appeal. These errors may be combined and addressed as follows. Did the District Court exceed its authority as an appellate court under the APA by failing to accord PERB the deference it is due and by substituting its' judgment as to the weight of the evidence when it held: 1) City's July 15, 2004, mediation offer was inadmissible as a confidential settlement

⁶ 11 O.S.2001, § 51-102(6): "Unfair labor practices" for the purpose of this article shall be deemed to include but not be limited to the following acts and conduct: 6a. Action by corporate 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; (3) interfering in any manner whatsoever with the process of selection by fire fighters or police officers of their respective bargaining agents or attempting to influence, coerce or intimidate individuals in such selection; (4) discharging or otherwise disciplining or discriminating against a police officer or fire fighter because he has signed or filed any affidavit, petition or complaint or has given any information or testimony under this article or because of his election to be represented by the 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 lockout. 6b. Action by bargaining agent: (1) interfering with, restraining, intimidating or coercing employees in the exercise of the rights guaranteed them by this article; (2) interfering with or attempting to coerce the corporate authorities in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances; or (3) refusing to bargain collectively or discuss grievances in good faith with the proper corporate authorities with respect to any issue coming within the purview of this article.

offer; and 2) that City did not engage in an unfair labor practice by submitting its LBO to interest arbitration.

With respect to the first proposition of error, FOP asserts the District Court erred in finding it was an error of law and improper procedure to admit City's July 15, 2004, settlement or mediation offer at PERB's hearing. FOP contends the prior offer was admissible pursuant to 12 O.S.2001, § 2408 because the statement or evidence was not being sought to "prove liability for the claim, invalidity of the claim or the amount of the claim." Rather, the prior offer was introduced to show City's "less or worse LBO" was presented with a bad motive to punish FOP for exercising its right of arbitration and that City was negotiating regressively and bargaining in bad faith. FOP further notes the rules of evidence are not necessarily applicable in administrative proceedings. See *McDonald's Corp. v. Oklahoma Tax Comm'n.*, 1977 OK 74, 563 P.2d 635.

City disagrees, citing *IAFF, Local 2479 v. City of Ponca City*, PERB Case No. 377, for the assertion that to establish illegal regressive bargaining a party must establish that the LBO was less or worse than a prior offer and the less or worse offer was premised on the union giving up a statutory right, *i.e.*, the right to invoke interest arbitration. City contends the offer made on July 15, 2004, at 11:30 p.m. was a confidential settlement offer made during mediation. City notes the

offer was made in the presence of the mediator, the offer had a thirty (30) minute time limitation, and was made with the expectation of confidentiality. Therefore, the prior offer was inadmissible during the PERB hearing as a confidential settlement offer.

With respect to the second element, City asserts there is no evidence FOP gave up any statutory right such as the right to interest arbitration. Therefore, without evidence of a prior offer to compare against City's LBO, FOP's assertion that City submitted a regressive offer in bad faith must fail.

Generally, offers of settlement or compromise are not admissible under 12 O.S.2001, § 2408 to prove liability, validity, or amount of the underlying claim. However, § 2408 permits admission of offers of settlement or compromise for "another purpose," *i.e.*, to show bias or prejudice of a witness or to negate a contention of undue delay. In addition, the exceptions listed in § 2408 are illustrative only, and do not limit admission of offers of settlement tendered for other purposes not specifically enumerated. See e.g., *F.D.I.C. v. Moore*, 1995 OK CIV APP 88, 898 P.2d 1329; *Pryor Automotive Supply, Inc. v. Estate of Edward*, 1991 OK CIV APP 49, 815 P.2d 202. For example, in insurance bad faith, the essence of the claim is failure to deal fairly and in good faith with an insured. Thus, the jury may be shown the entire course of conduct between the parties,

including settlement negotiations, to arrive at a determination of whether that standard has been breached. See *Timmons v. Royal Globe Ins. Co.*, 1982 OK 97, 653 P.2d 907.

Ultimately, a trial court, or in this case PERB, has discretion in deciding whether proffered evidence is relevant and, if so, whether it should be admitted, and a judgment will not be reversed based on a court's ruling to admit or exclude evidence absent a clear abuse of discretion. *Myers v. Missouri Pacific R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014, 1033. Under the circumstances of this case, we cannot say PERB abused its discretion in accepting evidence regarding the July 15, 2004, offer. The evidence was not offered to prove liability or the invalidity or amount of the offer. The evidence was directly relevant and offered to evaluate City's conduct regarding whether it negotiated in bad faith in making a regressive LBO. Accordingly, we cannot say PERB's decision to admit the July 15, 2004, offer was erroneous. The District Court's conclusion to the contrary was in error.

City contends that even if the prior offer was properly considered by PERB, FOP failed to prove City committed an unfair labor practice by (1) submitting a regressive offer; or (2) submitting a proposal on health insurance that purportedly permitted City to make unilateral changes to a mandatory subject of bargaining.

City asserts merely offering a regressive offer does not establish a party has engaged in bad faith bargaining. City contends it had a sufficient justification for submitting a reduced LBO to interest arbitration -- a lack of "available revenues" based on a change in the City's economic circumstances. City presented evidence to the Arbitrator that it had anticipated revenues for FY 2004-2005 of \$50,817,569.00 and anticipated expenditures, after distributed in the budget, of \$50,162,000.00, leaving a projected surplus or "available revenues" of \$655,348.00. However, because of settlements with IAFF, AFSCME, and non-union employees, City was left with insufficient "available revenues" to fund either City's settlement offer or FOP's LBO. Notably, FOP's LBO exceeded City's "available revenues," requiring approximately \$357,000.00 in additional appropriations.

FOP disagreed, asserting City's own evidentiary material established City had a budget surplus in its "fund balance" more than sufficient to fund the settlement offer or FOP's LBO.⁷ FOP notes the Arbitrator found City had the available revenues to fund FOP's LBO and, after the Arbitrator chose FOP's LBO, City chose to accept this result and declined to exercise its right to submit the wage

⁷ The fund balance is an account that is held to protect the City in any shortfall from unanticipated operational demands or below-budget revenues during the budget year. The parties agreed the City Council had the statutory power to use the fund balance account for current expenditures, but disagreed whether the arbitration panel could make a decision as to force the City to invade this fund balance.

issue to the voters in a special election pursuant to 11 O.S.2001 and Supp., 2004, § 51-108(B).

With respect to group health insurance, FOP asserts City sought to impose language through its LBO that effectively removed health insurance, a mandatory subject of collective bargaining, from the negotiation process and would further give City the unilateral right to increase premiums and eliminate benefits during the year as City deemed appropriate. FOP contends there is a clear distinction between having a union grant permission to unilaterally effect such changes to health insurance through *quid pro quo* bargaining, and an employer requesting an arbitration panel grant such permission by removing a mandatory subject of bargaining from the negotiation process. FOP contends this attempted forced “waiver” is contrary to good faith bargaining.

City disagrees, asserting initially that it never intended to provide itself with the right to make unilateral changes in insurance benefits and that the proposal even provides health benefits “will be addressed in negotiations each year.” City further argues that even if there is such a term in its LBO, the term is not illegal; rather, it is permissible when a management rights clause evidences a grant of permission by the FOP to unilaterally effect such changes. City cites *Lodge No. 103, FOP v. City of Ponca City*, PERB No. 349, for support.

Parties to a labor agreement may reach an agreement which permits the Employer to issue policies and make substantive changes concerning terms and conditions of employment during the term of a collective bargaining agreement without requiring bargaining by the Employer on such subjects. (Citations omitted) An Employer does not violate any duty to bargain when it alters subjects such as the reduction of the number of hours, assignment of employees, or a change in the system of progressive discipline when the management rights clause of the collective bargaining agreement negotiated between the Employer and the FOP gives the Employer the right to make, issue and enforce such policies or practices. (citations omitted).

As a consequence, there is nothing illegal about a proposal that provides management may take unilateral action on a mandatory subject of bargaining during the term of a CBA. City was free to make any proposal it deemed appropriate and FOP was free to agree or disagree with City's proposal. However, City contends there should be no artificial line between negotiations and interest arbitration.

Interest arbitration constitutes a part of the formation of the collective bargaining agreement. See *City of Bethany v. Public Employees Relations Bd.*, 1995 OK 99, 904 P.2d 604. Interest arbitration is the mechanism designed by the legislature to break the parties' impasse and select the most reasonable of the parties' LBOs. However, the right to interest arbitration is subject to the binding obligation of the parties to bargain in good faith. *Fraternal Order of Police, Lodge*

No. 165, v. City of Choctaw, 1996 OK 78, 933 P.2d 261. Pursuant to 11 O.S.2001,

§ 51-109:

The arbitrators shall conduct the hearings and render their decision upon the basis of a prompt, peaceful and just settlement of all submitted disputes between the firefighters or police officers and the corporate authorities. The factors, among others, to be given weight by the arbitrators in arriving at a decision shall include: . . .

4. Interest and welfare of the public and *revenues available* to the municipality; or . . . (Emphasis Added).

In the present case, with respect to wages, the Arbitrator found “City has the burden in an *ability to pay* type defense of showing that revenues were demanded in other areas in the overall ‘interest and welfare of the public’ (to use the words of Section 51-109) that did not permit the allocation of revenues to meet the firefighter or police unit demands.” The Arbitrator found City did not meet this burden. Rather, City voluntarily extended a one and one-half (1.5%) pay increase to IAFF, AFSCME, and non-union employees, including top executives of the City, and then proceeded to argue there were no funds for police officers. Although the funds may not have been fully appropriated by City, the Arbitrator held there were “available revenues.” Thus, the Arbitrator rejected City’s argument and chose the FOP’s LBO.

PERB, in reviewing the totality of the circumstances, found City's conduct constituted bad faith bargaining. PERB held City had the available revenue to fund its settlement offer and that its withdrawal of this offer was not motivated by financial concerns. Rather, City "was unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Therefore, [City's] LBO was a regressive [LBO] not made in good faith. Such action constitutes 'refusing to bargain collectively ... in good faith....'."

On appeal, the District Court found the offer made was not regressive but materially different. In the alternative, if the offer was considered regressive, the court held it was not unlawful or unfair.

With respect to health insurance, the Arbitrator found City's proposal reasonable as it related to benefits and costs. However, when compared to City's health packages offered to and accepted by other union and non-union employees, the Arbitrator noted how differently FOP was being treated. "[T]his disparate treatment of the Police Officer creates a potential morale and psychological problem that could have an adverse impact on the '... interest and welfare ..' of the public." Finally, the Arbitrator noted FOP's insurance proposal generally followed that accepted by the other union and non-city employees.

The PERB found:

Group health insurance is a mandatory subject of collective bargaining. *W.W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875, 878 (1st Cir. 1949). The City attempted to force upon the union through its LBO a proposal on health insurance that would have given the City the unilateral right to change benefits provided and premiums charged at the City's discretion. These changes amounted to an improper forced waiver of the duty to bargain on mandatory subjects of bargaining. See *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 609-610 (Okla. 1995) (neither side can bargain to exclude certain contractual provisions from grievance arbitration). Such action constitutes "refusing to bargain collectively ... in good faith with the designated bargaining agent with respect to any issue coming within the purview of" Article 51 of the Oklahoma Statutes in violation of 11 O.S. 2001 § 51-102(6a)(5).

On appeal, the District Court disagreed, stating "the City may propose such a thing then, the Union simply need not accept it.... Clearly, the City was not 'excluding' the issue, but making a proposal on the issue. ..."

Under the FPAA, mandatory subjects of bargaining include "wages, hours, and other conditions of employment." 11 O.S.2001, § 51-102(5). The parties must bargain in good faith concerning mandatory subjects of bargaining. Parties negotiating on mandatory subjects of bargaining may propose and insist on terms during negotiation and the obligation to bargain collectively does not compel either party to agree to the other's proposal or require the making of a concession. *Id.* However, an employer may not unilaterally alter a condition of employment which

is the subject of mandatory bargaining. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). See also *International Assoc. of Firefighters, Local 2839 v. City of Okmulgee*, PERB Case # 00125 (Generally, a city does not have the right to make unilateral changes in any matter which involves a mandatory subject of bargaining.) A union may waive its statutory right to bargain or defer to an employer the ability to make unilateral changes to a mandatory subject of bargaining. *Fraternal Order of Police, Lodge 103 v. City of Ponca City*, PERB Case No. 00349. Such a waiver must be "clear and unmistakable." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Further, an employer is allowed to alter the terms and conditions of employment "when a management rights clause evidences a grant of permission by the union to unilaterally effect such changes." *I.A.F.F. local 2171 v. City of Del City*, PERB Case No. 00194 (1990).

Whether a party has engaged in bad faith bargaining and committed an unfair labor practice is to be determined by the totality of the circumstances and the PERB's determination is conclusive if it is supported by substantial evidence on the record as a whole. See *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1380-81 (8th Cir. 1993); *Atlanta Hilton & Tower*, 21 N.R.L.B. 1600, 1984 WL

36775 (NLRB 1984). Considering the totality of the circumstances, we agree with PERB that City has engaged in an unfair labor practice.

The Arbitrator found City had the available revenue to fund its offer of a one and one-half percent (1.5%) wage increase and FOP's LBO wage increase of two percent (2.0%). The record provides City offered and ultimately funded a one and one-half percent (1.5%) wage increase to the IAFF and AFSCME unions and then to non-union city employees, including the top executives of the City. In addition, City did not require serious concessions on health insurance from these union and non-union employees. Thereafter, City refused to offer the FOP any wage increase and sought serious concessions on health insurance, including the unilateral right to change benefits and premiums during the CBA year as it desired.

Although we agree with City that parties may propose and negotiate for management rights during negotiations and, if accepted by the other party, such rights would permit management to take unilateral action during the term of a CBA on a mandatory subject of bargaining, this is not what occurred in the present case. City's proposal on health insurance was proposed during interest arbitration. In addition, there is evidence in the record to indicate the parties never discussed this proposal on health insurance during negotiations.⁸ Notably, if City's proposal was

⁸ The Arbitrator noted: "This Arbitrator was concerned with the testimony that seemed to indicate that the City's Last Best Offer at Arbitration included language that had never been discussed at the bargaining table. Thus, if the City's offer were adopted, this language would automatically be adopted without the benefit derived from the 'give and take' and clarifying discussions of negotiations. The Statute doesn't seem to deal with this, but the action would

accepted by the Arbitrator, the concessions sought would be imposed on the FOP without them ever having the opportunity to bargain or negotiate the proposed changes. Thus, an improper forced waiver of a mandatory subject of bargaining could occur.

Accordingly, pursuant to City's LBO, FOP would not receive a wage increase and would be required to make serious concessions on health insurance. In essence, FOP would be "giving up something for nothing." "It is equally unreasonable and unfair that the Legislature intended that fire fighters and police officers give up 'something for nothing.'" *City of Bethany*, 1995 OK 99, at ¶ 17, 904 P.2d at 611. Considering the totality of circumstances, City's actions in proposing a zero percent (0%) wage increase and in proposing the unilateral right to increase premiums and eliminate benefits during the year as it deemed appropriate was an unfair labor practice.

While City's evidence and arguments are compelling on appeal, we cannot conclude, based on the entire record, that PERB has erred in this matter. Neither this Court nor the trial court may substitute its judgment for that of an agency, especially when the agency is acting in its own area of expertise. *R&R Eng'g Co. v. Okla. Employment Sec. Comm'n*, 1987 OK 36, ¶ 8, 737 P.2d 118, 119. The trial court erroneously substituted its judgment for that of the PERB.

not seem within the spirit of good faith bargaining."

CONCLUSION

We find PERB's decision is not affected by error of law, nor clearly erroneous on the evidence adduced below, nor arbitrary or capricious. 75 O.S.2001, § 322(1). Accordingly, the District Court erroneously reversed PERB's decision. The District Court's January 25, 2008, order is therefore reversed and PERB's June 8, 2006, order is reinstated.

REVERSED.

WISEMAN, V.C.J., and BARNES, P.J., concur.

October 6, 2009

I, Michael S. Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Opinion

in the above entitled cause, as the same remains on file in the office.

In Witness Whereof, I have set my hand and affix the Seal of said Court at Oklahoma City, this 10th day of Feb

2010

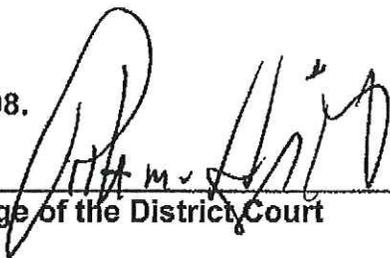
By

[Signature]
Clerk
[Signature]
DEPUTY

5. This Court finds no unfair labor practice by the city is supported in the record. The burden is upon the FOP to prove an unfair labor practice by a preponderance of the evidence. Practices individually and collectively permissible do not establish an unfair labor practice. The PERB finding in this regard is clearly erroneous in the view of this court and against the weight of the record. This court concurs with the Chair, Mr. Hoster in his dissent in the PERB opinion that a party's total conduct should be considered and that so considered the evidence does not support the finding of an unfair labor practice. Even more, this court finds that such a finding of an unfair practice is clearly erroneous and against the substantial competent evidence and a misapplication of the applicable law.

Accordingly this court finds the PERB decision should be and is reversed.

IT IS SO ORDERED this 25th day of January, 2008.



Judge of the District Court

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2008, a true and correct copy was mailed to the following:

1. Cleveland County Court Clerk
200 South Peters Avenue
Norman, OK 73069
2. James R. Moore, Esq.
Douglas D. Vernier, Esq.
Chandra R. Graham, Esq.
Sue Wycoff, Esq.
Moore & Vernier, P.C.
301 N.W. 63rd Street, Suite 550
Oklahoma City, OK 73116
3. Tony G. Puckett, OBA
Ronald T. Shinn, OBA
McAfee & Taft
211 N. Robinson
Oklahoma City, OK 73102
4. Brinda K. White, Esq.
Assistant Attorney General
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105