

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD  
STATE OF OKLAHOMA

**FILED**

APR 02 2013

Public Employees Relations  
Board

INTERNATIONAL ASSOCIATION )  
OF FIRE FIGHTERS, LOCAL 2298, )  
 )  
Complainant, )  
 )  
v. )  
 )  
CITY OF ADA, OKLAHOMA, )  
 )  
Respondent. )

PERB No. 2012-ULPC-521  
PERB No. 2012-ULPC-522

INTERNATIONAL ASSOCIATION )  
OF FIRE FIGHTERS, LOCAL 176, )  
 )  
Complainant, )  
 )  
v. )  
 )  
THE CITY OF TULSA, )  
 )  
Respondent. )

PERB No. 2012-ULPC-523

FRATERNAL ORDER OF POLICE, )  
LODGE 146, )  
 )  
Complainant, )  
 )  
v. )  
 )  
CITY OF JENKS, )  
 )  
Respondent. )

PERB No. 2012-ULPC-524

**INTERLOCUTORY ORDER DENYING MOTIONS TO DISMISS  
UNFAIR LABOR PRACTICE CHARGES AND OBJECTIONS TO JURISDICTION**

The Public Employees Relations Board (the "Board"), consisting of three (3) members and

two (2) vacant member positions, met in open session in a Regular Meeting on the 14<sup>th</sup> day of February, 2013, at 9:32 a.m., in the Oklahoma Department of Agriculture, Food and Forestry, Agriculture Building, First Floor Board Room, 2800 N. Lincoln Boulevard, Oklahoma City, Oklahoma, with a quorum present consisting of three (3) members.

#### **Ada IAFF Cases**

Certain matters (PERB No. 2012-ULPC-521 and PERB No. 2012-ULPC-522 collectively hereinafter referred to as the “Ada IAFF Cases”) objecting solely to the jurisdiction of the Board, together with other matters hereinafter referred to involving two (2) other cities likewise objecting solely to the jurisdiction of the Board in each of their respective cases (as hereinafter described), came on collectively for hearing before the Board, on the following written motions only (said motions being identical in both of the Ada IAFF Cases) and not on the merits of the charges (said charges not being identical in both of the Ada IAFF Cases but filed on the same date) hereinafter referred to:

Respondent Ada’s Motion to Dismiss and Brief in Support filed herein by the City of Ada (the “Respondent Ada”) on October 31, 2012 (the written motions are collectively hereinafter referred to as the “Ada Motion”) to dismiss the Unfair Labor Practice Charges of IAFF Local 2298 (the “Ada IAFF Complainant”) filed with the Board in each of the Ada IAFF Cases on August 3, 2012 (collectively the “Ada Charges”).

The Ada Motion was filed by the Respondent Ada on the alleged basis of the following:

(1) the Board’s lack of authority due to the enactment of two amendments to 11 O.S.2011, §51-104, the first to be enacted being H.B.2215 (that amended the Board’s sunset date to July 1,

2016), and the second to be enacted being H.B.1577 (that did not amend the Board's sunset date of July 1, 2012, but rather contained a stated effective date of November 1, 2012) during the last session of the Oklahoma Legislature; and,

(2) that due to the later enactment of H.B.1577 that contained a stated effective date of November 1, 2012, subsequent to the earlier enactment of H.B.2215 (that amended the Board's sunset date to July 1, 2016), that the Board no longer exists after said effective date of November 1, 2012, and has no power to adjudicate the Ada Charges; and

(3) that due to the date the Ada Charges were filed in the Ada IAFF Cases on August 3, 2012, that as the Board terminated on July 1, 2012, under either H.B.2215 or H.B.1577 as enacted during the last session of the Legislature, the Board did not exist as of the date the Ada Charges were filed on August 3, 2012, as the first bill enacted, H.B.2215 did not have an effective date by operation of law until August 24, 2012, a date ninety (90) days after the Governor signed it and a date about three weeks after the Ada IAFF Complainant filed the Ada Charges, that there was no place to file or receive the Ada Charges and no authority for the Board to accept the Ada Charges and the second bill enacted, H.B.1577 was not effective until November 1, 2012, and the bill that did not extend any sunset date which made H.B.1577 retroactive to July 1, 2012, therefore the Board did not exist as of the date the Ada Charges were filed on August 3, 2012, it was a nullity and nothing for the Board to do in the Ada IAFF Cases; and,

(4) that if it is contended that the date of July 1, 2012, in H.B.1577 was merely error and that July 1, 2012, was not the date of expiration of the Board, the fact remains that H.B.1577 provided for a five (5) member Board, that the same five (5) member Board has not been established and until so constituted with five (5) members that the Board would be without jurisdiction (argument from

the Jenks FOP Case adopted orally by the Respondent Ada in the hearing on February 14, 2013).

The Ada IAFF Complainant, due to its claim of not having received the Ada Motion from the Respondent Ada (*See* Ada IAFF Complainant's Response to Motion to Dismiss (on the merits) filed on December 3, 2012, in Ada IAFF Case PERB No. 2012-ULPC-521, n. 1), upon the order of the Board entitled "Order to Supplement Response" issued herein on January 17, 2013 (the "Order to Supplement Response"), was directed to respond in writing to and brief the issues raised by the Respondent Ada in its Ada Motion that the Ada Charges are invalid and that the Board cannot adjudicate the Ada Charges to conclusion allegedly because the Board will not (and now does not) exist after November 1, 2012.

The Ada IAFF Complainant filed a Response to Motion to Dismiss herein on January 18, 2013 (the "Ada IAFF Response"), in essence alleging that:

(1) H.B.2215 and H.B.1577 amended 11 O.S.2011, §51-104 in different ways that are not conflicting so that both became effective; and,

(2) neither the definitions of unfair labor practices (as stated in 11 O.S.2011, §51-102) nor the ability to file such unfair labor practice charges, were ever affected by the sunset law (as stated in 74 O.S.2011, §3901 et seq.), rather only the existence of the Board was affected by the sunset law, and that since the Board has been re-created, it can proceed to take action on charges that have been made and are pending; and,

(3) in every session of the Legislature there is a "clean-up" bill that merges and reconciles the various times in the previous legislative session that a section would be modified (there currently being such a clean-up bill S.B.977 pending in the current legislative session to address 11 O.S.2011, §51-104 as amended by H.B.2215 and H.B.1577 in the last legislative session), that such clean-up

work has been recognized and upheld against the logrolling claim (*See* Okla. Const. Article V, §57), that such a bill has passed in some form after each legislative session and merges amendments made in single-subject bills to the same statute to make one unified statute or section and that it is clear that the Legislature intended to revise duplicate bills in order to merge them and to reconcile any conflicts therein; and,

(4) neither the definitions of unfair labor practices nor the statutory ability to file unfair labor practice charges were ever affected by the sunset law, only the existence of the Board was so affected; and,

(5) should an unfair labor practice charge be made and pending and the Board were never to come back to life, the Oklahoma district courts being courts of general jurisdiction to resolve all justiciable claims, would have authority (which situation does not exist as the Board has been recreated); and,

(6) even if the Board “sunsetting” on July 1, 2012, the Oklahoma Sunset Law allows it to perform its duties until July 1, 2013 (argument from Jenks FOP Case adopted orally by the Ada IAFF Complainant in the hearing on February 14, 2013); and,

(7) a sunset date change from July 1, 2016, back to July 1, 2012, in H.B.1577 is void and severable because it was not identified as part of the legislative intent in H.B.1577's title (argument from Jenks FOP Case adopted orally by the Ada IAFF Complainant in the hearing on February 14, 2013); and,

(8) S.B.977 has been filed in the 2013 Legislative Session to clarify that the Board sunset date is July 1, 2016 (argument from Jenks FOP Case adopted orally by the Ada IAFF Complainant in the hearing on February 14, 2013); and,

(9) the Board does not need all five members to have jurisdiction because a simple majority is enough (argument from Jenks FOP Case adopted orally by the Ada IAFF Complainant in the hearing on February 14, 2013).

The Respondent Ada appeared generally and not specially by and through its Attorney, Tony Puckett, McAfee & Taft, Oklahoma City, Oklahoma. The Ada IAFF Complainant appeared generally by and through its Attorney, Steven R. Hickman, Frasier, Frasier & Hickman, LLP, Tulsa, Oklahoma. The Respondent Ada, in oral argument noted that it had a claim different than those in the Tulsa IAFF Case and in the Jenks FOP Case due to the date the Ada Charges were filed in the Ada IAFF Cases on August 3, 2012, as noted hereinabove and that it adopted all of the arguments made by the Respondent Tulsa in the Tulsa IAFF Case and the Respondent Jenks in the Jenks FOP Case objecting to the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013. The Ada IAFF Complainant in oral argument noted that it adopted all of the arguments made by the Tulsa IAFF Complainant in the Tulsa IAFF Case and by the Jenks FOP Complainant in the Jenks FOP Case recognizing the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013.

#### **Tulsa IAFF Case**

A certain matter (PERB No. 2012-ULPC-523 hereinafter referred to as the “Tulsa IAFF Case”), objecting solely to the jurisdiction of the Board, together with other matters herein referred to involving two (2) other cities likewise objecting solely to the jurisdiction of the Board in each of their respective cases (as herein described), came on collectively for hearing before the Board, on

the following written motion only and not on the merits of the charges hereinafter referred to:

The City of Tulsa's Supplement to its Request for Dismissal of Charges (which initial request was based on the merits) filed herein by the City of Tulsa (the "Respondent Tulsa") on December 18, 2012 (the "Tulsa Motion"), to dismiss the Unfair Labor Practice Charges of IAFF Local 176 (the "Tulsa IAFF Complainant") filed with the Board in the Tulsa IAFF Case on September 27, 2012 (collectively the "Tulsa Charges") and The City of Tulsa's Reply Brief in Support of its Supplement to its Request for Dismissal of Charges filed with the Board on February 8, 2013.

The Tulsa Motion was filed by the Respondent Tulsa on the alleged basis of the following:

(1) the Board's lack of authority due to the enactment of two amendments to 11 O.S.2011, §51-104, the first to be enacted being H.B.2215 (that amended the Board's sunset date to July 1, 2016), and the second to be enacted being H.B.1577 (that did not amend the Board's sunset date of July 1, 2012, but rather contained a stated effective date of November 1, 2012) during the last session of the Oklahoma Legislature; and,

(2) that due to the later enactment of H.B.1577 that contained a stated effective date of November 1, 2012, subsequent to the earlier enactment of H.B.2215 (that amended the Board's sunset date to July 1, 2016), the Board no longer exists after said effective date of November 1, 2012, and has no power to adjudicate the Tulsa Charges; and

(3) that due to the date the Tulsa Charges were filed in the Tulsa IAFF Case on September 27, 2012, and as the Board terminated on July 1, 2012, under H.B.1577 as enacted during the last session of the Legislature, the Board did not exist as of the date the Tulsa Charges were filed on September 27, 2012, as the second bill enacted, H.B.1577 was not effective until November 1, 2012,

and the bill did not extend any sunset date which made H.B.1577 retroactive to July 1, 2012, therefore the Board did not exist as of the date the Tulsa Charges were filed on September 27, 2012, that there was no place to file or receive the Tulsa Charges and no authority for the Board to accept the Tulsa Charges, it was a nullity and there was nothing for the Board to do in the Tulsa IAFF Case (argument from the Ada IAFF Cases and Jenks FOP Case adopted orally by the Respondent Tulsa in the hearing on February 14, 2013); and

(4) that if it is contended that the date of July 1, 2012, in H.B.1577 was merely error and that July 1, 2012, was not the date of expiration of the Board, the fact remains that H.B.1577 provided for a five (5) member Board, that the same five (5) member Board has not been established and until so constituted with five (5) members, the Board would be without jurisdiction (argument from the Jenks FOP Case adopted orally by the Respondent Tulsa in the hearing on February 14, 2013).

The Tulsa IAFF Complainant filed a response to the Tulsa Motion herein on January 21, 2013 (the "Tulsa IAFF Response"), in essence alleging that:

(1) H.B.2215 and H.B.1577 amended 11 O.S.2011, §51-104 in different ways that are not conflicting so that both became effective; and,

(2) neither the definitions of unfair labor practices (as stated in 11 O.S.2011, §51-102) nor the ability to file such unfair labor practice charges, were ever affected by the sunset law (as stated in 74 O.S.2011, §3901 et seq.), rather only the existence of the Board was affected by the sunset law, and that since the Board has been re-created, it can proceed to take action on charges that have been made and are pending; and,

(3) in every session of the Legislature there is a "clean-up" bill that merges and reconciles the various times in the previous legislative session that a section would be modified (there currently

being such a clean-up bill S.B.977 pending in the current legislative session to address 11 O.S.2011, §51-104 as amended by H.B.2215 and H.B.1577 in the last legislative session), that such clean-up work has been recognized and upheld against the logrolling claim (*See* Okla. Const. Article V, §57), that such a bill has passed in some form after each legislative session and merges amendments made in single-subject bills to the same statute to make one unified statute or section and that it is clear that the Legislature intended to revise duplicate bills in order to merge them and to reconcile any conflicts therein; and,

(4) neither the definitions of unfair labor practices nor the statutory ability to file unfair labor practice charges were ever affected by the sunset law, only the existence of the Board was so affected; and,

(5) should an unfair labor practice charge be made and pending and the Board were never to come back to life, the Oklahoma district courts being courts of general jurisdiction to resolve all justiciable claims, would have authority (which situation does not exist as the Board has been recreated); and,

(6) even if the Board “sunsetting” on July 1, 2012, the Oklahoma Sunset Law allows it to perform its duties until July 1, 2013 (argument from Jenks FOP Case adopted orally by the Tulsa IAFF Complainant in the hearing on February 14, 2013); and,

(7) a sunset date change from July 1, 2016, back to July 1, 2012, in H.B.1577 is void and severable because it was not identified as part of the legislative intent in H.B.1577's title (argument from Jenks FOP Case adopted orally by the Tulsa IAFF Complainant in the hearing on February 14, 2013); and,

(8) S.B.977 has been filed in the 2013 Legislative Session to clarify that the Board sunset

date is July 1, 2016 (argument from Jenks FOP Case adopted orally by the Tulsa IAFF Complainant in the hearing on February 14, 2013); and,

(9) the Board does not need all five members to have jurisdiction because a simple majority is enough (argument from Jenks FOP Case adopted orally by the Tulsa IAFF Complainant in the hearing on February 14, 2013).

The Respondent Tulsa appeared generally and not specially by and through its City Attorneys, Litigation Division Manager Gerald M. Bender and Assistant City Attorney Jason T. Seay. The Tulsa IAFF Complainant appeared generally by and through its Attorney, Steven R. Hickman, Frasier, Frasier & Hickman, LLP, Tulsa, Oklahoma. The Respondent Tulsa, in oral argument noted that it adopted all of the arguments made by the Respondent Ada in the Ada IAFF Cases and the Respondent Jenks in the Jenks FOP Case objecting to the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013. The Tulsa IAFF Complainant in oral argument noted that it adopted all of the arguments made by the Ada IAFF Complainant in the Ada IAFF Cases and by the Jenks FOP Complainant in the Jenks FOP Case recognizing the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013.

#### **Jenks FOP Case**

A certain matter (PERB No. 2012-ULPC-524 hereinafter referred to as the “Jenks FOP Case”), objecting solely to the jurisdiction of the Board, together with other matters herein referred to involving two (2) other cities likewise objecting solely to the jurisdiction of the Board in each of their respective cases (as herein described), came on collectively for hearing before the Board, on

the following written motions only and not on the merits of the charges hereinafter referred to:

Objection to Jurisdiction of Oklahoma Public Employees Relations Board (with no brief attached) filed herein by the City of Jenks (the "Respondent Jenks") on January 17, 2013 (the "First Jenks Motion"), to object to the jurisdiction of the Board and to delay Board action until the Board's jurisdiction is established with a fully constituted Board with five board members in connection with the Unfair Labor Practice Charges of the FOP Lodge 146 Complainant (the "Jenks FOP Complainant") filed with the Board in the Jenks FOP Case on October 1, 2012 (collectively the "Jenks Charges"), and the Motion to Delay Proceedings Until Jurisdiction of Oklahoma Public Employees Relations Board is Established and Brief in Support filed in the Jenks FOP Case by the Respondent Jenks on January 28, 2013 (the "Second Jenks Motion"), to again object to the jurisdiction of the Board and to delay Board action until the Board's jurisdiction is established with a fully constituted Board with five board members.

The First Jenks Motion and the Second Jenks Motion were filed by the Respondent Jenks in the Jenks FOP case on the alleged basis of the following:

(1) the Board's lack of authority due to the enactment of two amendments to 11 O.S.2011, §51-104, the first to be enacted being H.B.2215 (that amended the Board's sunset date to July 1, 2016), and the second to be enacted being H.B.1577 (that did not amend the Board's sunset date of July 1, 2012, but rather contained a stated effective date of November 1, 2012) during the last session of the Oklahoma Legislature; and,

(2) that due to the later enactment of H.B.1577 that contained a stated effective date of

November 1, 2012, subsequent to the earlier enactment of H.B.2215 (that amended the Board's sunset date to July 1, 2016), the Board no longer exists after said effective date of November 1, 2012, and has no power to adjudicate the Jenks Charges; and

(3) that due to the date the Jenks Charges were filed in the Jenks FOP Case on October 1, 2012, and as the Board terminated on July 1, 2012, under H.B.1577 as enacted during the last session of the Legislature, the Board did not exist as of the date the Jenks Charges were filed on October 1, 2012, as the second bill enacted, H.B.1577 was not effective until November 1, 2012, and the bill did not extend any sunset date which made H.B.1577 retroactive to July 1, 2012, therefore the Board did not exist as of the date the Jenks Charges were filed on October 1, 2012, that there was no place to file or receive the Jenks Charges and no authority for the Board to accept the Jenks Charges, it was a nullity and there was nothing for the Board to do in the Jenks FOP Case (argument from the Ada IAFF Cases and Tulsa IAFF Case adopted orally by the Respondent Jenks in the hearing on February 14, 2013); and

(4) that if it is contended that the date of July 1, 2012, in H.B.1577 was merely error and that July 1, 2012, was not the date of expiration of the Board, the fact remains that H.B.1577 provided for a five (5) member Board, that the same five (5) member Board has not been established and until so constituted with five (5) members that the Board would be without jurisdiction.

The Jenks FOP Complainant filed a response to the First Jenks Motion and Second Jenks Motion in the Jenks FOP Case on February 1, 2013 (the "Jenks FOP Response"), in essence alleging that:

(1) H.B.2215 and H.B.1577 amended 11 O.S.2011, §51-104 in different ways that are not conflicting so that both became effective; and,

(2) neither the definitions of unfair labor practices (as stated in 11 O.S.2011,§51-102) nor the ability to file such unfair labor practice charges, were ever affected by the sunset law (as stated in 74 O.S.2011, §3901 et seq.), rather only the existence of the Board was affected by the sunset law, and that since the Board has been re-created, it can proceed to take action on charges that have been made and are pending; and,

(3) in every session of the Legislature there is a “clean-up” bill that merges and reconciles the various times in the previous legislative session that a section would be modified (there currently being such a clean-up bill S.B.977 pending in the current legislative session to address 11 O.S.2011, §51-104 as amended by H.B.2215 and H.B.1577 in the last legislative session), that such clean-up work has been recognized and upheld against the logrolling claim (*See Okla. Const. Article V, §57*), that such a bill has passed in some form after each legislative session and merges amendments made in single-subject bills to the same statute to make one unified statute or section and that it is clear that the Legislature intended to revise duplicate bills in order to merge them and to reconcile any conflicts therein; and,

(4) neither the definitions of unfair labor practices nor the statutory ability to file unfair labor practice charges were ever affected by the sunset law, only the existence of the Board was so affected; and,

(5) should an unfair labor practice charge be made and pending, and the Board were never to come back to life, the Oklahoma district courts being courts of general jurisdiction to resolve all justiciable claims, would have authority (which situation does not exist as the Board has been recreated); and,

(6) even if the Board “sunsetting” on July 1, 2012, the Oklahoma Sunset Law allows it to

perform its duties until July 1, 2013; and,

(7) a sunset date change from July 1, 2016, back to July 1, 2012, in H.B.1577 is void and severable because it was not identified as part of the legislative intent in H.B.1577's title; and,

(8) S.B.977 has been filed in the 2013 Legislative Session to clarify that the Board sunset date is July 1, 2016; and,

(9) the Board does not need all five members to have jurisdiction because a simple majority is enough; and

(10) the First Jenks Motion should be overruled for failure to cite any legal authority and for failing to file a written brief in support of the motion in violation of the Board's Rules.

The Respondent Jenks appeared generally and not specially by and through its City Attorney, Stephen L. Oakley. The Jenks FOP Complainant appeared generally by and through its Attorney, Jarrod A. Leaman, James R. Moore & Associates, P.C., Oklahoma City, Oklahoma. The Respondent Jenks, in oral argument noted that it adopted all of the arguments made by the Respondent Ada in the Ada IAFF cases and the Respondent Tulsa in the Tulsa IAFF Case objecting to the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013. The Jenks FOP Complainant in oral argument noted that it adopted all of the arguments made by the Ada IAFF Complainant in the Ada IAFF Cases and by the Tulsa IAFF Complainant in the Tulsa IAFF Case recognizing the jurisdiction of the Board made both in writing and filed with the Board prior to the hearing on February 14, 2013, and those made orally before the Board in the hearing on February 14, 2013.

**Combined Ada IAFF Cases, Tulsa IAFF Case and Jenks FOP Case**

The Board was informed in writing and through oral argument of counsel presented simultaneously on February 14, 2013, of essentially the same objection to jurisdiction arguments urged by the respondent Cities of Ada, Tulsa and Jenks in their respective cases pending at the same time before the Board.

The Board was likewise informed in writing and through oral argument of counsel presented simultaneously on February 14, 2013, of essentially the same arguments urged by the complainant unions IAFF Local 2298, IAFF Local 176 and FOP Lodge 146 supporting the Board's jurisdiction in their respective cases pending at the same time before the Board.

The Board, having reviewed the written Ada Motion and Ada IAFF Response filed in the Ada IAFF Cases, the written Tulsa Motion and Tulsa IAFF Response filed in the Tulsa IAFF Case, the First Jenks Motion, the Second Jenks Motion and the Jenks FOP Response filed in the Jenks FOP Case, and having heard the arguments of counsel and otherwise being fully apprised in the Ada IAFF Cases, the Tulsa IAFF Case and the Jenks FOP Case, and not on the merits of the Ada Charges, the Tulsa Charges or the Jenks Charges, hereby determines as follows:

#### **FINDINGS OF FACT**

It is the finding of the Board by a preponderance of the evidence that:

1. The Respondent Ada, the Respondent Tulsa and the Respondent Jenks, respectively, each is, and each was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma.

2. The Ada IAFF Complainant and the Tulsa IAFF Respondent, respectively, each is, and each was at all times material herein, the sole exclusive bargaining agent for certain employees of the municipal fire department of the City of Ada and the City of Tulsa, respectively. The Jenks FOP

Complainant is, and was at all times material herein, the sole exclusive bargaining agent for certain employees of the municipal police department of the City of Jenks.

3. The Fifty-Third Legislature, Second Regular Session, adopted H.B.2215 and H.B.1577 that both amended 11 O.S.2011, §51-104, during the same legislative session which adjourned on May 25, 2012.

4. The first enactment, H.B.2215, amended 11 O.S.2011, §51-104 to re-create the Board until July 1, 2016, and had no stated effective date. H.B.2215 was approved by Governor Mary Fallin on April 17, 2012, and in the absence of a stated effective date, H.B.2215's effective date was August 24, 2012.

5. The second enactment, H.B.1577, amended 11 O.S.2011, §51-104 to expand the membership of the Board to five (5) members, increased the number of members required to constitute a quorum to three (3) members, reduced the number of years of the terms of board members (other than the Chairman) to three (3) years, specified term limits to two (2) terms only, and provided for an effective date of November 1, 2012.

6. The Board (with two (2) vacant member positions) held a regular meeting on February 14, 2013, with a quorum present consisting of three (3) members, in which meeting it held a hearing.

7. The First Jenks Motion was filed by the Respondent Jenks in the Jenks FOP Case without a brief attached or a brief being subsequently filed and was not a motion made during a hearing.

#### **CONCLUSIONS OF LAW**

The Board concludes as a matter of law as follows:

1. Pursuant to 11 O.S.Supp.2012, §51-104 effective November 1, 2012, the Board is composed of five (5) members, three (3) of whom being present "... shall constitute a quorum."

2. Under its Rules, the Board is authorized to determine if it has jurisdiction, whether personal and/or subject matter, or lacks jurisdiction, whether personal and/or subject matter. OAC 585: 2-7-3.

3. The matters in IAFF Local 2298 v. City of Ada (PERB Case No. 2012-ULPC-521 and PERB Case No. 2012-ULPC-522), IAFF Local 176 v. City of Tulsa (PERB Case No. 2012-ULPC-523) and FOP Lodge 146 v. City of Jenks (PERB Case No. 2012-ULPC-524), each involve an objection to the jurisdiction of the Board due to the enactment of two amendments to 11 O.S.2011, §51-104, H.B.2215 and H.B.1577, during the same session of the Fifty-Third Legislature, Second Regular Session, which matters are imparted by the provisions of the Board's Rule OAC 585: 2-7-3, 74 O.S.2011, §3903 and 74 O.S.2011, §3909.

4. The Board, pursuant to 11 O.S.2011, §51-104b, has personal jurisdiction over the Ada IAFF Complainant and the Respondent Ada in the Ada IAFF Cases, the Tulsa IAFF Complainant and the Respondent Tulsa in the Tulsa IAFF Case, and the Jenks FOP Complainant and the Respondent Jenks in the Jenks FOP Case.

5. The burden of proof in these matters is a preponderance of the evidence pursuant to OAC 585: 2-7-12. The Respondent Ada, the Respondent Tulsa and the Respondent Jenks, in raising the issue of and objecting to the Board's subject matter jurisdiction, have the burden in their respective cases of proving their respective allegations and the objections by a preponderance of the evidence. OAC 585: 2-7-12.

6. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.2011, § 308a et seq. and the Board's Rules at OAC 585: 2-1-1 et seq. and the meeting was convened with a quorum present consisting of three (3) board members and the

meeting was conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S.2011, § 301 et seq.

7. Under the provisions of its Rules at OAC 585: 2-7-3, the Board recognizes all motions permitted under the Oklahoma Pleading Code, 11 O.S.2011, § 2001 et seq., including, but not limited to, motions to dismiss and objections to jurisdiction. However, the Board does not recognize any such motions not combined with a written brief, other than those motions made during a hearing. OAC 585: 2-7-3.

8. “The function of a motion to dismiss is to test the law of the claims, not the facts supporting them. *Zaharias v. Gammill*, 1992 OK 149, 844 P. 2d 137, 138. In assessing the sufficiency of a petition, the general rule is that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle her to relief. *Id.* The question, on a motion to dismiss, is whether taking all of plaintiff’s allegations as true, she is precluded from recovering as a matter of law. *Patel v. OMH Medical Center, Inc.*, 1999 OK 33 ¶ 43, 987 P. 2d 1185, 1202, reh. den., cert. den. 528 U.S. 1188, 120 S.Ct. 1242, 146 L.Ed.2d 100.” *Estate of Hicks v. Urban East, Inc.*, 92 P. 3d 88, 90 (Okla. 2004).

9. “It is axiomatic that the cardinal rule of statutory construction is to ascertain the intent of the legislature and if possible to give effect to all its provisions.” *Kratz v. Kratz*, 905 P. 2d 753, 755 (Okla. 1995).

10. “The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, and that intent is first sought in the language of a statute.” *City of Durant v. Cicio*, 50 P. 3d 775, 781 (Okla. 2002).

11. “Legislative acts are to be construed in such manner as to reconcile the different

provisions and render them consistent and harmonious and give intelligent effect to each.” *Eason Oil Co. v. Corp. Comm’n.*, 535 P.2d 283, 286 (Okla. 1975), *City of Tulsa v. Smittle*, 702 P.2d 367, 370 (Okla. 1985).

12. “When two acts, or parts of acts, are susceptible of construction which will give effect to both without doing violence to either, this construction should be adopted in preference to one which leads to a conclusion that there is a conflict”. *AMF Tubescop Co. v. Hatchel*, 547 P. 2d 374, 379 (Okla. 1976), *City of Tulsa v. Smittle*, 702 P.2d 367, 370 (Okla. 1985).

13. “Generally, the latest enactment in point of time will ordinarily prevail, but in construing statutes passed at the same session of the Legislature, and at nearly the same time, there is a strong presumption against implied repeals. *In re Adoption of Lewis*, 1963 OK 24, 380 P.2d 697, 700.”, *Tubbs v. Teachers’ Retirement System of Oklahoma*, 57 P.3d 571, 577 n. 10 (Okla. 2002).

14. “When construing statutes passed at the same session of the Legislature and at nearly the same time, there is a strong presumption against implied repeal of one statute by the other. *In re Adoption of Lewis*, Okl., 380 P.2d 697 (1963)”. *Okla. Ass’n. of Municipal Attorneys v. State*, 577 P. 2d 1310, 1315 (Okla. 1978).

15. “... bills adopting a ‘revision of statutes’ are clearly excluded from the single-subject rule of [Okla. Const.] Article 5, §57. House Bill 2195 falls squarely into this ‘revision of statutes’ exception.” *M.A.W. v. State*, 185 P.3d 388, 391 (Okla.Crim.App.,2008)

16. “The structure, title, and text of HB 2195 all confirm that, while it was enacted in 2007, it is a clean-up bill of sorts, designed to amend, merge, consolidate and repeal duplicate sections added to various Oklahoma Statutes during the 2006 legislative session. This type of bill is passed in some form after each legislative session and merges amendments made in separate single-subject

bills to the same statute to make one unified statute or section ... It is clear that the Legislature intended, through HB 2195, only to revise these duplicate bills (originally SB 1760 and SB 1765), which amend the same sections of the Youthful Offender Act in order to merge them and to reconcile any conflicts therein.” *M.A.W. v. State*, 185 P.3d 388, 391 (Okla.Crim.App.,2008)

17. “It is a well-settled principle of statutory construction that, where possible, court will not allow statutes to have absurd or discriminatory consequences. A construction that would lead to an absurdity or to discriminatory treatment will be avoided if it can be done without violating legislative intent.” *Cox v. Dawson*, 911 P.2d 272, 281 (Okla. 1996); (See *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Com’n*, 764 P. 2d 172, 179 (Okla. 1988)).

18. “Repeals by implication are not favored in law or by this court. The United States Supreme Court agrees:

‘It is a cardinal principle of construction that repeals by implication are not favored.

When there are two acts upon the same subject, the rule is to give effect to both if possible. (cites omitted). The intention of the legislature to repeal must be ‘clear and manifest’. (cites omitted).” *City of Tulsa v. Smittle*, 702 P.2d 367, 370 (Okla. 1985).

19. “When construing statutes passed at the same session of the Legislature and at nearly the same time, there is a strong presumption against implied repeal of one statute by the other. *In re Adoption of Lewis*, 380 P.2d 697 (1967).” *Okla. Ass’n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla. 1978).

20. “...we note at the outset that repeals by implication are not favored and all statutory provisions must be given effect if possible; unless the conflict so demonstrated is irreconcilable the earlier provision will not be repealed by the later enactment. *Smith v. State Bd. of Education*, 190

Okl. 556, 126 P.2d 241 (1942). Nothing short of irreconcilable conflict between statutes accomplishes a repeal by implication. *Sesow v. Swearingen*, 552 P.2d 705 (Okl.1976), *State ex rel. King v. White*, 170 Okl. 126, 39 P.2d 69 (1934). Where such a conflict exists, the later modifies the earlier, even where both sections were enacted into the same official codification. *Ex parte Burns*, 88 Okl. Cr. 270, 202 P.2d 433 (1949).” *City of Sand Springs v. Dep’t of Pub. Welfare*, 608 P.2d 1139, 1151 (Okla. 1980).

21. The Board, which is subject to “sunset” or termination under the provisions of the Fire and Police Arbitration Law, specifically 11 O.S.2011, §51-104, has reviewed the following provisions of the Oklahoma Sunset Law, 74 O.S.2011, §3901 et seq., and determines that each applies to the Board (as a statutory entity specifically named in Section 3903 of Title 74 of the Oklahoma Statutes), in the Ada IAFF Cases, the Tulsa IAFF Case and the Jenks FOP Case, respectively:

(A) “The following statutory entities and their successors shall be terminated on July 1, 2012, and all powers, duties and functions shall be abolished one (1) year thereafter: ... 7. Public Employees Relations Board as created by Section 51-104 of Title 11 of the Oklahoma Statutes.” 74 O.S.2011, §3903 (in pertinent part); and,

(B) “Except as otherwise provided by law, any statutory entity listed in Sections 3903 through 3908 of this title [i.e. including the Board] which is terminated shall have a period of one (1) year after its termination date for the purpose of ceasing its affairs and termination shall not reduce or otherwise limit the powers, duties or functions of said entity. Upon the expiration of the one-year period, the entity and its personnel positions shall be abolished.” 74 O.S.2011, §3909(A).

22. The Board, in having its membership newly increased from three (3) board members to

five (5) board members under H.B.1577, recognizes the following well-settled law as expressed by the Oklahoma Supreme Court more than one hundred years ago that: “[w]hen the office came into being, there was, ipso facto, a vacancy in the office. Knight v. Trigg, 16 Idaho, 256, 100 Pac. 1060; State v. City of Butte, 41 Mont. 377, 109 Pac. 710.” *State v. Breckinridge*, 126 P. 806, 810 (Okla. 1912).

23. The Board has subject matter jurisdiction over the matters objecting to its jurisdiction in the Ada IAFF Cases, the Tulsa IAFF Case and the Jenks FOP Case and of the Ada Charges, the Tulsa Charges and the Jenks Charges pursuant to 11 O.S.2011, §51-104b.

The Board, having heard the arguments of counsel and otherwise being fully apprised of these matters objecting solely to the jurisdiction of the Board as well as these matters supporting the Board’s jurisdiction and not on the merits of the Ada Charges, the Tulsa Charges and the Jenks Charges, hereby determines as follows:

### **OPINION**

It is the finding of the Board as follows:

1. The Board determines that the legislative intent as expressed in the plain language of both H.B.2215 and H.B.1577 (which each amended 11 O.S.2011, §51-104), is that the Board continue to exist uninterrupted until July 1, 2016, that the Board consist of five (5) board members, that the number of board members required to constitute a quorum be increased to three (3) board members, that the terms of board members (other than the Chairman) be reduced to three (3) years, that term limits of board members be specified to two (2) terms only, and that the effective date be November 1, 2012.

2. The Board determines that there was no express or implied repeal of H.B.2215 through

the passage of H.B.1577. The Board determines that H.B.2215 and H.B.1577 should both be given effect as each bill amended 11 O.S.2011, §51-104 in different ways with no irreconcilable conflict. Further, the Board determines that there was no clear and manifest legislative intent in this instance to repeal the first enactment, H.B.2215, through the passage of the second enactment, H.B.1577.

3. The Board determines that the provisions of H.B.2215 and H.B.1577 are legislative acts that are to be construed in such manner as to reconcile the different provisions and render them consistent and harmonious and give intelligent effect to each. Further, the Board determines that the provisions of H.B.2215 and H.B.1577 can and should be harmonized such that the Board has been recreated until July 1, 2016 (as provided in H.B.2215), with all of the new provisions of H.B.1577 effective as of November 1, 2012.

4. The Board determines that, due to the provisions of the Oklahoma Sunset Law, 74 O.S.2011, §3909, even if it had been the Legislature's intention to "sunset" the Public Employees Relations Board, the Board, as a statutory entity listed in 74 O.S.2011, §3903(7) that terminated on July 1, 2012, continues at least one (1) year after its termination date of July 1, 2012, until its abolition date, July 1, 2013, with all of its powers, duties and functions in force.

5. The Board determines that under the provisions of H.B.1577 (which amended 11 O.S.2011, §51-104), when the five (5) board member positions came into being, there was, ipso facto, a vacancy in each of the five (5) board member positions and that three (3) of such vacant positions were subsequently filled in accordance with the provisions of H.B.1577. Further, the Board determines that under the provisions of H.B.1577, as a quorum of its five (5) member Board consists of three (3) members and the Board currently has three (3) members and two (2) vacant board member positions, that the three (3) members of the Board who held a regular meeting on February

14, 2013, did so as a quorum.

The 1<sup>st</sup> Jenks Motion filed in the Jenks FOP Case without a brief in violation of the Board's Rule, should be and hereby is DENIED.

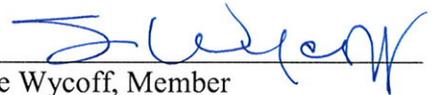
The Ada Motions, the Tulsa Motion and the 2<sup>nd</sup> Jenks Motion filed in the Ada IAFF Cases, the Tulsa IAFF Case and the Jenks FOP Case, respectively, should each be and each hereby is DENIED. The Ada Motions, the Tulsa Motion and the 2<sup>nd</sup> Jenks Motion being each so DENIED in this Interlocutory Order, the jurisdiction of the Board under H.B.2215 and H.B.1577 has been addressed and the Board finds that it has personal jurisdiction over the Ada IAFF Complainant, the Tulsa IAFF Complainant, the Jenks FOP Complainant, the Respondent Ada, the Respondent Tulsa and the Respondent Jenks and subject matter jurisdiction over the matters in the Ada IAFF Cases, the Tulsa IAFF Case and the Jenks FOP Case.

IT IS SO ORDERED.

Dated this 14<sup>th</sup> day of March, 2013.



Robert McCampbell, Chairman  
Public Employees Relations Board



Sue Wycoff, Member  
Public Employees Relations Board



Greg Buckley, Member  
Public Employees Relations Board