

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, TULSA LOCAL 176,)
)
Complainant,)
)
vs.) Case No. 207
)
CITY OF TULSA, OKLAHOMA,)
)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND OPINION

This matter came on for hearing before the Public Employees Relations Board (PERB or the Board) on September 7, 1989, on the Complainant's Unfair Labor Practice (ULP) charge. The charging party appeared by and through its attorney Donald Bingham and certain of its members. The Respondent appeared by and through its counsel Patrick Boulden and certain of its employees.

The Board received documentary and testimonial evidence. The Board also solicited and received post-hearing submissions (Proposed Findings of Fact, Conclusions of Law and supporting briefs) from both parties, the last received by this Board on April 3, 1990.

The Board is required by 75 O.S. 1981, § 312, to rule individually on Findings of Fact submitted by the parties. The submission of the Respondent is treated as follows:

1. Proposed Findings Nos. 1-29 are substantially adopted by the Board.

2. Proposed Findings Nos. 30-32 are rejected by the Board as being unnecessary for the decision of this Board.

The Board treats the complainant's submissions as follows:

The Board accepts proposed findings numbered 1-4, 7, 10, 11, 15. The Board accepts, in part, and rejects in part those findings numbered 6 and 9. The Board rejects proposed findings 5, 8, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, as being unnecessary for the decision of this Board. The Board rejects proposed finding 23.

FINDINGS OF FACT

1. The Respondent, the City of Tulsa, Oklahoma, is and was, at all pertinent times, a freehold, home-rule charter city, duly organized and existing under the Constitution and laws of the State of Oklahoma, with a governing body identified as the Board of Commissioners of the City of Tulsa. [See Pre-Hearing Conference Order, Stipulations, and Exhibit J-1.]

2. The Complainant, the International Association of Fire Fighters, Tulsa Local 176, AFL-CIO, is and was at all pertinent times, the duly elected, acting and exclusive collective bargaining agent and representative for all firefighters employed by the Respondent, except for probationary firefighters, the Fire Chief, and an assistant to the Fire Chief. [See Pre-Hearing Conference Order, Stipulations.]

3. Effective July 1, 1988, the parties were governed by a certain collective bargaining agreement (CBA), which contained an expiration date of June 30, 1989 (Exhibit 14).

4. The CBA expressly sets forth certain medical insurance provisions and pursuant to Article 4 expressly incorporates all working conditions, including employee benefits in effect on July 1, 1988. (Exhibit 14)

5. The city has established an insurance committee consisting of both elected officials and department manager. (Tr. p. 77)

6. The insurance committee functions as an advisory committee to the city and is empowered to make recommendations to the City Commission. (Tr. p. 29)

7. The Complainant and Respondent, for the past seventeen (17) years, from May 26, 1972 to the date of hearing (September 7, 1989) have entered into twelve (12) CBAs and one Memorandum of Understanding governing certain aspects of parties' labor-management, employer-employee relationship. [See Tr. 78 and Exhibits J-2 through J-14.] The parties have, in addition, subsequent to the hearing of this matter entered into a CBA covering 1989-1990 (supplemental Exhibit D).

8. During the terms of the parties' 1972-1973 and 1973-1974 CBAs, Blue Cross and Blue Shield provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan as selected and determined by the governing body of the Respondent, and the parties' 1972-1973 and 1973-1974 CBAs contained no negotiated health benefit provisions. [Tr. 78-80 and Exhibits J-2 and J-3.]

9. During the term of the parties' 1974-1975 CBA, Blue Cross and Blue Shield provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 24, provided that the Respondent would pay \$4.00 per month as a supplement to a firefighter's payments for dependent health coverage. [See Tr. 80-81 and Exhibit J-4.]

10. During the term of the parties' 1975-1976 CBA, Blue Cross and Blue Shield provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 24, provided that the Respondent would pay \$10.00 per month as a supplement to a firefighter's payments for dependent health coverage. See Tr. 80-81 and Exhibit J-5.]

11. During the term of the parties' 1976-1977 CBA, through December 31, 1976, Blue Cross and Blue Shield provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan as selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 24, provided that the Respondent would pay \$24.72 per month as a supplement to a firefighter's payment for dependent health coverage. See Tr. 80-81 and Exhibit J-6.]

12. Effective January 1, 1977, at mid-term of the parties' 1976-1977 CBA, the governing body of the Respondent, following consultations with the Complainant's representatives, both without negotiations and amendments to the parties' CBA, or any objections by Complainant, unilaterally discontinued its Blue Cross and Blue Shield health benefits plan for all employees of the Respondent, and implemented a new health benefits plan offered by Aetna [Tr. 82-84.].

13. During the term of the parties' 1977-1978 CBA, Aetna provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 13, provided that the Respondent would pay \$29.44 per month as a supplement to a firefighter's payment for dependent health coverage. See Tr. 80-81 and Exhibit J-7.]

14. During the term of the parties' 1978-1980 CBA, Aetna continued to provide all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 12, provided that the Respondent would: (a) continue to pay the entire cost for a firefighter's health coverage; (b) pay \$29.44 per month as a supplement to a firefighter's payment for dependent health coverage; and (c) limit a firefighter's payment for dependent

health coverage to \$22.64 per month during the life of the agreement. See Tr. 80-81 and Exhibit J-8.]

15. During the term of the parties' 1978-1980 CBA, the health benefits plan provided by Aetna to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the Respondent, following consultations with the Complainant's representatives, but without negotiations and amendments to the parties' CBA or any objections by the Complainant. Those alterations were as follows: (a) effective November 1, 1978, the addition of up to \$300 of emergency coverage at 100%; (b) effective April 29, 1979, the addition of federal maternity coverage; (c) effective August 1, 1979, the addition of a dental plan; and (d) effective June 1, 1980 an increase in employee's premium payments for dependent medical coverage from \$22.64 to \$30.95. See Tr. 89-90, Tr. 101, Exhibits J-19 and J-20.]

16. During the term of the parties' 1980-1981 CBA, Aetna continued to provide all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 12, provided that: (a) the respondent would continue to pay 100% of the cost of a firefighter's health insurance; (b) the Respondent would pay 56.6% of a firefighter's payment for dependent medical insurance and 100% of a firefighter's dependent dental insurance payments; and (c) that during the term of subject CBA, firefighters would

receive any additional dependent health coverage premium supplements which might be provided to any other collective bargaining group of the Respondent. [See Tr. 84-86 and Exhibit J-9.]

17. During the term of the parties' 1981-1983 CBA, Aetna continued to provide all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 12, provided that: (a) the Respondent would continue to pay 100% of a firefighter's health insurance; (b) the Respondent would begin paying 58.7% of a firefighter's payment for dependent medical insurance and 100% of a firefighter's dependent dental insurance payments; (c) that effective January 1, 1982, the Respondent would offer an alternative dependent medical plan (Plan "B"); and (d) that firefighters would only be allowed to change medical plans once a year. [See Tr. 86-90, r. 101, Exhibits J-11 and J-20.]

18. Furthermore, during the term of the parties' 1981-1983 CBA, the health benefits plan provided by Aetna to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the Respondent following consultations with the Complainant's representatives, but without negotiations and amendments to the parties' CBA or any objections by the Complainant. Those alterations were as follows: (a) effective January 1, 1982, the establishment of a health benefits plan for an alternate dependent

medical plan (Plan "B"); (b) effective January 1, 1983, the elimination of 100% coverage on the first \$1,000 of in-hospital expenses, but the addition of out-patient and pre-admission testing coverage; and (c) effective March 1, 1983, the addition of a PruCare HMO (Health Maintenance Organization) option along with the addition of orthodontic and other dental coverage. [See Tr. 86-90, Tr. 101, Exhibits J-19 and J-20.]

19. During the term of the parties' 1984-1986 CBA, Aetna and PruCare continued to provide all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 13, provided that (a) the Respondent would continue to pay 100% of the cost of a firefighter's health insurance; (b) the Respondent would begin paying 64.3% of a firefighter's payments for dependent medical insurance and 100% of a firefighter's dependent dental insurance; (c) firefighters could change medical/dental plans only at the designated enrollment period; (d) retired firefighters could continue certain health benefits upon retirement; and (e) that a joint Union-City committee would review medical programs and "recommend" cost containment measures. [See Tr. 90-91 and Exhibit J-11.]

20. During the term of the parties' 1984-1986 CBA, the health benefits plan provided by Aetna and PruCare, to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the

Respondent, following consultations with the Complainant's representatives, both without negotiations and amendments to the parties' CBA, or any objections by the Complainant. Those alterations were as follows: (a) effective July 1, 1985, the establishment of a maximum lifetime benefit; (b) effective January 1, 1986, the imposition of a "hospital pre-certification and continued stay" cost control requirement; (c) effective July 1, 1984 an increase in the dollar amount of an employee's payments to regular dependent health coverage from \$40.45 to \$49.45; (d) effective September 1, 1984, a decrease in the dollar amount of an employee's payments to regular dependent health coverage from \$49.95 to \$36.27; and (e) effective July 1, 1985 and increase in the dollar amount of an employee's payments to regular dependent health coverage from \$36.27 to \$49.65. See Tr. 90-92, Tr. 101 and Exhibits J-19 and J-20.]

21. From July 1, 1986 through June 30, 1987, during the term of the parties' Memorandum of Understanding, Aetna and PruCare continued to provide all employees of the Respondent, including the Complainant's membership, with a health benefits plan selected and determined by the governing body of the Respondent, and the only negotiated changes from the parties 1984-1986 CBA included (a) a provision that firefighters may only change health/dental plans once a year during a designated enrollment period, normally between May 15, and June 1; and (b) a new provision which allowed retired firefighters within the Respondent's health plan to continue

participation at rates paid by regular employees. [See Tr. 90-92 and Exhibit J-12.]

22. During the period from July 1, 1986 through June 30, 1987, the health benefits plan provided by Aetna and PruCare to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the Respondent, following consultations with the Complainant's representatives, but without objections, negotiations or amendment to the parties' CBA. Those alterations were as follows: (a) effective April 1, 1987, the addition of 100% coverage for routine physical examinations and a \$100.00 vision benefit; and (b) the addition of a Comp-Med PPO (Preferred Provider Organization) health benefit option. [See Tr. 90-92, Tr. 101 and Exhibit J-20.]

23. During the term of the parties' 1987-1988 CBA, Aetna, PruCare, Comp-Med, Health Accord, Pacificare and HMO Oklahoma provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan as selected and determined by the governing body of the Respondent, and the only negotiated provision of the parties' CBA, Article 13, remained the same as those negotiated into the parties' 1984-1986 CBA and modified by negotiations set out in the parties' 1986-1987 Memorandum of Understanding. (See Finding of Fact Nos. 15 and 17.) [See Tr. 90-92, Exhibits J-13 and J-16.]

24. During the term of the parties' 1987-1988 CBA, the health benefits plan provided by Aetna, PruCare, Comp-Med, Health Accord,

Pacificare and HMO Oklahoma to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the Respondent, following consultations with the Complainant's representatives, but without negotiations or amendment to the parties' CBA or any objections by the Complainant. Those alterations, effective July 1, 1987, were as follows: (a) the addition of a \$3.00 prescription card, an increase in maximum medical coverage from \$1,000,000 to unlimited, 100% "birthing center" maternity coverage, a \$3.00 co-pay for Aetna, low option "B", prescription drugs; and (b) a decrease in the dollar amount of employee's payments to regular dependent health coverage from \$49.65 to \$39.72. [See Tr. 90-92, Tr. 101, Exhibits J-19 and J-20.]

25. Moreover, during mid-term of the parties' 1987-1988 CBA the HMO known as Health Accord ceased operations effective May 31, 1988, and thereafter no longer provided any employee of the Respondent, including the Complainant's membership, with health benefits selected and determined by the governing body of the Respondent. [See Tr. 91 and Exhibit J-16.]

26. During the term of the parties' 1988-1989 CBA, Aetna, Pacificare, PruCare and HMO Oklahoma provided all employees of the Respondent, including the Complainant's membership, with a health benefits plan as selected and determined by the governing body of the Respondent and the only negotiated provision of the parties' CBA, Article 13, remained the same as negotiated in the parties'

1987-1988 CBA. (See Findings of Fact No. 19). [See Tr. 90-92, Exhibits J-13 and J-14.]

27. During the term of the parties' 1988-1989 CBA, the health benefits plan provided by Aetna, Pacificare, PruCare, and HMO Oklahoma to all employees of the Respondent, including the Complainant's membership, was unilaterally established and altered by the governing body of the Respondent, following consultations with the Complainant's representatives, but without negotiations or amendment to the parties' CBA or any objections by the Complainant. Those alterations, effective July 1, 1988, were as follows: (a) the addition of a mammography benefit; (b) the addition of 100% outpatient surgery coverage; (c) the addition of an employee contribution in Pacificare employee only coverage and an increase in dependent coverage costs; (d) the addition, in PruCare membership, of a \$50.00 co-payment at emergency rooms outside its service area and an employee contribution, as well as an increase in dependent coverage costs; and (e) an HMO Oklahoma increase in Endodontics co-payments from 10% to 50%. [See Tr. 90-92, Tr. 101, Exhibits J-16 and J-20.]

28. From 1976 through 1989 it has been the established practice of the Respondent, whenever there was even a minor change in health benefits premiums or a change in health benefit plan designs to communicate and meet with all employee and the Union leadership about anticipated changes. [See Tr. 89-90 and Tr. 92-93.]

29. From 1972 through 1988, during negotiations between the Complainant and the Respondent upon any CBA, the parties have not negotiated health benefit design changes, which necessarily includes the absence of health benefit plan design negotiations for the 1981-1983 CBA, when a low option plan (Plan "B") was addressed in the parties' CBA only insofar as it required a 100% Respondent paid dependent health coverage benefit. [See Tr. 87-89, Tr. 92 and Exhibit J-11.]

30. From 1972 through 1988, the parties' collective bargaining agreements and negotiations have never included a fixed dollar level for employee health benefits and dependent health benefit premiums, but have only addressed fixed dollar supplements or percentage supplement payments by the Respondent towards firefighter payments for dependent health benefits. [See Exhibits J-4 through J-14 and Exhibit J-19.]

31. From 1972 through 1989 the health insurance benefits provided to the Complainant's membership have always been the same as the coverage provided to all other employees of the Respondent. [See Tr. 54-56.]

32. For the Respondent's Fiscal Year 1989-1990, effective July 1, 1989, the Respondent proposed and implemented a health benefits plan provided by Aetna, Pacificare, PruCare and Bluecross HMO/Dentalguard to all employees of the Respondent, including the Complainant's membership, as unilaterally established and altered by the governing body of the Respondent, following consultations and negotiations with the Complainant's representatives, and over

objections raised by the Complainant. Those alterations included, but were not limited to the following changes, effective July 1, 1989: (a) the addition of an Aetna PPO (Preferred Provider Organization) Network; (b) a discontinuation of Pacificare employee contributions for employee only coverage, as well as an increase in dependent coverage costs; (c) for PruCare members, an increase in physician office visit co-payments from \$5.00 to \$10.00, a slight decrease in employee contributions for employee only coverage, as well as a slight increase in dependent coverage costs; (d) an increase in the Aetna low option "B" deductible and co-payments; and (e) an increase in the dollar amount of employee's payments to regular dependent health coverage from \$39.72 to \$65.50. [See Tr. 67-71, Tr. 94-98, Tr. 111-116, as well as Exhibits J-15, J-17, J-18, J-19, J-20, J-22, J-23, and J-24.]

33. At no time during the parties' negotiations for a 1989-1990 CBA has the Respondent refused to negotiate health benefits with the Complainant's representatives and the Respondent has conceded that it is obligated to negotiate with the Complainant's representatives in good faith over health benefit coverage, when such a proposal is submitted for collective bargaining. [See Tr. 52-53 and Tr. 74-75.]

34. The 1988-1989 CBA, Article 4 provided as follows:

ARTICLE 4 - PREVAILING RIGHTS

All rules, regulations, fiscal procedures, working conditions, departmental practices, and manner of conducting the operation and administration of the Tulsa Fire Department currently in effect on the effective date of

any negotiated agreement shall be deemed a part of this Agreement, unless and except as modified or changed by the specific terms of this Agreement. (Exhibit 14)

35. The 1988-1989 CBA, Article 5 provided in part, as follows:

ARTICLE 5 - MANAGEMENT RIGHTS AND RESPONSIBILITIES

Union recognizes the prerogative of Employer to operate and manage its affairs in all respects and in accordance with its responsibilities; and the powers or authority which Employer has not officially abridged, delegated, granted or modified by this Agreement are retained by Employer; and all rights, powers, and authority Employer had prior to the signing of this Agreement are retained by Employer and remain exclusively without limitation within the rights of Employer. (Exhibit 14)

36. The 1988-1989 CBA, Article 6, provided as follows:

ARTICLE 13 - DEPENDENT HEALTH COVERAGE

Section 1. Employer agrees to continue to pay 100% of the cost for the Employees' medical and dental insurance.

Section 2. Employer agrees to pay 64.3% of the cost for dependent medical insurance. Employees shall pay 35.7% of the cost for dependent medical insurance and 100% of the cost for dependent dental insurance.

Section 3. Employer to pay 100% of the cost for alternate medical Plan "B" - Low Option for both employee and dependent coverage. Employees shall continue paying 100% of the cost for dependent dental insurance.

Section 4. Employees may only change medical/dental plans one (1) time per year during the designated enrollment period which will normally be between May 15 and June 1. If dependent coverage is elected, the entire family must enroll in the plan option selected by the Employee.

Section 5. Retired employees who have continued their membership in the City's group medical or HMO's program shall be allowed to continue to participate by payment of the total cost at the rate(s) designated for regular employees and their dependents.

Section 6. During the term of this Agreement, sessions will be held with representatives from the Union and Employer to review the current group medical insurance programs with the goal to identify various cost factors involved and to recommend future cost effective and/or cost containment measures.

37. With the exemption of percentage changes the current Article 13 of the 1989-1990 agreement is identical to the 1988-1989 CBA, but adds the following:

Section 7. Parties agree to form a joint task force for the purpose of reviewing data regarding the health and welfare plan of the City of Tulsa and for the purpose of determining whether or not the members of the Bargaining Unit will remain as part of the City's group health and welfare program or withdraw and provide their members with a separate plan under the jurisdiction of the Bargaining Agent. For this limited purpose, effective July 1, 1990, Article 13 will be open to meet and confer on the various options available to the parties. (Exhibit D)

38. During several negotiating sessions on past CBAs, the union had made several proposals on insurance costs and coverage [Supplemental Exhibits A, B and C.]

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this dispute pursuant to 11 O.S. § 51-104(6).

2. A union, through clear and unmistakable evidence may waive rights which may otherwise exist including the right to

bargain benefit changes in health insurance. EPI Corporation v. General Drivers, Warehousemen and Helpers Local Union No. 89, 279 NLRB 1170 (1986). The evidence herein, including many years of past practice and the language of the collective bargaining agreements, is sufficient to support a finding of such a waiver.

OPINION

The evidence is clear that the city has for many years, without objection by the Complainant, adopted health benefit plans for its employees including the employees represented by the complainant. The content of the health plans has not normally been the subject of negotiation but rather only the portion of the cost to be borne by the city.

The Fire and Police Arbitration Act provides in 11 O.S. Supp. 1989, § 51-111 in part as follows:

All rules, regulations, fiscal procedures, working conditions, departmental practices and manner of conducting the operation and administration of fire departments and police departments currently in effect on the effective date of any negotiated agreement shall be deemed a part of said agreement unless and except as modified or changed by the specific terms of the agreement.

In each collective bargaining agreement entered into, year after year, no provision of note limited the traditional role of the city in selecting the contents of the health plans offered to city employees. Although unilateral changes in benefits are often found to constitute unfair labor practices, (See e.g., Vernon Fire Fighters v. Vernon, 107 Cal.App.3d 802, 165 Cal. Rptr. 908 (1980

2nd District) and Mt. Clemens Fire Fighters Union v. Mt. Clemens, 228 N.W.2d 500 (Mich. 1975)) however, unilateral changes of benefits may not, depending on individual circumstances, necessarily constitute an unfair labor practice. American Federation of State, County and Municipal Employees v. State Board of Higher Education, 570 P.2d 388 (Or. 1977); See, e.g., Maxwell v. School Board of Broward County, 330 So.2d 177 (Fla. 1976).

In determining an exception to the general rule that insurance is a mandatory topic of bargaining the Board must look to the evidence to determine if, for example, the union has waived its right to bargain changes within the parameters of the collective bargaining agreement.

The Board first turns to Article 4 of the 1988 - 1989 CBA and current agreement which provides as follows: (for the purposes of clarity, the Board repeats Articles 4, 5, and 13, see Findings of Fact 34, 35 and 36.)

ARTICLE 4 - PREVAILING RIGHTS

All rules, regulations, fiscal procedures, working conditions, departmental practices, and manner of conducting the operation and administration of the Tulsa Fire Department currently in effect on the effective date of any negotiated agreement shall be deemed a part of this Agreement, unless and except as modified or changed by the specific terms of this Agreement.

Secondly, Article 5 provides in pertinent part:

ARTICLE 5 - MANAGEMENT RIGHTS AND RESPONSIBILITIES

Union recognizes the prerogative of Employer to operate and manage its affairs in all respects and in accordance with its

responsibilities; and the powers or authority which Employer has not officially abridged, delegated, granted or modified by this Agreement are retained by Employer; and all rights, powers, and authority Employer had prior to the signing of this Agreement are retained by Employer and remain exclusively without limitation within the rights of Employer.

Finally, Article 13 provides, in its entirety as follows:

ARTICLE 13 - DEPENDENT HEALTH COVERAGE

Section 1. Employer agrees to continue to pay 100% of the cost for the Employees' medical and dental insurance.

Section 2. Employer agrees to pay 64.3% of the cost for dependent medical insurance. Employees shall pay 35.7% of the cost for dependent medical insurance and 100% of the cost for dependent dental insurance.

Section 3. Employer to pay 100% of the cost for alternate medical Plan "B" - Low Option for both employee and dependent coverage. Employees shall continue paying 100% of the cost for dependent dental insurance.

Section 4. Employees may only change medical/dental plans one (1) time per year during the designated enrollment period which will normally be between May 15 and June 1. If dependent coverage is elected, the entire family must enroll in the plan option selected by the Employee.

Section 5. Retired employees who have continued their membership in the City's group medical or HMO's program shall be allowed to continue to participate by payment of the total cost at the rate(s) designated for regular employees and their dependents.

Section 6. During the term of this Agreement, sessions will be held with representatives from the Union and Employer to review the current group medical insurance programs with the goal to identify various cost factors

involved and to recommend future cost effective and/or cost containment measures.

The current CBA adjusts the percentages of section 2 and adds the following section to Article 13:

Section 7. Parties agree to form a joint task force for the purpose of reviewing data regarding the health and welfare plan of the City of Tulsa and for the purpose of determining whether or not the members of the Bargaining Unit will remain as part of the City's group health and welfare program or withdraw and provide their members with a separate plan under the jurisdiction of the Bargaining Agent. For this limited purpose, effective July 1, 1990, Article 13 will be open to meet and confer on the various options available to the parties.

When viewing the evidence presented to the Board in conjunction with the three cited provisions of the CBA, the Board is compelled by clear and unmistakable evidence to conclude that the union has waived its rights to bargain changes to insurance under the 1988-1989 CBA and the current CBA.

Although courts have held that past practices are not always incorporated into a CBA unless nearly automatic in execution, City Cab Co. of Orlando, Inc. v. NLRB, 787 F.2d 1475 (11th Cir. 1986), engaging in past practices which merely continue former policies, although resulting in varying benefit and detriment to the union does not offend the obligation to bargain under the FPAA. See Luther Manor Nursing Home v. United Food and Commercial Workers Union, Local No. 304A, 270 NLRB 949 (1984). This is particularly true where the union, as here, has acquiesced in changes over a period of many years.

But the Board need not rely solely on past practices of the parties to find a waiver in this case. The CBA itself clearly provides for retention by management of all rights enjoyed by the city prior to the agreement. For seventeen years the city has made changes in health plans and it retained that right under Article 5 and under 11 O.S. § 51-111.

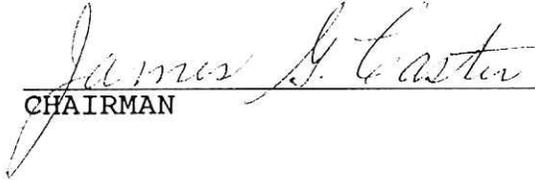
Article 13 of the 1988-1989 CBA and current CBA also offers compelling evidence of waiver. At no point in this rather detailed Article, is any plan mentioned (other than Option B, which still exists) or any particular benefits required. It certainly seems reasonable to conclude that the parties agreed that the union would remain in the city's health insurance program during the term of the agreement or at least until July 1, 1990. To hold that the union has not waived its rights would require overlooking seventeen years of practice by the parties and to ignore the language of the 1988-1989 CBA and current CBA.

The Board is persuaded that the best rule is that a union, through clear and unmistakable evidence may waive rights which may otherwise be present, including the right to bargain benefit changes in health insurance EPI Corporation v. General Drivers, Warehousemen and Helpers Local No. 89, 279 NLRB 1170 (1986).

The Board finds the evidence herein sufficient to meet this standard. The Board finds that for the purposes of the 1988-1989 CBA and the current CBA, the union has waived its right to

negotiate changes in health care coverage while the current CBA remains in effect and this action is therefore dismissed.

Dated this 6th day of September, 1990.



CHAIRMAN

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Fire.ff