

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FILED

JUN 26 2009

Public Employees Relations
Board

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES UNION, LOCAL 3894)
Complainant,)
vs.)
THE CITY OF LAWTON, OKLAHOMA)
Respondent.)

Case No. M010-PPC

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

This matter came on for hearing before the Public Employees Relations Board (the "Board" or "PERB") on the 11th day of June, 2009 on the Motion for Summary Judgment filed by Complainant American Federation of State, County and Municipal Employees Union, Local 3894 (the "Union"), and on the Motion for Summary Judgment filed by Respondent City of Lawton (the "City"). The Union appeared by and through its attorney, Douglas D. Vernier. The City appeared by and through its attorney, Timothy E. Wilson.

The primary issue is whether the City's retirement system is a mandatory subject of bargaining under the Oklahoma Municipal Employee Collective Bargaining Act ("OMECBA"). This issue is a matter of first impression for PERB. The Union's Prohibited Practice Charge alleges that the City failed and refused to bargain the existing retirement system when the City unilaterally changed the contribution rates. The City contends that the retirement system is not a mandatory subject of bargaining under the statutory language of OMECBA. Alternatively, the City argues that the

retirement system is not the subject of bargaining under the labor law doctrines of management rights, waiver and past practice.

The Board, having read the parties' briefs and exhibits, having heard the arguments of counsel and being fully advised in the premises, issues its final order in accordance with OAC 585:2-7-15.

Findings of Fact

Based upon the statements filed in support of the Union's motion and the statements filed by the City in support of its motion,¹ the Board finds that there is no substantial controversy as to the following facts:

1. The City is a municipal corporation organized under the laws of the State of Oklahoma as a city with its own charter. Respondent's Fact No. 1.

2. The Union is the duly elected and certified bargaining agent for the City's non-police and non-fire employees, *i.e.*, those general employees working in positions that are authorized by OMECBA to belong to a bargaining unit. Complainant's Fact No. 1; Respondent's Fact No. 2.

3. Since November 1, 1970, the City has had its own retirement system created by ordinance for its non-police and non-fire employees, *i.e.*, its general employees. Respondent's Fact No. 3.

4. The Union was certified as the bargaining agent effective October 12, 2006. Complainant's Fact No. 2.

¹ All the "Undisputed Material Facts" submitted by both parties are substantially adopted by the Board, except the City's Proposed Finding of Fact No. 13 which was disputed by the Union.

5. Since the Union's October 12, 2006 certification by PERB as the bargaining agent for the City's union-eligible general employees, the City's retirement system has been the retirement system for both the City's union-eligible and non-union-eligible general employees. Respondent's Fact No. 4.

6. The Union and the City entered and executed their first Collective Bargaining Agreement (the "CBA") on March 25, 2008 with an effective date of April 7, 2008 through June 30, 2008 and automatically renewed for Fiscal Year July 1, 2008 through June 30, 2009. Complainant's Fact No. 3.

7. In an actuarial valuation report on the retirement system issued March 3, 2008, it was noted that from July 1, 2003 to July 1, 2007, the system went from 78.3% funded to 69.2% funded. Respondent's Fact No. 5.

8. On May 12, 2008, the City provided the Union written notice that the City Council would be considering proposed employee/employer contribution changes to the retirement system at its May 27, 2008 meeting. Despite notification, no one from the Union appeared at the May 27th meeting to express either opposition or support for the proposed changes. Respondent's Fact No. 6.

9. To help preserve the solvency of the retirement system, on May 27, 2008, the Lawton City Council passed an ordinance increasing the monthly employee contributions to the pension plan from 4.8% to 5.3% of employee salary, beginning July 14, 2008. In the same ordinance, the City Council also increased the City's contributions from 7.5% to 8.0% retroactive to July 2, 2007. Respondent's Fact No. 7; Complaint's Fact No. 4.

10. The City did not bargain those changes with the Union. Complainant's Fact No. 5.

11. The at-issue retirement plan is not established pursuant to 74 O.S. § 903. Complainant's Fact No. 6.

12. The City did not obtain and does not have payroll deduction forms or agreements from the employees represented by the Union authorizing the increased withholding for retirement contributions. Complainant's Fact No. 7.

13. As of the end of September 2008, there were 186 retirees receiving a monthly pension from the City's retirement system. At the same time, the gross amount paid out of the system in benefits was approximately \$219,000 per month. Respondent's Fact No. 8.

14. On October 6, 2008, the Union filed a prohibited practice charge against the City with PERB alleging the City's unilateral modification of employee pension contributions to the City's retirement plan constituted a prohibited practice under sections 51-208(B)(1) and (5) of OMECBA. The City subsequently filed an answer denying the Union's allegations of prohibited practice. Respondent's Fact No. 9.

15. The management rights section of the parties' contract, specifically Article XV, Section 2, states in part that "[t]he City retains the rights in accordance with the Constitution and laws of the State of Oklahoma and the responsibilities and duties contained in the Charter of the City of Lawton and the ordinances and regulations promulgated there under. ..." Respondent's Fact No. 10.

16. In addition to the above-referenced language in Article XV, Section 2, the language in Section 3 of Article XV of the CBA also states:

Except as specifically abridged, delegated, granted or modified by this Agreement, or any other supplementary Agreement that may be made hereafter, all the rights, powers, and authority the City had prior to the signing of this Agreement are retained by the City and remain exclusively, and without limitation, within the rights of the City.

Respondent's Fact No. 11.

17. Section 17-3-4-355 of the Lawton City Code titled "Future Changes in the Operation of the Retirement System," which predates the ratification of the parties' contract, states in part that:

The city shall have the right to amend at any time and from time to time the terms and provisions of the retirement system and to terminate the retirement system, and any of which actions shall be accomplished by ordinance of the city.

Respondent's Fact No. 12.

Conclusions of Law

The Board concludes as a matter of law as follows:

1. This matter is governed by the provisions of OMECBA, 11 O.S. §§ 51-200, *et seq.*, and the Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S. § 51-204.

2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. §§ 308a, *et seq.*

3. The Board is empowered to prevent any person, including corporate authorities, from engaging in any prohibited practice. 11 O.S. § 209(D).

4. The Board may properly consider federal labor decisions involving parallel federal legislation in reaching decisions under OMECBA. *Cf., Stone v. Johnson*, 1984 OK 76, ¶ 14, 690 P.2d 459, 462; *FOP Lodge 193 v. City of Nichols Hills*, PERB Case No. 160 (1988).

5. In an administrative proceeding before PERB, the charging party has the burden of proof by a preponderance of the evidence as to the factual issues raised in its prohibited practice charge. OAC 585:2-7-12

6. Summary judgment is appropriate where there is no substantial controversy as to any material fact and one party is entitled to judgment as a matter of law. *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 23, ¶ 15, 913 P.2d 1311, 1313.

7. A retirement system is a term and condition of employment under OMECBA.

8. A retirement system/pension plan is a mandatory subject of bargaining under OMECBA.

9. Basic wages, seniority, medical/health coverage and pensions are major conditions of employment.

10. For a past practice to be binding upon the parties, it must be (a) unequivocal, (b) clearly enunciated and acted upon, and (c) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. *Lodge 127, FOP v. City of Midwest City*, PERB Case No. 375 (2001).

11. The City's 35-year unilateral administration, management and control of the retirement system constitutes a past practice binding upon the parties.

12. A waiver of a statutory right must be clear and unmistakable. *FOP, Lodge 93 v. City of Tulsa*, PERB Case No. 473 (2009); *FOP, Lodge 125 v. City of Guymon*, PERB Case No. 329 (1996).

13. The Union's inaction regarding the City's notice that adjustments to the contribution rates to the pension plan would be considered at the May 27, 2008 City Council meeting does not constitute a waiver of statutory rights.

14. The provisions of the CBA executed by the parties on March 25, 2008, do not grant or allow the City, as a reserved management right, to unilaterally modify the retirement system and do not constitute a waiver of the Union's statutory right to bargain with respect to the retirement system.

15. No substantial controversy exists as to a material fact. The Union's Motion for Summary Judgment and the City's Motion for Summary Judgment are granted in part and denied in part consonant with the Findings of Fact and Conclusions of Law entered herein.

16. The City has not engaged in a prohibited practice and a cease and desist order is, therefore, not warranted.

Opinion

The threshold question is whether the City has a duty to bargain with respect to its existing retirement system. The retirement system was created in November, 1970 by Lawton City ordinance for the City's non-police and non-fire employees.² The City's retirement system was created pursuant to 11 O.S. §§ 48-101 to 48-106, which grant municipalities the authority to create, control and manage their own retirement systems.

PERB certified the Union as the bargaining agent for the City's union-eligible employees under the provisions of OMECBA on October 12, 2006. At that time, the

² Firefighters and police officers are covered by state-wide retirement systems pursuant to 11 O.S. §§ 49-100.1, *et seq.*, covering firefighters, and 11 O.S. §§ 50-101, *et seq.*, covering police officers.

City's retirement system served as the retirement system for all employees, except fire and police.

The Union and the City bargained, resulting in the execution of their first CBA on March 25, 2008. The effective date of the CBA was April 7, 2008 through June 30, 2008 and automatically renewed for the fiscal year July 1, 2008 through June 30, 2009.

The City learned from a March 2008 actuarial valuation report that the retirement system went from 78.3% funded on July 1, 2003 to 69.2% funded on July 1, 2007. The City notified the Union on May 12, 2008 that the City Council would be considering proposed employee/employer contribution changes to the retirement system at the Council's May 27, 2008 meeting.

Without any input from the Union, the Lawton City Council passed an ordinance on May 27, 2008 increasing the monthly employee contributions to the pension plan from 4.8% to 5.3% of the employee's salary effective July 14, 2008 and increasing the City's contribution from 7.5% to 8.0% retroactive to July 2, 2007.

On October 6, 2008, the Union filed the subject Prohibited Practice Charge alleging that the City's unilateral modification of the employee pension contributions constitutes a prohibited practice under sections 51-208(B)(1) and (5) of OMECBA.

Under OMECBA, the parties are obligated to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment. 11 O.S. § 51-207(A). Retirement/pension plans for covered employees have historically been considered a major mandatory subject of collective bargaining.³ The Board considers the substance

³ In Oklahoma, firefighters and police officers are covered by state-wide retirement systems and consequently, agreements between unions, *e.g.*, the FOP and the IAFF, and Oklahoma municipalities do not address retirement/pension plans.

of a retirement system, including employee contributions thereto, to be a major item subject to bargaining and thus, a mandatory subject for bargaining under OMECBA. It is significant that the CBA in this case does not specifically address and identify the City's then-existing retirement system.

The City argues, nonetheless, that the existing retirement system is not a mandatory subject of bargaining. In support of its position, the City relies upon the statutory language of OMECBA as well as the labor law concepts of past practice, management rights and waiver. Each of the City's arguments is addressed below.

Statutory Language of OMECBA

The City points out that OMECBA requires good faith negotiation "with respect to wages, hours, and other terms and conditions of employment exclusive of retirement programs established pursuant to Section 903 of Title 74 of the Oklahoma Statutes." 11 O.S. § 51-207(A). The City contends the Oklahoma legislature intended also to exclude the instant retirement system from bargaining. The fallacy with this argument is that the City's retirement system was not established pursuant to Title 74 but instead was established under Title 11. This Board cannot re-write the statutory provisions of OMECBA as this is an act more appropriately performed by the legislature. See, *FOP, Local 108 v. City of Ardmore*, PERB Case No. 364 (2000) (dissent).

The City next focuses on language in 11 O.S. § 51-207 which states that "neither the municipal employer nor the exclusive bargaining representative shall be required to negotiate over any matter that is inconsistent with state law. ..." The City thus argues that because 11 O.S. §§ 48-101 to 48-106 grants municipalities the authority to create, control and manage their retirement systems by ordinance, the City may take privileged

unilateral action with respect to its Title 11 retirement system. The City points out that section 48-102 specifically states that municipal ordinance shall provide the amount of contributions to be made by the municipality and the employee.

The Board believes, however, that the provisions of OMECBA, including 11 O.S. § 51-207, are not inconsistent with 11 O.S. §§ 48-101 to 48-106. The Board believes that the duty to bargain in good faith⁴ with respect to a retirement system, and the interest arbitration provisions and impasse procedures set forth at sections 51-214 and 51-215 of OMECBA, are not inconsistent with 11 O.S. §§ 48-101 to 48-106.⁵

Past Practice

The City established its retirement system in 1970. A retirement system normally constitutes a significant cost for an employer and is normally significant to any long-term employee. It is difficult to imagine that parties negotiating a bargaining agreement would overlook or not consider major benefits/conditions of employment such as basic wages, seniority, medical/health coverage and pensions.

The Board has previously stated that a "past practice," to be binding upon the parties, must be "unequivocal," "clearly enunciated and acted upon," and "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties." *Lodge 127, FOP v. City of Midwest City*, PERB Case No. 375 (2001). In *Midwest City*, the Board considered physical fitness standards and determined that under the specific facts in that case, the physical fitness requirements did not constitute a past practice binding upon the parties.

⁴ "Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession." 11 O.S. § 51-207(A).

⁵ This conclusion renders unnecessary any discussion concerning the Union's alternative statutory construction arguments.

Here, the retirement system is unequivocal.⁶ It was established by City ordinance in 1970. It was also clearly enunciated and acted upon by the City and the employers for over 35 years. And it was readily ascertainable by way of the published City ordinance as well as regular payroll deductions, over a reasonable period of time as a fixed and established practice accepted by the employees and the City. The retirement system has the requisite clarity, acceptability and consistency to constitute a past practice binding on the parties, unless modified by the CBA.

An important factor in the Board's analysis of the requirements to make a past practice binding on the parties here is the major significance of a retirement/pension plan in bargaining. In *Midwest City*, the Board found no past practice relating to Midwest City's short-term physical fitness standards. Here, we are faced with a long-term retirement system rigidly set out by city ordinance that is surely a major employee benefit for a substantial number of the municipal employees.

"A collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the collective bargaining agreement, which prevailed when the collective bargaining agreement was executed." Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1116-17

⁶ The Union contends that the employee contribution rate to the plan is the established "past practice." Instead, the Board considers the entire retirement system the relevant inquiry for "past practice" status. Indeed, the City ordinance clearly provides that under the retirement system, the City "shall have the right to amend at any time and from time to time the terms and provisions of the retirement system." See, Lawton City Code § 17-3-4-355 titled "Future Changes in the Operation of the Retirement System." Thus, it is the retirement system *in toto* that the Board is considering as opposed to the pre-2008 employee contribution rate. Indeed, the established retirement system, which includes the City's right per City ordinance to change the contribution rates, is the relevant consideration in the Board's "past practice" analysis.

(1950). In the instant case, we have a major condition of employment – the retirement system – which is not specifically addressed in the CBA but which was well established at the time the CBA was negotiated and executed. Moreover, there is no reference to any aspect of the retirement system within the four corners of the CBA. Indeed, as further demonstrated by the following discussion of "waiver" and "management rights," all indications are that the parties expected and intended the retirement system to continue as established by City ordinance.

Waiver

The City gave the Union 15 days written notice that the City Council would be considering at the Council's May 27, 2008 meeting proposed employer/employee contribution changes to the retirement system.⁷ The Union took no action prior to the City ordinance of May 27, 2008, increasing employee and City contributions to the pension plan. The issue is whether the Union's failure to act constitutes a waiver under PERB precedent.

The Board has previously held that a waiver of the duty to bargain mandatory subjects of bargaining must be "clear and unmistakable." *FOP, Lodge 93 v. City of Tulsa*, PERB Case No. 473 (2009); *FOP, Lodge 125 v. City of Guymon*, PERB Case No. 329 (1996); *IAFF Local 2567 v. City of Jenks*, PERB Case No. 211 (1990).⁸

⁷ Article XV, Section 2(1)(o) of the CBA states that the City has the right "to establish, modify and enforce reasonable policies, procedure rules and regulations following ten (10) day notice to the Union."

⁸ The City suggests that the Board should apply a "contract coverage standard" as opposed to a "clear and unmistakable waiver standard" citing *Johnson v. Lodge #93 of the Fraternal Order of Police*, 393 F.3d 1096 (10th Cir. 2004). The current Board, however, applies a "clear and unmistakable waiver" standard.

Waiver by inaction is possible. In *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996), the Tenth Circuit denied enforcement of a NLRB order and found a 4-day notice adequate for the union to request "effects bargaining" and determined that the union waived its right to bargain. *But, see, King Soopers v. NLRB*, 254 F.3d 738 (8th Cir. 2001) (a waiver will be found only where the union has "consciously yielded" its position). Here, it is apparent from the City's position that it believed it could take unilateral action and any attempt by the Union to bargain would arguably be a nullity.⁹

The Board believes that under the facts in this case, the "clear and unmistakable" waiver standard has not been met; however, the Board considers the Union's failure to respond in some manner to the City's 15-day written notice a factor that supports a finding that the City did not commit a prohibited practice. Nevertheless, the Board rejects the City's argument of waiver as the facts before the Board on the parties' respective summary judgment motions do not satisfy the clear and unmistakable standard necessary to constitute waiver.

Management Rights

The City robustly argues that there is no language in the CBA taking away the City's pre-contract right to adjust contributions under the retirement system and therefore, the right to manage and control the pension plan is a right reserved to the City pursuant to Section 3, Article XV of the CBA, which states in pertinent part "... all the rights, powers, and authority the City had prior to the signing of this Agreement are

⁹ As stated *supra*, the Board believes that the retirement system is a mandatory subject of bargaining under OMECBA. And a union's acquiescence in an employer's unilateral conduct does not necessarily constitute a waiver of the right to bargain in the future over the same or similar employer conduct. *E.R. Stembner, Inc.*, 313 NLRB 459 (1993).

retained by the City and remain exclusively and without limitation, within the rights of the City."

To be sure, the language of the CBA provides an opening for the City's argument. The CBA does indeed state that all the City's pre-contract rights, powers and authority not modified by the CBA remain with and are retained by the City. This point, at first blush, suggests that the City could take privileged unilateral action regarding the retirement system contributions. The point is worth making, for it actually cuts the other way, by emphasizing how broad and lacking in specificity the CBA provisions really are.

Labor law recognizes that "a mere catchall phrase in a management-rights clause to the effect that ... 'all management rights not given up in the contract are expressly reserved to it,' or reciting that the exclusive functions and rights of management include the right to establish, continue, or modify policies, practices, or procedures will fall short of being a 'clear and unmistakable' relinquishment." *The Developing Labor Law*, Vol. I, Ch. 13. VII.A.1.b., at 1014-15 (5th ed. 2006).¹⁰

Here, an examination of the CBA shows that Article XV ("Management Rights"), in addition to the catchall provision cited above, specifically identifies 16 areas over which the City retains rights (e.g., the right to reorganize all City departments, the right to assign and schedule employees, the right to determine safety, health and property

¹⁰ This Board's tendency is to construe waiver clauses narrowly, giving them limited effect. PERB's evaluation of the circumstances under which a claim of privileged unilateral action is made usually involves considerations other than the interpretation of a single specific contract provision. Consequently, the Board has adopted principles for evaluating claims of waiver and has determined that a waiver of statutory rights must be clear and unmistakable. Waiver will not normally be found merely because the bargaining agreement contains a general management prerogative clause or merely because the union in contract negotiations failed to obtain contractual protection for its statutory rights. See generally, Elkouri & Elkouri, *How Arbitration Works*, Ch. 13.2.A.i.g., at 654 (6th ed. 2003).

protection measures). Conspicuously absent from the CBA is any direct mention of the retirement system. As stated above, the retirement system is a major benefit and clearly a mandatory subject of bargaining under OMECBA. While the CBA specifically addressed such subjects as holidays (Art. X), sick leave (Art. XI), and wages and benefits (Art. XVIII),¹¹ there is no direct reference to the retirement system. Significantly, the CBA devotes an entire Article (Art. XIX) to employee health benefits, stating: "The City agrees to provide employees, and the employees' dependents, with a group health insurance plan that has the benefit coverage in effect as of July 1, 2007. ..." There is no similar provision in the CBA addressing the existing retirement system, however.

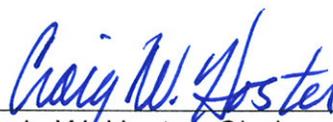
Thus, the Board rejects the City's position that the management rights clause is a basis, under established labor law precedent, for holding that the City reserved its rights regarding the retirement system by a mere catchall provision in the CBA. Instead, the Board believes the language of the CBA, as well as the 35-year existence of the City's retirement system, lend weight to the Board's reasoning that the retirement system is properly categorized as a "past practice" as discussed above.

In summary, the Board holds that the retirement system is a mandatory subject for bargaining under OMECBA. The Board concludes, nevertheless, that the City had the unilateral right to adjust the pension plan contributions because the existing retirement system constitutes a past practice unaffected by the language of the current CBA. While the Board does not believe that the City has met its burden of establishing

¹¹ For example, the CBA provides that "Family Medical Leave shall be allowed in accordance with the provisions ... of the Lawton City Code as it may be amended from time to time. ..." Article XVIII, Section 6. There is no similar mention of the retirement system in the CBA.

that the Union waived its right to bargain the adjustments to the contribution rates or that the City has the unilateral right to modify the retirement system under the management rights clause in the CBA, the Board, nonetheless, believes that the waiver and management rights analysis adds weight to its conclusion that the City's unilateral administration of the 35 year old retirement system is a past practice under established labor law precedent. Thus, the City had, and has, a duty to bargain with respect to the retirement system but the City has not committed an OMECBA prohibited practice under the totality of the circumstances in this case.

Dated: June 26, 2009



Craig W. Hoster, Chair
Public Employees Relations Board

By unanimous vote. Chair Craig W. Hoster presiding. Members Larry W. Gooch and Linda Samuel-Jaha present and voting.

Concurring Opinion by Member Larry W. Gooch

The duty to bargain is a mutual responsibility. As the sole and exclusive bargaining representative for all members of the unit, the Union has the responsibility to fairly represent its members at the bargaining table. In this case, the City provided and managed a retirement plan unfettered by an obligation to bargain the details for approximately 38 years. Both parties agree that absent a statutory or contractual waiver, a retirement system is a major condition of employment and there is a mandatory duty to bargain. The City argues that a statutory and contractual waiver exists. We disagree. A waiver was created however, when the Union received

notice two weeks in advance of the City's intent to review the plan and failed to put the City on notice that it believed this issue must be negotiated.

It appears both sides are attempting to achieve their positions without bargaining. The Union wishes for status quo, but instead of achieving this through bargaining, it allowed the City to act and then five months later attempts to reverse this action through the PERB. There is an axiom in arbitration that a party cannot gain in arbitration what it cannot achieve at the table. In other words, one cannot hide behind the log and place a proposal before an arbitrator that had not been brought up during bargaining. It appears the Union is hoping to gain its position through the PERB without the risk of bargaining. The Union could achieve its position by willfully waiting for the City to wrongfully act and then bringing the issue before us for a hopeful reversal.

The City did commit a prohibited practice with its unilateral change in employees' retirement contributions and ordinarily a cease and desist order should be issued. The Union, however, had the obligation to demand negotiations on the matter, once it had knowledge of the City's intent, but failed to do so. A waiver was created by the Union's silence.



Larry W. Gooch, Member
Public Employees Relations Board