

**BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA**

FILED

INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS, LOCAL 157,)
)
Complainant,)
)
v.)
)
CITY OF OKLAHOMA CITY,)
)
Respondent.)

PERB No. 2010-ULPC-493

MAR 10 2011
Public Employees Relations
Board

ORDER GRANTING CITY'S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the Public Employees Relations Board (the "Board") meeting in a Regular Meeting on the 13th day of January, 2011, at 9:00 a.m., in the Oklahoma Department of Agriculture, Agriculture Building, First Floor Board Room, 2800 N. Lincoln Boulevard, Oklahoma City, Oklahoma, on the following motions: (1) Charging Party's Motion for Summary Judgment and Brief in Support filed by the International Association of Firefighters, Local 157 (the "Complainant") on October 14, 2010; and, (2) a Motion to Dismiss and for Partial Summary Judgment and Brief in Support filed by the City of Oklahoma City (the "Respondent") on October 14, 2010. The Complainant appeared by and through its attorney Kevin E. Hill. The Respondent appeared by and through its attorney Richard E. Mahoney. No proposed findings of fact were submitted to the Board by either party to these proceedings.

The alleged violation in this matter was filed by the Complainant on March 4, 2010, and alleged that the Respondent failed to bargain in good faith in accordance with the provisions of the Fire and Police Arbitration Act ("FPAA"), 11 O.S. 51-101 through 11 O.S. 51-113 et seq.

The Board, having reviewed the written motions filed herein and having heard the arguments of counsel and otherwise being fully apprised of this matter, makes the following

findings of fact:

FINDINGS OF FACT

It is the finding of the Board by a preponderance of the testimony taken and evidence that there is no substantial controversy as to the following facts or issues:

1. This case arises out of collective bargaining that occurred on the 2009-2010 contract between the Respondent City of Oklahoma City and the Complainant International Association of Firefighters ("IAFF") Local 157. Pursuant to the terms of FPAA 11 O.S. §51-101 et seq., the parties began engaging in collective bargaining negotiations for the fiscal year 2010 Collective Bargaining Agreement ("CBA") during the Spring of 2009. The parties failed to reach an agreement on the unresolved contract issues and the parties entered into interest arbitration pursuant to FPAA 11 O.S. §51-106 through §51-110. Complainant's Undisputed Fact No. 1.

2. In this case, the three Interest Arbitrators selected for FMCS 090414-55718-8 were Pedro G. Molina, Jr. (the Neutral Arbitrator), Tony G. Puckett (Arbitrator for the City), and Roy L. "Sandy" McGhee (IAFF Arbitrator). The Neutral Arbitrator set the first hearing date as August 19, 2009 and set the date for the close of the hearing and close of the record as September 8, 2009. Complainant's Undisputed Fact No. 2.

3. On August 12, 2009, pursuant to 11 O.S. §51-108(A)(2), the Respondent City and the Complainant IAFF Local 157 submitted to each other and the Interest Arbitration Board their last best offers ("LBO"). Complainant's Undisputed Fact No. 3.

4. On August 19, 2009, at the Interest Arbitration Hearing the Complainant IAFF Local 157 filed a "Motion to Strike" the Respondent City's LBO and to select the Complainant IAFF Local 157 LBO. Complainant IAFF Local 157 argued that the city changed language in Article 21 dealing with wages in their LBO. The Complainant IAFF Local 157 asserted that the Respondent

City never presented the language change to the Complainant IAFF Local 157 during contract negotiations. The Complainant IAFF Local 157 asserted that the Respondent City failed to collectively bargain in good faith and was attempting to obtain through arbitration what it could not obtain through negotiation. Complainant's Undisputed Fact No. 4.

5. The Interest Arbitration Board took the Complainant IAFF Local 157's Motion to Strike under advisement and allowed the Respondent City time to respond to the Motion to Strike. Complainant's Undisputed Fact No. 5.

6. Both parties then presented evidence regarding the contract negotiation and their evidence under the five factors set forth in the FPAA. Complainant's Undisputed Fact No. 6.

7. At that time, Phil Sipe was on the negotiating team for the Complainant IAFF Local 157. Mr. Sipe is currently the President of the Complainant Local 157. In an Affidavit attached to the Charging Party's Motion for Summary Judgment, Mr. Sipe's sworn testimony is that the Respondent City never presented the language change to the Complainant IAFF Local 157 prior to exchanging LBO's. Complainant's Undisputed Fact No. 7.

8. In the Respondent City's LBO, the Respondent City attempted to change language dealing with wages. Prior to the 2009-2010 LBO, Article 21.1 read:

The parties hereto agree that a '*market approach*' shall be used to determine appropriate wage levels for members.

In the Respondent City's 2009-2010 LBO the Respondent City changed this section to read:

It is the intent of the parties that in fiscal year 2010, ~~The parties hereto agree that a~~ "market approach" shall be used to determine appropriate wage levels for members.

Complainant's Undisputed Fact No. 8.

9. Monica Coleman was the chief negotiator for the Respondent City during the 2009-2010 contract negotiations. At the Arbitration hearing she testified the Complainant Union never saw the

Respondent City's language change prior to the Respondent City submitting its LBO. Ms. Coleman further testified the language in Article 21.1 that the Respondent City submitted in its LBO was different from past years when the parties rolled the contract. Complainant's Undisputed Fact No. 9.

10. On September 3, 2009, the Arbitration Board held a telephone conference between the Arbitration Board, Richard E. Mahoney, the lead counsel in the Interest Arbitration for the Respondent City of Oklahoma City, and Kevin E. Hill, lead counsel for the Complainant IAFF Local 157. During the telephone conference, Mr. Mahoney testified "I don't think the language was presented to the union before the last best offer". Mr. Mahoney testified, "Well I'm saying that there wasn't a language proposal submitted to the union" and "But there was not a language proposal submitted to the union". Complainant's Undisputed Fact No. 10.

11. In the three-member Arbitration Board's undated Response to the Union's Motion to Strike the City's Last Best Offer, the Arbitration Board sustained the Union's Motion to Strike the City's Last Best Offer by a vote of two (2) in favor to one (1) against (as evidenced by the approving signatures of only two (2) of the three (3) Arbitration Board members). Respondent's Response of City to Motion for Summary Judgment Exhibit I-F.

12. On August 6, 2010, the District Court of Oklahoma County vacated the decision of the Arbitration Board to sustain the Union's Motion to Strike the City's Last Best Offer in its Case No. CJ-2009-11637. Respondent's Response of City to Motion for Summary Judgment Exhibit 2.

13. The Complainant IAFF Local 157 was aware the Respondent City proposal on wages for 2009-2010 had always been a rollover. Assistant Personnel Director Monica Coleman testified the intent of the Respondent City was to retain the market approach for 2010-11 exactly as it had existed prior to 2010. The change of language did not change the use of the market approach to

determine wages. Respondent's Supplemental Undisputed Fact Nos. 1 and 2.

14. The Respondent's City Manager filed a Request for Special Election on September 17, 2009 with the Respondent's City Clerk in order to request that Mayor and City Council convene to consider calling for a special election to submit to the City's registered voters the last best offers of the Respondent City and the Complainant IAFF Local 157 due to the receipt of a decision from the Arbitration Board that the Respondent's City Manager stated was not in the Respondent City's best interests. Respondent's Motion to Dismiss and for Partial Summary Judgment Exhibit C, Attachment 1.

15. The parties attempted to agree on a ballot but were unable to. The parties submitted their proposed ballots to the Arbitration Board and asked the Board to select the ballot to be used in the election. On November 29, 2009 a majority of the Arbitration Board selected the firefighters ballot. Complainant's Undisputed Fact No. 15.

16. On September 29, 2009 the City Council of Oklahoma City passed a resolution calling for a special election to place the two LBOs before a vote of the people. Complainant's Undisputed Fact No. 16.

17. On November 10, 2009 the City Council amended its September 29, 2009 Resolution to allow the Respondent City to commence a declaratory judgment action against Complainant IAFF Local 157 regarding the Arbitration Board's Decision and Award and selection of Complainant IAFF Local 157's ballot. This Resolution set the special election to be held on May 11, 2010. Complainant's Undisputed Fact No. 17.

18. On November 10, 2009 the Respondent City passed a Resolution authorizing City attorneys to pursue litigation to 1) vacate the Arbitration Board's ballot decision; and 2) seek substitution of the Respondent City's ballot (that contained the language change that was not

bargained for) for Complainant IAFF Local 157's ballot that was selected by the Arbitration Board.
Complainant's Undisputed Fact No. 18.

19. On November 25, 2009 the Respondent City filed a Declaratory Judgment action against Complainant IAFF Local 157 asking the Court to grant in essence:

- 1) Overturn the Arbitration Board's Decision and Award;
- 2) Declare the Respondent City's ballot as legally sufficient and that the Respondent City's ballot must be used as the ballot for the May 11, 2010 special election.

Complainant's Undisputed Fact No. 19.

20. On May 4, 2010, the Respondent City passed a Resolution cancelling the May 11, 2010 special election. Complainant's Undisputed Fact No. 20.

CONCLUSIONS OF LAW

The Board concludes as a matter of law as follows:

1. This matter is governed by the provisions of the Fire and Police Arbitration Law, 11 O.S. §§ 51-101 et seq. and the Board has jurisdiction over the parties and the subject matter of this complaint pursuant to 11 O.S. §51-104b.

2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S. §§ 308a et seq. and the meeting was convened and conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S. §§ 301 et seq.

3. The burden of proof in this matter is a preponderance of the testimony taken pursuant to 11 O.S. §51-104b (C) and a preponderance of the evidence pursuant to OAC 585: 2-7-12.

4. The Board is empowered to prevent any person, including bargaining agents and corporate authorities, from engaging in any unfair labor practice. 11 O.S. §51-104b (A).

5. The Complainant, in asserting a violation of 11 O.S. §§ 51-101 et seq., has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 11 O.S. §51-104b (C) and OAC 585: 2-7-12.

6. “Summary Judgment is appropriate only where it appears that there is no substantial controversy as to any material fact and that 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. In determining if a party has met its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603, 1984 WL 36775 (NLRB 1984), *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB Case No. 421, Conclusion of Law ¶ 10.

8. “It is necessary to scrutinize an employer’s overall conduct to determine whether it has bargained in good faith. ‘From the context of an employer’s total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.’ ” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603, 1984 WL 36775 (N.L.R.B. 1984), *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB Case No. 421, Conclusion of Law ¶ 10.

OPINION

It is the finding of the Board as follows:

Taking the totality of the situation, the language change presented by the Respondent in its last best offer pursuant to 11 O.S. §51-108(A)(2), to the Complainant and the Interest Arbitration Board, was not done in bad faith and was not meant to frustrate the bargaining process, rather the language change so presented by the Respondent was made to clarify the bargaining process. The

language change presented by the Respondent in its last best offer pursuant to 11 O.S. §51-108(A)(2), to the Complainant and the Interest Arbitration Board, did not constitute an actual change in the language that would have the effect of bad faith bargaining.

Pursuant to 11 O.S. 2001, § 51-104b and OAC 585: 2-7-12, the Board finds that upon a preponderance of the testimony taken and of the evidence, that the Complainant has failed to meet its burden of proof and the Respondent has not engaged in any unfair labor practice.

Because no substantial controversy exists as to a material fact and the Respondent is entitled to judgment as a matter of law, the Respondent's motion for summary judgment should be and is hereby GRANTED and the Complainant's motion for summary judgment should be and hereby is DENIED.

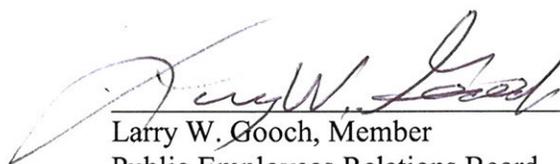
Dated this 10 day of March, 2011.



Michael Barlow, Chairman
Public Employees Relations Board



Max Speegle, Member
Public Employees Relations Board



Larry W. Gooch, Member
Public Employees Relations Board

(Dissent attached)

Larry W. Gooch Dissent

I respectfully dissent from the majority opinion in this case because the clear reading of the FPAA statute requires the parties to negotiate changes in their agreement before presenting them to an arbitration panel or on an election ballot. Subsection 51-108 (A)(2) of the FPAA provides in pertinent part:

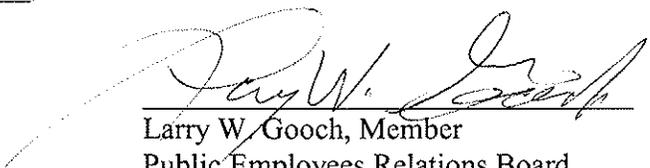
“2. At least seven (7) days before the date of the (*arbitration*) hearing the corporate authorities and the bargaining agent shall submit to each other and to the arbitration board members a written arbitration statement listing all contract terms which the parties have resolved and all contract terms which are unresolved. Each arbitration statement shall also include a final offer on each unresolved issue.”

The statute does not permit a new issue to be presented to an arbitration board or placed on a ballot because this does not allow the other party an opportunity to resolve the issue or “include a final offer on each unresolved issue.”

My colleagues opine that a ULP should not be sustained in this case because the change made by the city was minor and does not rise to the level of bad faith. I disagree that the change was minor as evidenced by the fact that different interpretations by the city and union proves that it is ambiguous on its face and furthermore the intent of bad faith is not required for an Unfair Labor Practice to exist.

I fear that a bad precedent is being established in this case by making such a determination.

Dated this 10 day of March, 2011.


Larry W. Gooch, Member
Public Employees Relations Board