

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FILED

SEP 17 2010

Public Employees Relations
Board

INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS,)
LOCAL 1002,)
)
Complainant,)
v.)
)
CITY OF STILLWATER,)
)
Respondent.)

Case No. 2009-PPC-016

**OPINION AND FINAL ORDER GRANTING THE CITY OF STILLWATER'S
MOTION FOR SUMMARY JUDGMENT AND DISMISSING PROHIBITED
PRACTICE CHARGE**

This matter was heard by the Public Employees Relations Board (the "Board" or "PERB") on the 10th of June, 2010 on City's Motion for Summary Judgment. Complainant, International Brotherhood of Electrical Workers, Local 1002 (the "Union" or "Local 1002"), appeared through its attorney, Jarrod A. Leaman. Respondent, City of Stillwater (the "City"), appeared through its attorney, Chanda R. Graham. After oral argument, the Board continued this matter to August 12, 2010 for further consideration and legal research.

The Union's initial complaint alleged that the City had engaged in several prohibited practices. However, in its response to City's motion for summary judgment, the Union abandoned all but one issue: whether the City committed a prohibited practice when it refused to arbitrate a grievance brought on behalf of a terminated bargaining unit member after the collective bargaining agreement ("CBA") had expired and before a subsequent agreement was executed. This issue is a matter of first impression for the Board. The City urged that its duty to arbitrate a grievance expired with the contract under the plain language of the Oklahoma Municipal Employee Collective Bargaining Act

("OMECBA"). In the alternative, the City contended that the plain language of the CBA prohibits the arbitration of grievances outside the term of the agreement. 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 submissions of the parties, the Board finds that there is no substantial controversy as to the following material facts or issues:

1. The City of Stillwater is a municipality governed by the laws of the State of Oklahoma and is a council-manager form of government. Union's Undisputed Fact 7.
2. This Board certified the International Brotherhood of Electrical Workers as the exclusive bargaining agent for the City's Electrical Utility Department on September 13, 2007. Union's Undisputed Fact 1.
3. Shortly after certification, the parties began negotiations for their first collective bargaining agreement. Union's Undisputed Fact 2.
4. In February, 2009, after negotiating for over a year, the parties submitted all open items to interest arbitration. Union's Undisputed Fact 3.
5. An arbitrator selected the Union's last best offer. However, City declined to implement the award. Union's Undisputed Fact 3.
6. The parties eventually reached agreement in June, 2009, entering a collective bargaining agreement for fiscal year 2009, effective June 29, 2009. The contract expired June 30, 2009. City's Undisputed Fact B(1).
7. A bargaining unit employee was allegedly terminated August 5, 2009. Union's

Undisputed Fact 5. At this time, the parties were two months away from their first negotiation session for a fiscal year 2010 contract. City's Undisputed Fact A(8). Thus, there was no CBA in effect. City's Undisputed Fact B(1); Union's Undisputed Fact 6.

8. The Union grieved the employee's termination and the grievance was denied at each step. Union's Undisputed Fact 5.

9. The Union requested arbitration and the City refused to arbitrate the grievance. Union's Undisputed Fact 5.

10. December 23, 2009, the Union filed a prohibited practice charge against the City with PERB alleging that City acted in bad faith for refusing/failing to set negotiation dates for fiscal year 2010. (Exhibit "8"; PERB Complaint, 2009-PPC-016 dated December 23, 2009). City's Undisputed Fact A(9).

Conclusions of Law

The Board concludes the following as a matter of law:

1. The Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S., Supp. 2009 § 51-204.
2. The hearing and procedures are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S., 2001 and Supp. 2009, §§ 308a, et seq.
3. The Board is empowered to prevent any person, including corporate authorities, from engaging in any prohibited practice. 11 O.S., Supp. 2009 § 51-209(D).
4. 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. Here, there is no substantial

controversy as to any material fact.

5. The OMECBA provides in relevant part:

B. The collective bargaining agreement negotiated between the employer and the exclusive bargaining representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of grievances pertaining to employment terms and conditions and related personnel matters including questions of arbitrability and appeal of disciplinary and other employment actions.

11 O.S., Supp. 2009 § 51-207(B).

A. After a negotiated agreement has been agreed to by both parties, or a final and binding arbitration decision has been rendered in accordance with §15 of this act, the municipal employer shall submit a request for funds necessary to implement the agreement and for approval of any other matter requiring the approval of the appropriate governing body within fourteen (14) days after the date on which the parties finalize the agreement, or the date on which the arbitration decision is issued, unless otherwise specified in this section. If the appropriate governing body is not in session at the time, then the submission shall be within fourteen (14) days after it next convenes.

B. If the governing body rejects the submission of the municipal employer, either party may reopen negotiations.

C. The parties shall specify that those provisions of the agreement not requiring action by a governing body shall be effective and operative in accordance with the terms of the agreement.

11 O.S. Supp. 2009 § 51-215.

6. The Fire and Police Arbitration Act (the "FPAA") states:

It shall be the obligation of the municipality, acting through its corporate authorities, to meet at reasonable times and confer in good faith with the representatives of the fire fighters or police

officers within ten (10) days after receipt of written notice from said bargaining agent requesting a meeting for collective bargaining purposes. The obligation shall include the duty to cause any collective bargaining agreement resulting from negotiations to be reduced to a written agreement, the term of which shall not exceed one (1) year; provided, any such agreement shall continue from year to year and be automatically extended for one-year terms unless written notice of request for bargaining is given by either the municipal authorities or the bargaining agent of the fire fighters or police officers at least thirty (30) days before the anniversary date of such negotiated agreement. Within ten (10) days of receipt of such notice by the other party, a conference shall be scheduled for the purposes of collective bargaining, **and until a new agreement is reached, the currently existing written agreement shall not expire and shall continue in full force and effect.**

11 O.S., 2001 § 51-105. This highlighted clause is known as an "evergreen clause." The OMECBA has no such clause.

7. Because the OMECBA does not contain an evergreen clause but, to the contrary, as is set forth in the Opinion below, the legislature struck an evergreen clause from the enactment of the OMECBA in 2004, no evergreen clause exists, explicitly or implicitly, in the OMECBA.

8. Because no evergreen clause exists in OMECBA there was no obligation on the part of the City to arbitrate the issue of the termination of an employee who was allegedly terminated during a period when no CBA existed between the City and the Union.

9. The City's Motion for Summary Judgment is granted consistent with the Findings of Fact, Conclusions of Law and Opinion below.

Opinion

The threshold question is whether the City committed a prohibited practice when

it refused to arbitrate a grievance that arose during a period of time there was no collective bargaining agreement in effect. The Board is empowered to prevent any person from engaging in any prohibited practice and may issue a cease and desist order. *See* 11 O.S. Supp. 2009 § 51-209(D).

The Union was certified as the bargaining agent for the City's electric department September 13, 2007. After negotiating more than a year for a fiscal year 2009 contract, the parties entered their first collective bargaining agreement June 29, 2009. The contract expired a day later, June 30, 2009. Fiscal year 2010 contract negotiations did not begin until October 12, 2009. Thus, there was a period of several months where there was no CBA in place.

During the period of time the fiscal year 2009 contract had lapsed, August 5, 2009, a bargaining unit employee was allegedly terminated. The Union filed a grievance of the termination, which the City denied at every step. When the Union sought to arbitrate the grievance, the City refused, asserting that the Union had no right to arbitrate a grievance that arose when there was no CBA in effect. On December 23, 2009, the Union filed the present Prohibited Practice Charge, alleging, in relevant part, that the City's refusal to arbitrate the Union's termination grievance constitutes a prohibited practice under section 51-208(B)(7) of OMECBA.

There is no dispute that the FY 2009 CBA did contain a grievance resolution procedure that provided "for final and binding arbitration of grievances." However, at the time of the alleged employee termination August 5, 2010, there was no CBA in effect. The FY 2009 CBA had expired June 30, 2010, the parties had yet to come to terms on an FY 2010 CBA, and there

is no evergreen clause in the OMECBA.

The Union argued that this Board must read into the OMECBA the clause contained in the FPAA providing for an "evergreen" clause. As quoted in Conclusion of Law # 6, the FPAA, 11 O.S. 2001 § 51-105, provides for continuation of an agreement after expiration date; however, as quoted in Conclusion of Law #5, such a clause is conspicuously absent from the OMECBA in both §§ 51-207(B) and 51-215(C). The question thus, is whether this Board can read such a clause into the OMECBA.

To determine the legislative intent of any law, the rule of construction of statutes requires that it "should ordinarily be done by consideration of the language of the statute, and the courts should not read into a statute exceptions not made therein." *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 422 P.2d 840. (Okla., 1966).

Moreover, the rule of construction should only be used to determine legislative intent where the language of the statute is ambiguous and thus requires interpretation. *Russett School Dist. No. C-8 v. Askew*, 141 P.2d 575 (Okla., 1943). In the instant matter, the OMECBA does not contain an "evergreen clause".

Local 1002 asserted that the purpose of the OMECBA was to extend collective bargaining to non-uniformed municipal personnel in much the same way that the FPAA does for public safety personnel.

Local 1002 asserted that if the OMECBA serves the same purpose as the FPAA, the PERB should rely on FPAA precedent in upholding an "evergreen clause" to preserve certain expired non-economic terms of a CBA. However, the legislative actions in 2004 undermine this argument.

In 2004, the 2nd Session of the 49th Legislature of the State of Oklahoma introduced Senate Bill 1529. Originally titled the "Oklahoma Public Employee Collective Bargaining Act", the bill was introduced by Senator Gumm as a measure to roughly parallel the provisions set out in the FPAA. However, upon a comparison of the initially introduced bill with the final legislation, it is clear that the initial authors' contemplated provisions for continuation of expired terms were rejected by the legislature prior to passage by both houses.

As initially introduced, Senate Bill 1529 states in relevant part, that it is "An Act relating to public employment; providing short title; the Oklahoma Public Employee Collective Bargaining Act...*providing for treatment of terms upon expiration of agreement.*" Moreover, § 16(D) of Senate Bill 1529, as initially introduced, expressly states "*Upon the expiration of an agreement, the terms of such agreement shall remain in effect until superseded by a new agreement*". In the final legislation, which became law on November 1, 2004, neither provision related to continuation of expired terms was included.

Section 16 of SB 1529 was later codified as 11 O.S., Supp. 2009 § 51-215 and is titled "Final Agreement or Arbitration Decision-Request for Funds to Governing Body." Sections A and B of § 51-215 primarily serve to answer the question of funding for terms that have been bargained for between the unions and cities. Section 215(C) states "The parties shall specify that those provisions of the agreement not requiring action by a governing body shall be effective and operative in accordance with the terms of the agreement". Section (D), which might be considered an evergreen clause, was entirely deleted.

Local 1002 also asserts that § 51-215(C) and certain parts of the expired CBA that do not require action by the governing body, the non economic matters, are to remain effective after the expiration of the contract. That section provides: " The parties shall specify that those provisions of the agreement not requiring action by a governing body shall be effective and operative in accordance with the terms of the agreement." 11 O.S., Supp. 2009 § 51-215(C). The Union seeks now, without supporting authority to use the phrase "after the agreement has expired."

In analyzing the provisions of the OMECBA, it cannot be questioned that the drafters considered expiration of terms in a CBA. It is also clear that the drafters struck "evergreen" provisions from the OMECBA. Where it is clear that those provisions were struck from the final bill, this Board cannot find that legislators intended § 215(C) to preserve any expired terms.¹ The discussion of the legislative action above clearly demonstrates, no part of this expired OMECBA CBA may continue after the expiration of the contract. Section 215(C) only addresses what matters are to operate "automatically" during the agreement, not after it has expired. The action of the legislature in 2004 deleting an evergreen clause renders the Union's argument wholly invalid.

Initially, the Union's claim that the Oklahoma Supreme Court in *City of Tulsa v. Public Employees Relations Board*, 845 P.2d 872 (Tulsa 1990) in which the Court stated that in an FPAA case, an agreement to arbitrate survived a contract expiration, did not address a case filed under the OMECBA, passed fourteen years later in 2004. After the legislature had specifically

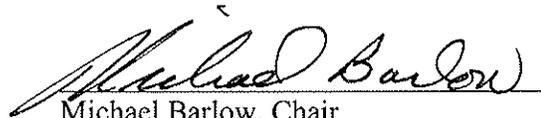
¹The City relies on 11 O.S., 2001 Supp. 2009. § 51-101 et seq., *Int'l Ass'n of Firefighters, Local No. 2359 v. City of Edmond*, 1980 OK CIV APP 44, 619 P.2d 1274 and PERB Case No. 208 (1990), *Int'l Ass'n of Firefighters, Local No. 3199 v. City of Hugo* to argue that the FPAA cases which do not allow an extension of terms after expiration of a CBA are persuasive. Having determined the OMECBA's absence of an evergreen clause is dispositive, we need not address this alternative argument.

declined to insert an evergreen clause in the OMECBA, the Union's argument is not persuasive. In conclusion, it is undisputed that the employee was allegedly terminated on August 5, 2009 during a period there was no CBA in effect. There was no evergreen clause by statute or in the CBA. The City's duty to arbitrate expired with the FY 2009 CBA on June 30, 2009. Thus, the City has not committed an OMECBA prohibited practice. Accordingly, the City's Motion for Summary Judgment is GRANTED.

FINAL ORDER

The City's Motion having been GRANTED, it is hereby ORDERED that the prohibited practice charge is dismissed with prejudice to refile.

Date: 9-17-10


Michael Barlow, Chair
Public Employees Relations Board

DISSENTING OPINION BY MEMBER LARRY GOOCH

I dissent from the majority opinion on this case. I do not believe the legislature intended that there would be gaps in coverage during or between the negotiations of collective bargaining agreements for fire, police and municipal employees. The legislature imposed the prohibition of the right to strike whether a contract is in place or not, and in exchange for this right, employees were afforded other rights of labor, including the right to bargain collectively. The legislature intended that contract coverage be continuous evidenced by the fact that an "evergreen" provision appears in the FPAA. This provision was ultimately ruled unconstitutional because it could create a

debt beyond the municipalities budget year. The court cases that followed; dynamic status quo in Tulsa, and the multi-year contract in Stillwater, also created debts past the fiscal year and subsequently were ruled unconstitutional. This is a case of first impression as there is not any case law that prohibits non-economic provisions from carrying forward from one contract to another. The "evergreen" provision in the FPAA was ruled unconstitutional clearly because of the continuation of economic benefits, and the provision that was initially proposed and later dropped from the Municipal Employees bargaining act had the same fatal flaw. These employees are still prohibited from striking and in exchange still have other rights of labor. To determine what these rights are, we often turn to federal labor law and NLRB case regarding the same. When I requested legal counsel research this issue, I specifically asked that it look at 295 NLRB No. 64, 131 LRRM 1802 (1985) which requires continuation of a grievance procedure established pursuant to an expired contract. This rule applies in a sector where employees do have a right to strike and I can see no reason why it should not apply in the public sector where the powerful right of strike has been removed.