

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FRATERNAL ORDER OF POLICE,))
LODGE 122,))
Complainant,))
v.) Case No. 00421
CITY OF NORMAN, OKLAHOMA))
Respondent.))

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND CEASE AND DESIST ORDER

This matter came on for hearing before the Public Employees Relations Board (the "Board") on the 8th day of September, 2005, on the Unfair Labor Practice (ULP) Charge of Complainant Fraternal Order of Police, Lodge 122 (the "Union" or "FOP"). The Union appeared by and through its attorney, James Patrick Hunt. The Respondent City of Norman, Oklahoma, (the "City") appeared by and through its attorney, Tony G. Puckett.

The Board received documentary and testimonial evidence. The Board also solicited post-hearing submissions (Proposed Findings of Fact, Conclusions of Law, and supporting briefs) from both parties. The Board is required by 75 O.S. 2001, § 312, to rule individually on Findings of Fact submitted by the parties. The submission of the Union is treated as follows:

1. Proposed Findings of Fact Nos. 1-10 are substantially adopted by the Board.

The submission of the City is treated as follows:

1. Proposed Findings of Fact Nos. 1-3, 83, 139-140, 147, 171, 174-175 are substantially adopted by the Board.

2. Proposed Findings of Fact Nos. 23, 36, 67-74, 78, 138, 183, 188, 204-205, 207-220

are accepted in part as modified herein and rejected in part.

3. Proposed Findings of Fact Nos. 4-22, 24-35, 37, 39-66, 75-77, 79-82, 84-94, 96-137, 141-146, 148-152, 154-166, 170, 172-173, 177-181, 185, 190-203, 206, 221-237 are rejected as unnecessary to this Board's decision or as duplicative of other Proposed Findings of Fact.

4. Proposed Findings of Fact Nos. 38, 95, 153, 167-169, 176, 182, 184, 186-187, 189 are rejected.

FINDINGS OF FACT

1. The Fraternal Order of Police, Lodge 122 ("FOP") is the bargaining agent for the police officers employed by the City of Norman ("City"). Tr. 163.

2. In 2004, the FOP and the City attempted to negotiate a collective bargaining agreement ("CBA") for the purpose of creating a contract between the FOP and the City that would begin July 1, 2004 and end June 30, 2005, *i.e.* a contract for fiscal year (FY) 2004-05. Tr. 69, 167.

3. The FOP and the City had eight (8) negotiation sessions. Tr. 167. The first of these sessions occurred in January, 2004. *Id.* Attending these sessions on behalf of the FOP were Stephen A. Lucas, Jim Keesee and other FOP members. Tr. 35. Attending the sessions on behalf of the City were then Assistant City Attorney Jeff Bryant, Anthony Francisco, Finance Director, and Gala Hicks, the Department of Human Resources Director. *Id.* Mr. Bryant was the City's chief negotiator. Tr. 162. The eighth and final session occurred on August 10, 2004. Tr. 167. At all of these sessions, the City offered no wage increase to the FOP. Tr. 76-77.

4. Between the seventh and eighth session, on July 15, 2004, the City's representatives, Jeff Bryant and Gala Hicks, met with representatives of all three of the City's municipal unions at an agreed mediation session. Tr. 35-36, 112-113. The two other unions were the International

Association of Firefighters, Local 2067 ("IAFF") and the American Federation of State, County and Municipal Employees, Local 2875 ("AFSCME"). *Id.* A representative of the Federal Mediation and Conciliation Service ("FMCS") also attended. *Id.* The parties did not enter into a written agreement regarding the confidentiality of the mediation session. Tr. 18.

5. At approximately 11:30 p.m., Mr. Bryant offered the unions a one and one-half percent (1.5%) wage increase starting January 1, 2005. Tr. 113. Mr. Bryant told them they had until midnight – approximately a half-hour – to accept the offer or it would be "off the table." Tr. 40, 113-114, 140. Mr. Lucas told Mr. Bryant that they would need the opportunity to discuss it with their union members. Tr. 40. Mr. Bryant responded that they could not do that and that they would have to accept or reject by midnight. *Id.*

6. The same offer was made to the IAFF and to AFSCME. Tr. 185. The IAFF accepted it that night. Tr. 41. The AFSCME union accepted it sometime after August 25, 2004. Tr. 42. Additionally, all the remaining non-union employees of the City received a one and one-half percent wage increase. *Id.*

7. On July 15, 2004, the FOP rejected the offer made by the City. Tr. 42.

8. On August 10, 2004, the FOP had its eighth and final negotiation session with the City. Tr. 76-77. At that meeting, the City offered zero in wage increases. *Id.*

9. On August 17, 2004, approximately thirty (30) days after the City offered a 1.5% wage increase, the City submitted its statutory last best offer ("LBO") to the arbitration panel in accordance with 11 O.S. §51-106 et seq. Tr. 43. The City's LBO proposed no wage increase and a freeze in merit increases. *Id.* The City's LBO also proposed significant changes in health insurance coverage. Tr. 45, 109; City Exh. "1", Tab 5. The City's LBO gave the City the unilateral right to set

insurance premiums. Tr. 110-111.

10. Specifically, in relevant part, the City submitted the following in its LBO to the FOP:

Article 32, Section 2:

b. The City may determine the health and dental benefits coverage offered employees, and to revise such coverage on an annual basis in the interests of the City as a whole including the right to contract with an insurance carrier to provide health insurance benefits to employees if the City determines that doing so is a better option fiscally. Benefits for said insurance will be addressed in negotiations each year for a new Agreement for the succeeding fiscal year. Should the City determine changes in its insurance plans provided to its employees are needed, (whether those changes be in benefits provided under the plans, or whether to provide the plans through self-funding, private insurance carriers or through other means) the City will notify its intention to consider such changes at least 120 days before the beginning of a new fiscal year. The FOP may then, through the negotiation process, determine if it desires for its members to continue participating in the City's plans, and/or to seek coverage through other means.

c. The City may set premiums for the plans including implementing premium increases on annual basis as the City deems appropriate.

City Exh. "1", Tab 5.

11. The FOP also submitted its last best offer. Tr. 42. The FOP's offer proposed a wage increase of two percent (2%) across the board and made some concessions on health insurance. *Id.*

12. The interest arbitration was heard on August 24 and 25, 2004. City Exh. "2". At that hearing, the City argued that it could not fund the FOP's last best offer. *Id.* at 9. The arbitrator disagreed, ruling that the City had a budget surplus of \$655,000.00 on the existing budget. *Id.* at 11. The Arbitration Board selected the FOP's last best offer. Tr. 51. The City chose not to take the matter to a vote of the people. *Id.*

13. Pursuant to 11 O.S. 2001, § 51-109, the arbitrator found that the City had revenues available to fund the FOP's last best offer. City Exh. "2" at 11, Tr. 138.

CONCLUSIONS OF LAW

1. This matter is governed by the provisions of the Fire and Police Arbitration Act ("FPAA"), 11 O.S. 2001 and Supp. 2005, *CC* 51-101, *et seq.*, and the Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S. 2001, *C* 51-104b.

2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 2001, *CC* 308a, *et seq.*

3. Federal law may be considered in the construction of the FPAA. *Stone v. Johnson*, 690 P.2d 459, 462 (Okla. 1984).

4. The Board is empowered to prevent any person, including corporate authorities, from engaging in any unfair labor practice. 11 O.S. 2001, *C* 51-104b(A).

5. The Union, in asserting a violation of 11 O.S. 2001, *C* 51-102(6), has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 11 O.S. 2001, *C* 51-104b(C) and OAC 585:1-7-16.

6. Statements made by the City in the contract negotiations are admissible. No "claim" is involved; rather the parties were engaged in contract negotiations leading to a collective bargaining agreement. 2 Whinney, *Oklahoma Evidence* *C* 19.07 (2d ed. 2000) (a claim involves a dispute as to legal rights). Therefore, Title 12 O.S. *C* 2408 is not applicable.

7. Even if a "claim" were involved, Rule 408 "only bars admission of evidence relating to settlement discussions if that evidence is offered to prove 'liability for or invalidity of the claim or its amount.'" *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir. 1997) (quoting Fed.R.Evid., Rule 408). Rule 408 is inapplicable when the claim is based upon some wrong that was

committed in the course of the settlement discussions, e.g., unfair labor practice. *Uiforma/Shelby Business Forms, Inc. v. N.L.R.B.*, 111 F.3d 1284, 1293 (6th Cir. 1997) (quoting 23 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* ¶ 5314 (1st ed 1980)). “Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations.” *Id.* The Union is attempting to use this evidence to establish that the City retaliated against the Union for rejecting the City’s proposed contract by offering much less for salary and benefits in its LBO and that it negotiated in bad faith. Therefore, Rule 408 is inapplicable.

8. The City did not establish that the parties agreed that the mediation statements be kept confidential. A written agreement that the mediation be kept confidential is needed to do that. *See, e.g.*, 12 O.S. 2001, ¶ 1804(B)(2).

9. “[P]arties may engage in regressive bargaining and this fact alone is not an indicia of bad faith.” *International Association of Firefighters, Local 2479 v. City of Ponca City*, PERB Case No. 377 (2002).

10. In determining whether a party has violated 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 (N.L.R.B. 1984). “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.” *Id.* Conduct relevant to the issue of good faith bargaining includes, *inter alia*, unilateral changes in mandatory subjects of bargaining. *Id.*

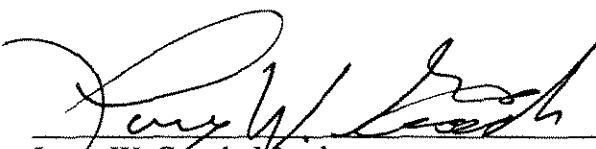
11. The City had the money to fund its offer of a 1.5% wage increase. City Exh. “2” at

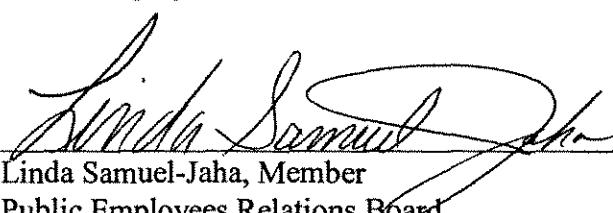
11, Tr. 138. The withdrawal of this 1.5% wage increase by the City was not motivated by financial concerns. Rather, the City was unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Therefore, the City's LBO was a regressive last best offer not made in good faith. Such action constitutes "refusing to bargain collectively . . . in good faith with the designated bargaining agent with respect to any issue coming within the purview of" Article 51 of the Oklahoma Statutes in violation of 11 O.S. 2001, § 51-102 (6a)(5).

12. Group health insurance is a mandatory subject of collective bargaining. *W.W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875, 878 (1st Cir. 1949). The City attempted to force upon the Union in its LBO a proposal on health insurance that would have given the City the unilateral right to change benefits provided and premiums charged at the City's discretion. These changes amounted to an improper forced waiver of the duty to bargain on mandatory subjects of bargaining. See *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 609-610 (Okla. 1995) (neither side can bargain to exclude certain contractual provisions from grievance arbitration). Such action constitutes "refusing to bargain collectively . . . in good faith with the designated bargaining agent with respect to any issue coming within the purview of" Article 51 of the Oklahoma Statutes in violation of 11 O.S. 2001, § 51-102 (6a)(5).

13. Pursuant to 11 O.S. 2001, § 51-104b, the Board finds that upon the preponderance of the testimony taken, the City has engaged in an unfair labor practice and a cease and desist order is warranted.

Dated: 4/18/06


Larry W. Gooch, Member
Public Employees Relations Board


Linda Samuel-Jaha, Member
Public Employees Relations Board

CEASE AND DESIST ORDER

The City of Norman, Oklahoma, is hereby ordered, pursuant to 11 O.S. 2001, § 51-104b(C) and consonant with the Findings of Fact and Conclusions of Law entered herein, to cease and desist from bargaining in bad faith by unlawfully endeavoring to frustrate the possibility of arriving at an agreement and by improperly forcing waiver of the duty to bargain on mandatory subjects of bargaining, in violation of 11 O.S. 2001, § 51-102(6a)(5).

Dated: 6/8/06



Larry Goode, Member
Public Employees Relations Board

Craig W. Hoster, dissenting

The Union, in this case, has the burden of establishing an unfair labor practice by a preponderance of the evidence. I must dissent from the majority because, in my view, the Union has not sustained its burden of proof.

The Board should examine the totality of a party's conduct in determining whether the party has violated its duty to bargain in good faith. See, Oklahoma Fixture Co, 165 LRRM 1122, 331 NLRB 145 (2000). A party's total conduct should be considered to determine whether the

party is lawfully engaging in hard bargaining to achieve a contract it considers desirable or whether the party is unlawfully endeavoring to frustrate the possibility of arriving at an agreement. *Id.*

I am led to the conclusion here that the City did not commit an unfair labor practice.

A handwritten signature in black ink, appearing to read "Craig W. Hoster".

Craig W. Hoster, Chair

Public Employees Relations Board