

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FILED

MAY 17 2012

Public Employees Relations
Board

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, LOCAL 2284,)
)
Complainant,)
)
v.)
)
CITY OF McALESTER, OKLAHOMA,)
)
Respondent.)

PERB No. 2011-ULPC-510

**ORDER GRANTING UNION'S MOTION FOR SUMMARY JUDGMENT
AND ORDER TO CEASE AND DESIST**

This matter came on for hearing before the Public Employees Relations Board (the "Board") meeting in a Regular Meeting on the 12th day of April, 2012, at 9:00 a.m., in the Oklahoma Department of Agriculture, Agriculture, Food and Forestry Building, First Floor Board Room, 2800 N. Lincoln Boulevard, Oklahoma City, Oklahoma, on the proposed written orders of both parties hereto related to the following motions heard herein on March 8, 2012, and on March 15, 2012:

(1) Respondent's Motion for Summary Judgment and Supporting Brief filed on February 3, 2012, by the City of McAlester, Oklahoma (the "Respondent" or "McAlester"); and

(2) Complainant's oral Motion for Summary Judgment announced during and near the end of the hearing, by the International Association of Firefighters, Local 2284 (the "Complainant" or "IAFF").

The Complainant appeared by and through its attorney Steven R. Hickman, Fraiser, Fraiser & Hickman, LLP, Tulsa, Oklahoma. The Respondent appeared by and through its Attorney Charles S. Plumb, McAfee & Taft, P.C., Tulsa, Oklahoma. Due to the Complainant's oral announcement of its Motion for Summary Judgment during and near the end of the hearing

and pursuant to the specific direction of the Board rendered at the conclusion of the hearing, the Complainant, whose oral Motion for Summary Judgment referred to hereinabove was granted by the Board from the bench, as the prevailing party, was directed to draft a proposed Order in writing within ten (10) days following the portion of the hearing held herein on March 15, 2012, to be submitted to the Respondent for its consideration and the Respondent was given ten (10) days to consider the draft order as proposed by the Complainant. The parties hereto were unable to reach any agreement on the form of the draft order to be submitted to the Board for its consideration. Accordingly, on March 26, 2012, the Respondent filed a document herein entitled "Respondent City of McAlester's Proposed Findings of Fact, Conclusions of Law and Cease and Desist Order" with an attached draft order containing ten (10) proposed findings of fact, proposed conclusions of law and draft cease and desist language (the "Respondent's Proposal"). On March 27, 2012, the Complainant filed a document herein entitled "Complainant's Proposed Findings of Fact, Conclusions of Law and Cease and Desist Order" with an attached draft order containing eight (8) proposed findings of fact, proposed conclusions of law and draft cease and desist language (the "Complainant's Proposal").

The alleged violation(s) in this matter was filed by the Complainant on September 28, 2011 (the "Charge"), and alleged that, among other things, on February 4, 2011, the Respondent refused to arbitrate five (5) grievances, namely: (1) unilateral refusal to pay incentive increases for completed training classes; (2) Lt. Belchers' abuse of authority and duty; (3) unilateral removal of Holidays and reduction of Sick and Annual Leave benefits; (4) unilateral implementation of an un-negotiated Code of Conduct; and, (5) discipline of Rodney Leamy, because the Respondent claimed that as the collective bargaining agreement had expired, there was no grievance process in effect and that the IAFF was not entitled to pursue a grievance or

proceed to arbitration. The Complainant also alleged that on May 5, 2011, the Respondent engaged in the prohibited practice of "surface bargaining" in connection with making a proposal for and reaching a tentative agreement on a new collective bargaining agreement for fiscal year 2010-11 and then the City Council not approving the new collective bargaining agreement for fiscal year 2010-11. Further, the Complainant alleged that on June 30, 2011, the Respondent refused to participate in an interest arbitration proceeding with the Complainant for a new collective bargaining agreement for fiscal year 2010-11 as the Respondent's fiscal year had already expired. Still further the Complainant alleged that the neutral interest arbitrator determined on August 1, 2011, that the interest arbitration was improperly empaneled and had no jurisdiction to continue, the Respondent refused to respond to the Complainant's request to empanel another interest arbitration panel. Collectively the Complainant alleges that the aforesaid actions by the Respondent constitute unfair labor practices in violation of Section(s) 51-102(6a)(1) and 51-102(6a)(5) of Oklahoma's Fire and Police Arbitration law, 11 O.S. 51-101 through 11 O.S. 51-113 et seq. (sometimes referred to herein as the "FPAA").

The Board, having reviewed the written motion filed herein and the oral motion announced herein, having considered the Respondent's Proposal and the Complainant's Proposal, having heard the arguments of counsel and having engaged in questioning of counsel and otherwise being fully apprised of this matter, expressly rejects the proposed findings of fact contained in the Complainant's Proposal numbers one (1) through and including eight (8) and adopts certain proposed findings of fact contained in the Respondent's Proposal numbers one (1) through and including seven (7), and numbers eight (8), nine (9) and ten (10) each in part as hereinafter provided, makes the following findings of fact:

FINDINGS OF FACT

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

1. McAlester is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma.
2. IAFF is a certified bargaining representative pursuant to the Fire and Police Arbitration Act for firefighters employed by McAlester. Respondent's proposed finding of fact No. 1.
3. McAlester's fiscal year ("FY") begins July 1 and ends June 30 of each year. Respondent's proposed finding of fact No. 2.
4. McAlester's FY 2009-10 collective bargaining agreement with the IAFF expired on June 30, 2010, and there has not been a contract in effect between the parties since June 30, 2010. Respondent's proposed finding of fact No. 3.
5. The five grievances that are the subject of the Charge all involved events arising after the last contract between the parties expired. When presented with those grievances, McAlester advised the IAFF the contract had expired, there was no grievance process in effect, and IAFF was not entitled to pursue grievance or proceed to arbitration. Respondent's proposed finding of fact No. 4.
6. The IAFF invoked interest arbitration for a 2010-11 contract, and an interest arbitration board chaired by neutral arbitrator Edward Valverde originally met on December 15, 2010. After the IAFF and McAlester filed charges with the PERB regarding the 2010-11 contract negotiations, the Interest Arbitration Board indefinitely suspended further proceedings until the PERB ruled. Respondent's proposed finding of fact No. 5.

7. In an April 14, 2011, hearing, the PERB held that the IAFF had improperly and prematurely invoked interest arbitration for a 2010-11 contract. The PERB returned the parties to the same positions they had been during the first negotiating session for a 2010-11 contract. Respondent's proposed finding of fact No. 6.

8. At a May 5, 2011 negotiating meeting, IAFF negotiators and McAlester negotiators reached a tentative agreement on a 2010-11 contract. In the past, tentative agreements reached by parties' negotiators had always been subject to approval by IAFF's membership and the City Council. The IAFF and McAlester negotiators specifically agreed the tentative agreement on a 2010-11 contract would be subject to approval by Local 2284's membership and McAlester's City Council as legally required. Respondent's proposed finding of fact No. 7.

9. City Manager Pete Stasiak, a member of the McAlester negotiating team, presented the tentative agreement to the McAlester City Council in an Executive Session for discussion and consideration. When the City Council reconvened into Regular Session from their Executive Session, no member of the City Council moved to approve the tentative agreement for a 2010-11 contract, and the City Council adjourned. Respondent's proposed finding of fact No. 8 as amended.

10. When McAlester informed the IAFF the City Council had not approved the tentative agreement for a 2010-11 contract, the IAFF informed McAlester it intended to seek the 2010-11 contract through the interest arbitration process. Respondent's proposed finding of fact No. 9 as amended.

11. Thereafter, the IAFF asked the Interest Arbitration Board to reconvene and conduct an interest arbitration hearing for a 2010-11 contract. On July 30, 2011, the Interest Arbitration Board advised the IAFF and McAlester it had no authority or jurisdiction to act on a 2010-11

contract, based upon the PERB's holding that interest arbitration had been improperly and prematurely invoked by the IAFF. At that point, the 2010-11 fiscal year had expired. Thereafter, in August 2011, the IAFF sought to select a new interest arbitration board for a 2010-11 contract, after the 2010-11 FY had already expired. Respondent's proposed finding of fact No. 10 as amended.

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.2011, §§ 51-101 et seq. and the Board has jurisdiction over the parties and the subject matter of this complaint pursuant to 11 O.S. 2011, §51-104b.
2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.2011, §§ 308a et seq. and the meeting was convened and conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S. 2011, §§ 301 et seq.
3. The burden of proof in this matter is a preponderance of the testimony taken pursuant to 11 O.S. 2011, §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.2011, §51-104b (A).
5. The Complainant, in asserting a violation of 11 O.S.2011, §§ 51-101 et seq., has the burden of proving the allegations of unfair labor practice by a preponderance of the testimony taken pursuant to 11 O.S. 2011, §51-104b (C) and a preponderance of the evidence pursuant to 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 cases or situations where previous a collective bargaining agreement between a municipal employer and the representatives of fire fighters or police officers, respectively, has expired, 11 O.S.2011, §51-111 provides, among other things, a procedure for the arbitration of grievances where no collective bargaining agreement currently exists.

8. In cases or situations where a previous collective bargaining agreement between a municipal employer and the representatives of fire fighters or police officers, respectively, has expired and the expired agreement's grievance procedure in subsequent negotiating sessions for a new collective bargaining agreement is either tentatively agreed to as unchanged or has not been discussed in such subsequent negotiating sessions for a new collective bargaining agreement, a municipal employer does not commit an unfair labor practice under the Fire and Police Arbitration Law, 11 O.S.2011, §§ 51-101 et seq. by refusing to arbitrate grievances under the expired agreement's grievance procedure whether it is tentatively agreed to or not as it has not been approved by either the fire fighters or police officers, respectively, or the municipal governing body.

9. A municipal governing body and the members thereof do not engage in "surface bargaining" or commit an unfair labor practice under the Fire and Police Arbitration Law, 11 O.S.2011, §§ 51-101 et seq. during a meeting of the governing body merely by choosing to make no motion to approve or disapprove a tentative collective bargaining agreement that has been tentatively agreed to by the municipality's negotiating team or by not voting to approve or disapprove such tentative collective bargaining agreement. Likewise, a municipal governing

body and the members thereof do not engage in “surface bargaining” or commit an unfair labor practice under the Fire and Police Arbitration Law, 11 O.S.2011, §§ 51-101 et seq. during a meeting of the governing body merely by choosing to make no motion to approve or disapprove a tentative collective bargaining agreement that consists solely or primarily of a municipal employer’s proposal that is accepted as a tentative agreement between a municipal employer and the representatives of fire fighters or police officers, respectively, or by not voting to approve or disapprove such tentative collective bargaining agreement.

OPINION

It is the finding of the Board as follows:

Pursuant to 11 O.S.2011, § 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, solely as to the issue of the arbitration of five grievances referred to herein, has met its burden of proof and the Respondent through its City Manager has engaged in an unfair labor practice(s) by refusing to engage in grievance arbitration as to the five grievances referred to herein. Otherwise however, pursuant to 11 O.S.2011, § 51-104b and OAC 585: 2-7-12, the Board finds that the Complainant has not met its burden of proof as to the other allegations of “surface bargaining” and the Respondent’s alleged refusal to participate in a second interest arbitration proceeding for a new collective bargaining agreement for a previous fiscal year of the Respondent that had already expired and accordingly, that the Respondent has not engaged in any additional unfair labor practices.

Because no substantial controversy exists as to a material fact and the Complainant is entitled to judgment as a matter of law solely as to the issue of the arbitration of five grievances referred to herein, the Complainant’s oral Motion for Summary Judgment should be and hereby

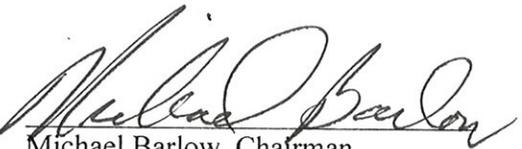
is GRANTED and the Respondent's Motion for Summary Judgment should be and hereby is DENIED.

CEASE AND DESIST ORDER

It is ORDERED that the Respondent, in the absence of a collective bargaining agreement, engage in statutory grievance arbitration pursuant to 11 O.S.2011, §51-111 with the Complainant on the five grievances referred to in the Charge and the Respondent shall be and hereby expressly is prohibited from refusing to engage in grievance arbitration with the Complainant in the absence of a collective bargaining agreement.

IT IS SO ORDERED.

Dated this 17 day of May, 2012.



Michael Barlow, Chairman
Public Employees Relations Board



C. Max Speegle, Member
Public Employees Relations Board



Larry W. Gooch, Member
Public Employees Relations Board