

**FILED**

OCT 11 2012  
Public Employees Relations Board

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

DARRELL J. MARTIN, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 INTERNATIONAL ASSOCIATION OF )  
 FIRE FIGHTERS, LOCAL 176, and )  
 CITY OF TULSA, OKLAHOMA, )  
 )  
 Respondents. )

PERB No. 2012-ULPC-520

**ORDER GRANTING CITY'S MOTION TO DISMISS  
AND THE UNION'S MOTION TO DISMISS**

This matter came on for hearing before the Public Employees Relations Board (the "Board") meeting in a Regular Meeting on the 13<sup>th</sup> day of September, 2012, at 9:00 a.m., in the Will Rogers Building, First Floor Rooms 102/104, 2401 N. Lincoln Boulevard, Oklahoma City, Oklahoma, on the following written motion(s): (1) The City of Tulsa's Request for Dismissal of Charges, filed by the City of Tulsa, Oklahoma (the "Respondent City" or "City"), on August 6, 2012 (the "City's Motion to Dismiss"); and (2) Respondent IAFF Motion to Dismiss, filed by the International Association of Fire Fighters, Local 176, as another respondent herein (the "Respondent Union" or "Union"), filed herein on August 15, 2012 (the "Union's Motion to Dismiss"). The complainant herein, Darrell J. Martin (the "Complainant"), based upon the information he provided in his Exhibit A attached to the Unfair Labor Practice charges he filed herein against both the Union and the City on July 19, 2012, alleges that he is employed by the City as a Fire fighter and is a member of the Union. The Complainant appeared through his attorney, A. Scott McDaniel, McDaniel Longwell Acord, PLLC, Tulsa, Oklahoma, in opposition to the City's Motion to Dismiss and the Union's Motion to Dismiss. The Respondent Union appeared by and through its attorney George Miles,

Fraiser, Fraiser & Hickman, L.L.P., Tulsa, Oklahoma. The Respondent City appeared by and through its Assistant City Attorneys Jason Seay and Brandon Burris. No proposed findings of fact were submitted to the Board by any party to these proceedings.

The alleged Unfair Labor Practice charges in this matter against both the Union and the City, were filed by the Complainant on July 19, 2012 (the "ULPs"), and alleged the existence of certain facts, among other things, that on or about January 19, 2012, a Memorandum of Understanding was entered into between the Respondent Union and the Respondent City (the "MOU"), addressing certain issues of underpayment to thirteen (13) union members and overpayment to three (3) union members under the Education and Language Incentive provision of multiple Collective Bargaining Agreements (the "CBAs"); that the MOU did not affect the rights of a majority of the Union's membership but only those union members identified in the MOU; that the MOU resulted from the resolution of a grievance raised by the City against certain union members identified in the MOU, not as a result of collective bargaining; that as a part of the MOU, the Union agreed to allow the City to recoup overpayments to the Complainant that allegedly occurred over fifteen years of employment and multiple CBAs that were no longer enforceable under Oklahoma law; that the three union members including the Complainant were not notified in advance of the discussions nor were they given an opportunity to be heard or to contest the claims of the City in violation of the then-current collective bargaining agreement for the 2011-2012 fiscal year July 1, 2011 through June 30, 2012 (the "2011-2012 CBA"), and the Fourteenth Amendment to the U.S. Constitution and the Oklahoma Constitution; that the 2011-2012 CBA provides for Union member's participation in any grievance raised uniquely related to that specific Union member; that the Complainant filed a formal grievance on this matter with the Union on June 21, 2012, that was never presented to the City; and, that the Union failed to submit the MOU to its membership for ratification after it was signed by the City's

Mayor and City Clerk for the City and by the Union president and Litigation manager for the Union. The Complainant further alleges that the City and the Union engaged in an unfair labor practice by entering into the MOU; and, that the Union committed a subsequent unfair labor practice by refusing to deal with and investigate his formal grievance filed with the Union on June 21, 2012; all in violation of, on the face of the ULP as to the Union, Sections 51-102(6b)(1) and (5) of the Fire and Police Arbitration Act, 11 O.S.2011, § 51-101 through 11 O.S.2011, §51-113 et seq. (the "FPAA"), and, on the face of the ULP as to the City, Sections 51-102(6)(1) and (5) of the FPAA. By way of damages and remedies in his prayer for relief, the Complainant seeks an order requiring the City to cease and desist with its enforcement of the MOU against the Complainant, an order requiring the Union and the City to engage the Complainant in discussions in good faith to resolve the City's claim for overpayment and due to the extent of the egregiousness of the alleged unfair labor practices engaged in by the both the City and the Union, the Complainant seeks his attorneys' fees and costs.

To summarize, an analysis of the damages and remedies sought by the Complainant through his ULPs, in essence, discloses the following:

The Complainant, among his remedies, essentially seeks to require the City, the Union and the Complainant to all three enter into negotiations for a new agreement as to the validity and the legality of the amount of the overpayment of wages sought by the City limited to only the Complainant and to prohibit the City from enforcing an agreement it negotiated as to wages, hours and other conditions of employment with the Union against the Complainant, an admitted member of the Union. Further, among his remedies, the Complainant seeks to require the City engage in the grievance process under a collective bargaining agreement in order to process his personal grievance, which personal grievance by his own admission was never

presented to the City, a personal grievance of the Complainant that the Union's Grievance Committee determined was not a grievance that existed under the collective bargaining agreement and which personal grievance of the Complainant, the Union's Grievance Committee voted unanimously not to approve. Neither the ULPs nor the Complainant's written Response to the City of Tulsa's Request for Dismissal of Charges and Adoption of the Same by the International Association of Firefighters, Local 176 filed herein on August 24, 2012, provide any support for the Complainant's request for attorneys' fees or costs.

The Board, having reviewed the written Unfair Labor Practice charges filed herein by the Complainant as aforesaid against the Respondent Union and the Respondent City on July 19, 2012, the Respondent City's written Motion to Dismiss filed herein on August 6, 2012, the Respondent Union's Motion to Dismiss filed herein on August 15, 2012, the Complainant's written Response to the City of Tulsa's Request for Dismissal of Charges and Adoption of the Same by the International Association of Firefighters, Local 176 filed herein on August 24, 2012, 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:

1. The City is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma.
2. The Union is, and was at all times material herein, the sole exclusive bargaining agent for certain employees of the City's fire department.

3. The Complainant is, and was at all times material herein, a Fire fighter employed by the City and a member of the Union.

4. The respondents are the parties to all collective bargaining agreements covering all bargaining unit members, including the Complainant.

### CONCLUSIONS OF LAW

The Board concludes as a matter of law as follows:

1. To the extent that this matter, on its face, involves alleged charges of the commission of unfair labor practices by the Union and the City, respectively, it 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 pursuant to 11 O.S.2011, §51-104b.

2. Pursuant to the provisions of 11 O.S.2011, §51-104b (A), the Board is empowered, in pertinent part, "...to prevent any person, including bargaining agent and corporate authorities, from engaging in any **unfair labor practice defined herein.**" (emphasis added).

3. Pursuant to the provisions of 11 O.S.2011, §51-102(6a), the following action by corporate authorities, i.e. a municipal employer or its designated representatives, constitute "unfair labor practices" as that phrase is defined in 11 O.S.2011, §51-102(6) that include but are not limited to the following acts and conduct:

(1) interfering with, restraining, intimidating or coercing employees

in the exercise of the rights guaranteed them by this article;

(2) dominating or interfering with the formation, existence or administration of any employee organization or bargaining agent;

(3) interfering in any manner whatsoever with the process of selection by fire fighters or police officers of their respective bargaining agents

or attempting to influence, coerce or intimidate individuals in such selection;

(4) discharging or otherwise disciplining or discriminating against a police officer or fire fighter because he has signed or filed any affidavit, petition or complaint or has given any information or testimony under this article or because of his election to be represented by the bargaining agent;

(5) refusing to bargain collectively or discuss grievances in good faith with the bargaining agent with respect to any issue coming within the purview of this article; or

(6) instituting or attempting to institute a lockout.

4. Pursuant to the provisions of 11 O.S.2011, §51-102(6b), the following action by a bargaining agent, i.e. the representative of the fire fighters (as defined in 11 O.S.2011, §51-102(1)) or the police officers (as defined in 11 O.S.2011, §51-102(1)), constitute “unfair labor practices” as that phrase is defined in 11 O.S.2011, §51-102(6) that include but are not limited to the following acts and conduct:

(1) interfering with, restraining, intimidating or coercing employees in the exercise of the rights guaranteed them by this article;

(2) interfering with or attempting to coerce the corporate authorities in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances; or

(3) refusing to bargain collectively or discuss grievances in good faith with the proper corporate authorities with respect to any issue coming within the purview of this article.

5. 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.

6. 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 and the evidence. 11 O.S.2011, §51-104b (C) and OAC 585: 2-7-12.

7. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.2011, § 308a et seq. and the Board's Rules at OAC 585: 2-1-1 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.

8. Under the provisions of its Rules at OAC 585: 2-7-3, the Board recognizes all motions permitted under the Oklahoma Pleading Code, 11 O.S.2011, § 2001 et seq., including, but not limited to, motions to dismiss. OAC 585: 2-7-3.

10. "The function of a motion to dismiss is to test the law of the claims, not the facts supporting them. *Zaharias v. Gammill*, 1992 OK 149, 844 P. 2d 137, 138. In assessing the sufficiency of a petition, the general rule is that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle her to relief. *Id.* The question, on a motion to dismiss, is whether taking all of plaintiff's allegations as true, she is precluded from recovering as a matter of law. *Patel v. OMH Medical Center, Inc.*, 1999 OK 33 ¶ 43, 987 P. 2d 1185, 1202, reh. den., cert. den. 528 U.S. 1188, 120 S.Ct. 1242, 146 L.Ed.2d 100. The appropriate question in testing the sufficiency of the

allegations in the complaint which is subject to a motion to dismiss is whether relief is possible under any set of facts that could be established consistent with the allegations. *Boren v. Thompson & Associates*, 2000 OK 3 ¶ 25, 999 P. 2d 438, 447.” *Estate of Hicks v. Urban East, Inc.*, 92 P. 3d 88, 90 (Okla. 2004).

10. “Federal law may be considered in the construction of the FPAA. *Stone v. Johnson*, 690 P.2d 459, 462 (Okla. 1984)”. *FOP, Lodge 93 v. City of Tulsa*, PERB Case No. 431 (2007), 2007 WL 5039941.

11. “Adjusting or attempting to adjust union grievances with individual employees rather than the designated bargaining agent violates the duty to discuss grievances in good faith with the bargaining agent. *United States Postal Service and American Postal Workers Union*, 281 NLRB 1015 (1986)”. *FOP, Lodge 93 v. City of Tulsa*, PERB Case No. 431 (2007), 2007 WL 5039941.

12. “It is the opinion of the PERB that under Oklahoma law, which follows the ‘American Rule’, a party is not entitled to attorney’s fees unless specifically authorized by agreement or statute. *Garner v. City of [Tulsa]*, 651 P.2d 1325 (Okla. 1982)”. *IAFF, Local 2721 v. City of Bartlesville*, PERB Case No. 142-X (1988), 1988 WL 1525262.

13. While this matter, on its face, is governed by the provisions of the Fire and Police Arbitration Law, 11 O.S. 2011, §51-101 et seq., in this instance the Board does not have jurisdiction over the subject matter of these charges pursuant to 11 O.S.2011, §51-104b.

### OPINION

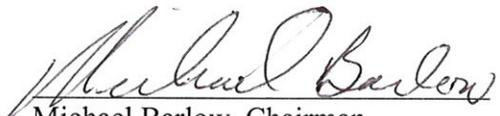
It is the finding of the Board as follows:

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 has failed to meet its burden of proof that either the Union has engaged in any unfair labor practice applicable to a

bargaining agent under 11 O.S.2011, §51-102(6b) or that the City has engaged in any unfair labor practice applicable to corporate authorities under 11 O.S.2011, §51-102(6a).

The City's Motion to Dismiss should be and hereby is GRANTED and the Union's Motion to Dismiss should be and hereby is GRANTED. Accordingly, the unfair labor practice charges filed herein against the City and the Union, respectively, are hereby DISMISSED.

Dated this 11 day of October, 2012.

  
Michael Barlow, Chairman

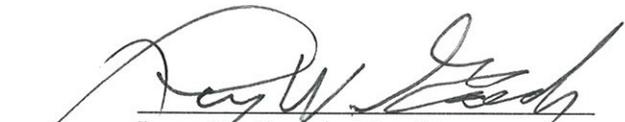
Public Employees Relations Board

*DISSEMINATING*



Max Speegle, Member

Public Employees Relations Board

  
Larry W. Gooch, Member

Public Employees Relations Board