

FILED

APR 12 2012

Public Employees Relations
Board

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

INTERNATIONAL ASSOCIATION OF)
FIRE FIGHTERS (IAFF), LOCAL 2651,)

Complainant,)

v.)

PERB No. 2011-ULPC-511

CITY OF BIXBY, OKLAHOMA, a)
municipal corporation,)

Respondent.)

ORDER GRANTING CITY'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 8th day of March, 2012, 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 written motion(s): City's Motion to Dismiss and Supporting Brief for the Respondent, the City of Bixby, Oklahoma, filed by the City of Bixby, Oklahoma (the "Respondent" or "City"), on February 10, 2012 (the "Motion to Dismiss"). The International Association of Fire Fighters, Local 2651, as the complainant herein (the "Complainant" or "Union") appeared by and through its attorney Steven R. Hickman, Fraiser, Fraiser & Hickman, L.L.P., Tulsa, Oklahoma. The Respondent appeared by and through its City Attorney Patrick T. Boulden. No proposed findings of fact were submitted to the Board by either party to these proceedings.

The alleged Unfair Labor Practice charge in this matter was filed by the Complainant on November 4, 2011 (the "ULP"), and alleged that on August 9, 2011, the Respondent through its representative David L. Weatherford, notified the Complainant and an interest arbitration panel

comprised of the Complainant's designated Interest Arbitrator Gordon Carriger, the Respondent's designated Interest Arbitrator Joel W. Barnaby, and the Neutral Interest Arbitrator chosen by Mr. Carriger and Mr. Barnaby from a list supplied by the Federal Mediation and Conciliation Service (the "FMCS") named A. Henry Hempe, that the Respondent would not participate in the process of setting a new contract term arbitration hearing through Mr. Hempe claiming that Mr. Hempe had no jurisdiction to decide any of the pending issues, in violation of Sections 51-102 (6) and 51-102(6a)(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").

The Board, having reviewed the written Unfair Labor Practice charge filed herein as aforesaid on November 4, 2011, the Respondent's written Answer filed herein on November 21, 2011, the Respondent's written Motion to Dismiss and Supporting Brief filed herein on February 10, 2012, and the Complainant's written Response to Motion to Dismiss filed herein on March 1, 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 bargaining agent for certain employees of the City's fire department.
3. On Friday, July 1, 2011, the City Manager of the City, Mr. Douglas J. Enevoldsen, received a letter dated June 27, 2011, from Mr. Chad Miller, advocate for the Union, notifying the City that the Union was invoking interest arbitration regarding negotiations on a labor agreement for

fiscal year 2011-2012 and named Mr. Gordon Carriger as the Union's interest arbitrator. Respondent's Undisputed Fact No.1 (Amended).

4. On Wednesday, July 6, 2011, City Manager Enevoldsen transmitted a letter to Mr. Chad Miller, acknowledging receipt of his June 27, 2011, letter and naming Mr. Joel W. Barnaby as the City's interest arbitrator. Respondent's Undisputed Fact No. 2.

5. On Monday, July 25, 2011, a third interest arbitrator named A. Henry Hempe, 5413 Trempealeau Trail, Madison, Wisconsin 53705, was selected by the Union's interest arbitrator and the City's interest arbitrator from a list of eligible candidates supplied by the FMCS and the said third interest arbitrator Mr. Hempe, by statute, was designated as chairman of the arbitration board. Respondent's Undisputed Fact No. 3 (Amended).

6. On Wednesday, July 27, 2011, the Union's interest arbitrator, Mr. Carriger, and the City's interest arbitrator, Mr. Barnaby, discussed the City's interpretation of the FPAA, Title 11, Oklahoma Statutes 2011, Section 51-101 *et seq.*, and Section 51-108 in particular, that time limits prescribed within the FPAA are mandatory and jurisdictional. In that discussion, Mr. Carriger informed Mr. Barnaby that the position of Local 2651 was that the statutory deadlines prescribed in the FPAA are "optional" and they had no intent to contact Interest Arbitrator Hempe to schedule an interest arbitration hearing within the ten (10) days prescribed in Title 11, Oklahoma Statutes 2011, Section 51-108.A. Respondent's Undisputed Fact No. 4 (Amended).

7. On Friday, August 5, 2011, the City's interest arbitrator, Mr. Barnaby, received an email from Tonda M. Gaede, Professional Fire Fighters of Oklahoma, wherein she stated the Union would be available for the arbitration hearing on either September 14, October 11 or 14, 2011. Respondent's Undisputed Fact No. 5 (Amended).

8. On Thursday, July 28, 2011, Interest Arbitrator Hempe was notified of his selection as the third member of the arbitration board and that same day he proffered possible arbitration hearing dates in calendar year 2011 of August 17, 18, 19, September 14 or 15, October 3-7 or October 10-14. Respondent's Undisputed Fact No. 6 (Amended).

9. On Tuesday, August 9, 2011, Mr. David L. Weatherford, attorney for the City, transmitted a letter to the three (3) members of the arbitration panel, advising them that under the FPAA, Title 11, Oklahoma Statutes 2011, Section 51-101 *et seq.*, Section 51-108.A, the panel, acting through its chair, "shall call a hearing to be held within ten (10) days after the date of appointment of the chair." (emphasis added.) Respondent's Undisputed Fact No. 7 (Amended).

10. The tenth day following Mr. Hempe's selection by the Union's interest arbitrator and the City's interest arbitrator on Monday, July 25, 2011 was Thursday, August 4, 2011. The tenth day following Mr. Hempe's notification of his selection as the third member of the arbitration board was Sunday, August 7, 2011. Respondent's Undisputed Fact No. 8 (Amended).

11. Relying on the requirements of Title 11, Oklahoma Statutes 2011, Section 51-108.A and the Oklahoma Supreme Court's decision in *City of Oklahoma City v. International Association of Fire Fighters, Local 157*, 254 P. 3d 678, 2011 OK 29, in Mr. Weatherford's August 9, 2011 letter to the three (3) members of the arbitration panel, he wrote:

"There is no doubt but that the jurisdiction of Mr. Hempe was only that jurisdiction granted by statute, and that jurisdiction for conducting an arbitration has now expired, just as in the above case. The City has made its position concerning the statutory deadlines well known, the City complied with every deadline (including the submission of a last best offer, with both no response and no last best offer from the IAFF), and the City is not willing to waive any of the mandatory statutory requirements for the process that was invoked by the IAFF."

"Based upon the above, the City will proceed as follows:

1. The City will not participate in any arbitration proceeding with Mr. Hempe, as he has no remaining jurisdiction to decide any of the pending issues.
2. The City, by copy of this letter, is notifying FMCS that it will not participate in the payment of any costs associated with any attempted arbitration, as there is no jurisdiction to conduct an arbitration.
3. The City will fulfill its statutory duty to continue to bargain in good faith with the hope of entering into a collective bargaining agreement with the Local.

"If there is an intention by the IAFF to proceed with an arbitration, please advise as soon as possible so we can take the appropriate action. If you have any questions or comments concerning this matter, please feel free to contact me." (emphasis added.)

Respondent's Undisputed Fact No. 9 (Amended).

12. In the time since Mr. Weatherford's August 9, 2011, letter was transmitted, Interest Arbitrator Hempe has made no effort to schedule an interest arbitration hearing between the City and the Union. Respondent's Undisputed Fact No. 10 (Amended).

13. On November 4, 2011, the Union filed the ULP which is the subject of this case, alleging that the City has violated FPAA requirements in Title 11, Oklahoma Statutes 2011, Section 51-102(6)(6a)(5), which provides as follows:

* * *

6. 'Unfair labor practices' for the purpose of this article shall be deemed to include but not be limited to the following acts and conduct:

* * *

6a. Action by corporate authorities:

* * *

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

Respondent's Undisputed Fact No. 10 (Amended).

14. Title 11, Oklahoma Statutes 2011, Section 51-108 provides, in pertinent part, as follows:

Section 51-108 - Hearing - Opinions

A. 1. The arbitration board acting through its chair shall call a hearing to be held within ten (10) days after the date of the appointment of the chair and shall, acting through its chair, give at least seven (7) days' notice in writing to each of the other two arbitrators, the bargaining agent and the corporate authorities of the time and place of such hearing.***

(Respondent's Undisputed Fact No. 12 (Amended)).

15. The Board based upon its review of the facts presented in this matter finds it beyond doubt that the Complainant can prove no set of facts under which the Complainant would be entitled to any relief. Taking all of the Complainant's allegations as true, the Complainant is precluded from any relief as a matter of law. In this matter before the Board, no relief is possible for the Complainant under any set of facts that could be established consistent with the Complainant's allegations in the ULP.

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 charge 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 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.

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

6. 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.

7. "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).

8. Title 11, Oklahoma Statutes 2011, Section 51-108 (A) provides, in pertinent part, as

follows:

Section 51-108 - Hearing - Opinions

A. 1. The arbitration board acting through its chair shall call a hearing to be held within ten (10) days after the date of the appointment of the chair and shall, acting through its chair, give at least seven (7) days' notice in writing to each of the other two arbitrators, the bargaining agent and the corporate authorities of the time and place of such hearing.***

(emphasis added.)

9. A party's invocation of and insistence upon compliance with the requirements of 11 O.S. 2011, §51-108 (A) that an interest hearing panel chair shall call a hearing within ten (10) days after the chair's appointment and the said party's subsequent refusal to participate in an interest arbitration after such statutory time limit, does not constitute an unfair labor practice under the Fire and Police Arbitration Law, 11 O.S.2011, §51-101 et seq.

OPINION

It is the finding of the Board as follows:

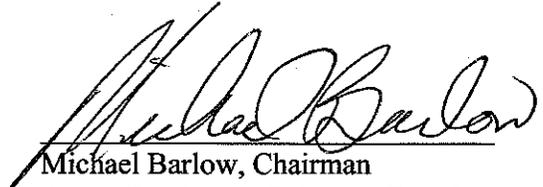
The City's Motion to Dismiss is hereby GRANTED because the City invoked the State's statute timelines and that's appropriate. (See 11 O.S.2011, §51-108(A)). Additionally the parties have acknowledged that negotiations have been restarted. Therefore, either party can request that unresolved issues be submitted to arbitration as provided by Title 11, Oklahoma Statutes 2011, §51-106 and, as provided therein, costs shall be borne equally by the parties.

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 and the Respondent has not engaged in any unfair labor practice.

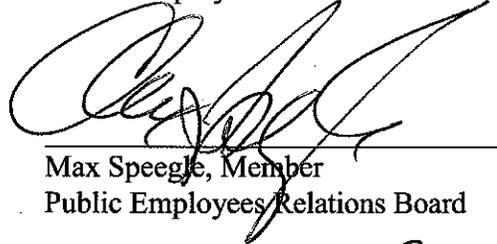
Because it is beyond doubt that the Complainant can prove no set of facts under which the Complainant would be entitled to any relief as a matter of law, the Respondent's Motion to Dismiss

should be and hereby is GRANTED.

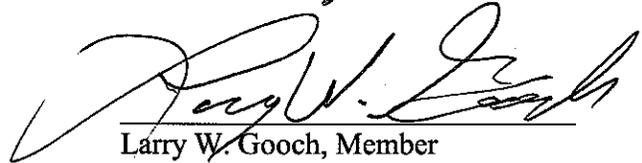
Dated this 12th day of April, 2012.



Michael Barlow, Chairman
Public Employees Relations Board



Max Speegle, Member
Public Employees Relations Board



Larry W. Gooch, Member
Public Employees Relations Board

dissent