

BEFORE THE OKLAHOMA PUBLIC EMPLOYEES RELATIONS BOARD

LOCAL 2551, INTERNATIONAL)
ASSOCIATION OF FIRE FIGHTERS,)
Complainant,)
vs.) Case No. 00159
CITY OF BROKEN ARROW,) consolidated with Case
Respondent.) Nos. 00168 & 00169

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

This matter comes on for decision before the Public Employees Relations Board (hereafter "PERB" or "the Board") on stipulated facts in which the parties, IAFF Local 2551 ("the Union") and the City of Broken Arrow ("the City"), ask the Board to address two issues:

1. Did the City commit an unfair labor practice by unilaterally implementing several of its collective bargaining proposals two (2) days after its rejection of an impasse arbitrator's recommendations?
2. Did the City commit an unfair labor practice by later refusing to engage in a second interest arbitration to resolve unagreed issues over the same collective bargaining contract?

Counsel for the parties have agreed that this matter may be decided on the basis of the stipulated facts, conclusions of law, and supporting briefs previously filed with the Board.

All statutory references herein are to the Fire and Police Arbitration Act (hereafter "the FPAA" or "the Act") codified at 11 O.S. 1981, §§ 51-101 et seq., as amended. Section 51-105 of the Act, set out in full below, contains

certain provisions extending the existing terms of a previously negotiated collective bargaining agreement (hereafter "CBA") beyond its scheduled expiration date pending the negotiation of a successor CBA. This provision is commonly referred to as the "Evergreen Clause" or "Evergreen".

RULINGS ON FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The Board is required to rule, 75 O.S. 1981, § 312, on the post-hearing submissions by the parties. The Findings of Fact, having been stipulated to be binding on the Board and are hereby adopted by the Board. Nanonka v. Hoskins, 645 P.2d 507 (Okla. 1982).

The Union's conclusion of Law number 1 and 2 are accepted. Conclusion of Law number 3 is rejected because it is not supported by the evidence.

The City's Conclusion of Law number 1 is accepted insofar as it recognizes that its unilateral changes all involved mandatory subjects of bargaining. Conclusion number 2 is not accepted because it ignores the obligations imposed by §§ 51-105 and 51-108. Conclusion number 3 is not accepted as a correct statement of the law. Although no second arbitration is expressly mandated by the FPAA, a failure to participate in additional arbitration or other dispute resolution procedures may, in some factual scenarios, be required as part of the duty to bargain in good faith.

The Board has concluded, however, that failure to participate in a second impasse arbitration is not per se a ULP.

FINDINGS OF FACT

1. The City of Broken Arrow (hereafter "City") is a City Manager-Council form of government, and an employer within the meaning of the FPAA.

2. At all times pertinent hereto Local 2551, International Association of Firefighters AFL-CIO/CSC (hereafter "Union") has been the bargaining agent for the City's firefighters.

3. During Fiscal Year 1986-87 the parties were bound by a Collective Bargaining Agreement ("CBA") running from July 1, 1986 to June 31, 1987. (Collective Bargaining Agreement, Exhibit #1). The parties began bargaining for Fiscal Year 1987-88 in a timely fashion pursuant to the FPAA. Thereafter, meetings were scheduled, proposals exchanged, and the parties began bargaining.

4. The parties met and conferred for purposes of bargaining nine times between May 7, 1987 and August 20, 1987 without reaching agreement. Impasse was declared on August 20, 1987. (No issue of "surface bargaining" has been raised herein with respect to this round of bargaining.)

5. Interest arbitration was invoked, and an individual arbitrator was selected. The parties presented evidence at a hearing held before the panel on September 2, 1987. Pre- and post-hearing briefs were submitted. (See Exhibit "A",

City Pre-hearing brief; Exhibit "B", City Post-hearing brief; and "C", Union Brief.)

6. An opinion and award was issued on September 30, 1987 (clarified October 26, 1987) attached hereto as Exhibits "D", and "E".

7. At a City Council meeting of November 2, 1987, the City of Broken Arrow rejected the arbitrator's recommendation.

8. On November 4, 1987, the City notified the Union of its intention to implement certain of its proposals which were submitted at arbitration. (See Exhibit "F") Specifically, the City did implement the following measures which represented changes from the FY 1986-87 CBA:

- (a) Article XVII, Longevity. Longevity pay was "frozen".
- (b) Article XXVII, Compensation. Wages and movement through the pay plan were frozen.
- (c) Elimination of Coffee and Tea Benefits.
- (d) Article XX, Dues Deduction. Immediate imposition of three percent surcharge to Union to administer dues deduction.

No other changes were effected. The changes made were within the scope of, and did not exceed, the proposals actually made by the City during the bargaining process.

9. The parties continued to meet and confer on a CBA for Fiscal Year 1987-88 subsequent to November 4, 1987, but reached no agreement.

10. On or about the first week of January, 1988, the Union requested a second interest arbitration panel with respect to the unresolved issues. This request was rejected by the City on or about January 5, 1988. (See letters of Lynn Paul Mattson and Russell Gale, attached hereto as Exhibits "G" and "H", respectively.)

11. On or about February 22, 1988, the Union filed the instant Public Employees Relations Board charges #00168 and #00169.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this dispute pursuant to § 51-104b and 75 O.S. Supp. 1988, §§ 309 et seq.

2. The four unilateral changes which the City made from the terms of the Fiscal Year 1986-87 CBA involved mandatory subjects of bargaining.

3. The City's unilateral implementation of its previous bargaining proposals, only two (2) days after rejecting the impasse arbitrator's recommendations, did not exhaust its duty to bargain in good faith as required by §§ 51-102(6a)(1) and (5). The City's actions were also violative of §§ 51-105 and 51-108, which require a resumption of good faith bargaining upon the rejection of an impasse

arbitration report and a continuation of existing contract terms pending agreement on a successor contract.

4. The Board is unable, on the facts submitted to determine whether the City's rejection of a request for a second impasse arbitration violated the FPAA and therefore finds that no ULP occurred.

OPINION

Introduction

In this case the City has asked the Board, in effect, to identify the point in time after which a municipal employer has exhausted its statutory duty to bargain in good faith and may lawfully impose contract terms on its uniformed unions. Conversely, the Union argues that Evergreen is theoretically of infinite duration and always prohibits the unilateral imposition of contract terms by a City.

It is not to be doubted that the Evergreen Clause presents a wide array of issues which are simultaneously interesting and perplexing. The truth of this assertion is amply supported by the thoughtful, provocative, and helpful brief filed by the parties. While it is tempting to offer a comprehensive view of all possible Evergreen-related problems, the Board's primary obligation as an adjudicative body is to decide the case actually presented by the stipulated facts rather than to speculate upon the more abstract questions implicit in Evergreen. See, In re:

Fletcher's Estate, 308 P.2d, 304, 309 (Okl. 1957); Marquette v. Marquette, 686 P.2d 990, 995 (Okla. App. 1984).

CONSTRUCTION OF EVERGREEN

The Board is asked to construe the obligations imposed by Evergreen. The rules of statutory construction most applicable to this inquiry appear to be as follows: Unless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of a statute is complete once the reviewing body find that the terms of the statute are unambiguous. Burlington Northern v. Oklahoma Tax Commission, 481 U.S. 454, 95 L.Ed.2d 404 (1987). The Courts are bound by the plain language of a statute. State v. Sims, 690 P.2d 1052 (Okl. 1984). Where the language of a statute is plain and unambiguous, there is no room for construction and no justification exists for interpretive devices to fabricate a different meaning. Anschutz Corp. v. Sanders, 734 P.2d 1290, (Okl. 1987). It is also true, however, that a literal meaning will not be applied if to do so would lead to an absurd result. Gilbert Central Corp. v. State, 716 P.2d 654, 658 (Okl. 1986).

Adjudicative bodies are required to adopt a construction of statutes which upholds the constitutionality of a statute. Idem. This last principle accords with the strong presumption of constitutionality afforded legislative

enactments. See, e.g., Oklahoma Water Resources Board, 679 P.2d 1296, 1300 (Okla. 1984).

Section 51-105 of the FPAA describes the duration of agreements between cities and municipal unions:

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 obligations 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.

[Emphasis added.]

The Act provides that if the parties are unable to reach agreement on a CBA a tripartite impasse arbitration panel may be convened (§§ 51-106 and 51-107) to evaluate the bargaining positions of the parties in the light of specific statutory criteria (§ 51-109). Section 51-108 describes the rights and

duties of the employer upon issuance of the arbitration report, reading in pertinent part as follows:

The corporate authorities are authorized, but not required, to adopt the majority opinion of the arbitrators and if adopted the agreement shall be binding upon the bargaining agent and the corporate authorities. Provided, however, if the majority opinion of the arbitrators is not adopted, the corporate authorities shall be required to resume the collective bargaining process as provided in Section 51-105 of this title.

[Emphasis added.] The literal meaning of the emphasized language in § 51-108, when read together with the final clause of § 51-105 is that current CBA's do not expire until successor agreements are in place: in short, Evergreen. It is hardly possible for the Board to find that Evergreen is ambiguous.

Does the literal reading of Evergreen utilized by the Board lead to absurd results? While it is inappropriate for the Board to express its views as to either the wisdom or the ultimate reach of Evergreen, suffice it to say that under the facts of this case, the Constitutionally protected prerogatives of the City are adequately accommodated by the FPAA. The Union cannot impose its contract terms on the City. Only the City is permitted to accept the terms of a favorable impasse arbitration report. Section 51-108. The City's failure to obtain a favorable recommendation from the impasse panel cannot serve as a basis for the Board to rewrite the FPAA. Given the structure of the FPAA it is the

City, not the Union, that should be most interested in follow-up interest arbitration, since the FPAA permits only the City to impose the results of the arbitration report on its unions.

The stipulated facts neither state nor imply that the Union failed to meet and confer in good faith following the City's rejection of the impasse panel report. Unions hoping to perpetuate favorable contract terms under Evergreen by refusing to bargain with municipal employers risk incurring ULP liability. Section 51-102(6b)(3). ULP liability also arises, for both sides, when "hard bargaining" degenerates into "surface bargaining." See, FOP Lodge 161 v. City of Bethany, PERB Case No. 00137-P.

The bargaining scheme fashioned by the Legislature is best read as promoting collective bargaining: that is, the establishment of the terms of the employment relationship in face-to-face meetings between the parties. Strikes, lockouts, and other forms of self-help are prohibited. Semi-advisory impasse arbitration is provided when the parties cannot agree. Lapses in the coverage of collective bargaining agreements are to be avoided. The problems of bargaining are to be resolved by more, and more effective, bargaining. This bargaining regime may be somewhat naive in its hope that requiring more bargaining will produce agreements, but the Board cannot say it is so absurd that

the mandates of the FPAA must be rewritten to accommodate this case.

Is the Board's reading of Evergreen one which renders it unconstitutional? Is the Board's reading of Evergreen one which renders it unconstitutional? In addressing this question the Board must be mindful that it almost certainly has no authority to declare Evergreen unconstitutional. The adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. Johnson v. Robison, 415 U.S. 361, 368, 39 L.Ed.2d 389, 398 (1974). An administrative agency is not the appropriate forum for determining whether its governing statute is constitutional. Robinson v. United States, 718 F.2d 336, 338 (10th Cir. 1983), citing Califano v. Sanders, 430 U.S. 99, 109, 51 L.Ed.2d 192, 201 (1977). Having said that, the Board nonetheless may venture to conclude that the City's "home rule" prerogatives under the Oklahoma Constitution, Art. 18, § 3 and Art. 10, § 20 are not impermissibly impaired, because the balance of bargaining power still tips decisively in the City's favor. Likewise, Art. 10, § 26 is not violated by this reading of Evergreen because an obligation imposed upon a county or municipality by an act of the Legislature does not come within the limitations of this constitutional provisions. See, Board of County Commissioners of Lincoln County v. Oklahoma Public

Employees Retirement System, 405 P.2d 68, 69 (Okl. 1965); Bd. of County Comm. v. Mullins, 217 P.2d 835, 842 (Okl. 1950).

PRIOR DECISIONS OF THE BOARD

Both parties support their arguments by reference to the Board's prior decision in FOP Lodge 93 and IAFF Local 176 v. City of Tulsa, PERB Case No. 00126 (hereafter "Tulsa"). Although judicial principles of stare decisis do not apply to administrative adjudications, consistency and predictability in its decisions are important to the Board. In the Tulsa case, the City argued that because Evergreen ran afoul of several provisions of the Oklahoma Constitution, its unilateral suspension of merit-type pay increases at the end of the designated contract term did not constitute a ULP. The Board ruled that Evergreen aside, the unilateral changes implemented by the City violated the duty to bargain in good faith pursuant to § 51-102(6a)(5). The Board thus avoided the City's constitutional challenges to Evergreen by rooting its decision in the duty to bargain in good faith, citing also to § 51-102(5) which defines the term "Collective Bargaining."

The Board's statement that "[u]nder Oklahoma law the duty to bargain in good faith extends through the impasse procedure", quoted by the City, was predicated squarely on § 51-102(6a), not on Evergreen, See Tulsa, Conclusion of Law No. 8, although the Board indicated that the same result

would have obtained under Evergreen. See Tulsa, Conclusions of Law No. 9.

On appeal, the PERB's Findings of Fact, Conclusions of Law, and Opinion were reviewed in a decision issued by Judge Boudreau in City of Tulsa v. PERB, Case No. CJ-86-7300, in Tulsa County District Court. Judge Boudreau affirmed the Board's non-Evergreen analysis but ruled that "[t]hose portions of the [Board's] Opinion purporting to construe the Evergreen Clause are extraneous, and are overruled and stricken." (Paragraph 18 of the Court's Final Order.) This case is now pending on appeal before the Oklahoma Supreme Court. In any event, it should be clear that the PERB's Tulsa decision does not compel a particular result in this case.

SUCCESSIVE ARBITRATIONS

The Board is asked to decide whether the City's failure to participate in a second impasse arbitration panel breached its duty to bargain in good faith. The facts stipulated to by the parties do not provide an adequate basis for the Board to find an additional violation of § 51-102(6a)(5). The few facts provided the Board do not indicate the scope or character of the bargaining in November and December of 1987, following the City's unilateral implementation of certain terms of employment. Although the Board is told that agreement was not reached (see Finding No. 9) it is not even clear that the parties were at impasse.

The Board should not rule out the possibility that § 51-102(6a)(5) may require either party to participate in additional dispute resolution procedures, including a subsequent impasse arbitration panel. Such a duty does not, however, arise in a vacuum. As the City has indicated in its brief, successive rapid-fire arbitrations could be both futile and burdensome. Therefore, the Board should have a much more detailed factual predicate for evaluating that duty than that provided in this case. Additionally, the City's actions with respect to the unilateral change issue and their possible impact on a second arbitration suggest that this is not the case in which to establish a rule of decision on this issue. The Board concludes that the facts presented do not support a finding that the City committed a ULP by declining the Union's request, in January, 1988, for a second arbitration.

Issued this ____ day of April, 1989.


CHAIRMAN, PUBLIC EMPLOYEES'
RELATIONS BOARD

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CEASE AND DESIST ORDER

The Board, having found that the unilateral changes by the City of Broken Arrow in mandatory terms and conditions of bargaining violate §§ 51-102(6a)(1), 51-102(6a)(5), 51-105, and 51-108, hereby orders the City of Broken Arrow, from and after the date of this Order, to cease and desist from further implementation of the provisions identified in Finding No. 9.

Both parties are ordered to resume bargaining in good faith to resolve those issues and to report to the Board, pursuant to 51-104b(c), not later than May 31, 1989 as to the extent to which it has complied with this Order.

Issued this ____ day of April, 1989.



CHAIRMAN, PUBLIC EMPLOYEES'
RELATIONS BOARD