

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

International Association)	
of Firefighters, AFL/CIO/CLC)	
Local No. 2565,)	
)	
Complainant,)	
)	
vs.)	Case No. 000154
)	
City of Cushing, Oklahoma,)	
)	
Respondent.)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND OPINION

This matter came on for hearing before the Public Employees Relations Board (PERB or The Board) on December 1, 1987, on the Complainant's unfair labor practice (ULP) charge. The charging party appeared by and through its attorney, James R. Moore, and certain of its officers; the Respondent appeared by and through its attorney Stephen L. Andrew. The Board received documentary and testimonial evidence; the Board also solicited and received post hearing submissions (Proposed Findings of Fact, Conclusions of Law and supporting briefs) from both parties.

The Board is required by 75 O.S. 1981, § 312, to rule individually on Findings of Fact submitted by the parties. The submittal of the Complainant is treated as follows:

1. Proposed Findings 1-8, 12, 13, 15, 17 have been substantially adopted by the Board.

2. Proposed Findings 9, 10, 11, 14 and 16 have been accepted in part and rejected in part by the Board as is reflected in the Findings of Fact set out herein below.

3. Proposed Finding 18 is rejected by the Board. Because the Respondent City did not submit Proposed Findings of Fact, the PERB need make no comparable rulings; the City did however include a "Statement of Facts" in its brief. The "Statement of Facts" cannot be addressed individually because the asserted facts are not asserted individually. Such assertions, when material and when at odds with the assertions of the Complainant will be addressed in the body of the opinion.

FINDINGS OF FACT

1. The City of Cushing is, and was at all pertinent times, a municipal corporation, duly organized and existing under the laws of the State of Oklahoma.

2. International Association of Firefighters, Local No. 2565 (Union) is and was at all pertinent times the duly certified and acting labor representative and bargaining agent for all Cushing firefighters except probationary employees, the Fire Chief, and the Chief's designated administrative assistant.

3. Although the parties engaged in collective bargaining each year since fiscal year (FY) 1981-1982, there

have only been two Collective Bargaining Agreements executed by the parties; for FY 1981-82 and for FY 1982-83. (Tr. p. 15)

4. Since the expiration of the written FY 1982-83 Collective Bargaining Agreement on June 30, 1983, the parties have engaged in bargaining each fiscal year to the present, but no written agreement has been reached since that date. (Tr. p. 15)

5. Bargaining for FY 1983-84 resulted in impasse and resort to statutory impasse resolution arbitration. The City rejected the recommendations of the impasse arbitration panel and refused to bargain any further for that fiscal year. (Tr. pp. 16-17)

6. Bargaining for FY 1984-85 resulted in an agreement by both parties on all issues. The Union ratified the agreement by a vote of its members. The City Manager, however, refused to present the agreement to the City Council for its ratification. As a result of the Manager's refusal to submit the matter to the Council, no written agreement was ever executed for FY 1984-85. (Tr. pp. 17-19, and pp. 56-59). The Complainant is not asserting that the refusal to present the agreement to the city council constitutes a ULP. (Tr. p. 69).

7. When Union President Paul Bell attempted to discuss the 1984-85 agreement's placement on the Council agenda with City Council members, he received a notice from the City

Attorney, which was placed in his city personnel file, recommending that he be terminated for his actions in attempting to get the matter before the City Council. (Tr. pp. 60-61)

8. President Bell was also advised by the Fire Chief that he should either not attend City Council meetings or not speak during meetings if he did attend. As a result, Bell did not attend any more City Council meetings. (Tr. pp. 58-62). The City Council did not thereafter consider the 1984-85 tentative agreement for the FY 1984-85 collective bargaining agreement.

9. The FY 1984-85 tentative agreement had provided for a seven percent increase in wages for all firefighters (Tr. p. 21).

10. Subsequently, the City ultimately gave the firefighters a seven percent increase in wages, retroactive to the beginning of FY 1984-85 (Tr. p. 62).

11. The parties did not proceed to statutory impasse arbitration when they were unable to agree on the terms of the FY 1985-86 agreement (Tr. pp. 22-23).

12. Bargaining for FY 1986-87 resulted in no agreement. The City refused to bargain implementation of FLSA overtime standards. (See Finding of Fact No. 13, below). During the fiscal year, the City unilaterally increased firefighter's base wages by \$30.00 per month without the benefit of

bargaining or the adoption of a collective bargaining agreement (Tr. pp.,. 24, 63-64).

13. Bargaining for FY 1987-88 resulted in impasse after this Board's Order in Case No. 00115, ordering the City to cease and desist from refusing to bargain in good faith on the length of the work period, overtime work, and comp time.

14. Since June 30, 1983, the parties have operated, in part, under the terms of the FY 1982-83 Collective Bargaining Agreement (Tr. pp. 33, 73).

15. Three grievances were filed by the union; one on October 1, 1986 dealing with emergency leave; one filed on February 6, 1986 concerning the reclassification of a firefighter for failure to pass an EMT (emergency medical technician) test and the third filed on April 28, 1986 concerned unilateral changes in overtime by the City (Union Ex. 2, 3, 4).

16. The grievances were processed by the City through the contractual grievance procedure to the last step in the process, arbitration. At that point the City denied the grievance alleging no Collective Bargaining Agreement existed and refused to discuss them further (Tr. pp. 30, 32).

17. The Fire Chief made various comments to members of the union including apparent threats for filing grievances and advising members that there would be no new equipment, furniture or carpets in the fire station as long as the union had actions pending before this Board (Tr. pp. 34-37, 64).

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this dispute pursuant to 11 O.S. Supp. 1986, § 51-1046.

2. In an administrative proceeding before the PERB, the complainant has the burden of persuasion by a preponderance of the evidence as to the factual issues raised by its ULP charges. See e.g., Prince Manufacturing Co. v. United States, 437 F.Supp. 1041 (D.C. Ill. 1977). In this case, the complainant has failed to prove its charges of overall bad faith in bargaining or implied agreement to process grievances.

OPINION

In its initial Unfair Labor Practice (ULP) petition, complainant alleges two ULP's as follows:

1. That the Respondent refused to discuss three grievances pursuant to the procedure set out in the last collective bargaining agreement executed by the parties, and

2. That over a period of years, the City has failed to bargain in good faith, preventing the execution of a collective agreement.

The Board will first examine the charge that the City has refused to bargain in good faith. In an administrative proceeding before the PERB, the charging party has the burden of persuasion as to the factual issues raised in its ULP charge. III, Q, Rules of the PERB. See also, Prince

Manufacturing Co. v. United States, 437 F. Supp. 1041 (D.C. Ill. 1977). Gourley v. Board of Trustees of the South Dakota Retirement Systems, 289 N.W. 2d 251 (S.D. 1980).

The FPAA requires the parties to bargain in good faith with the sincere intent to reach a collective bargaining agreement. 11 O.S.1981, § 51-102(6a)(5). Stone v. Johnson, 690 P.2d 459 (Okla. 1984). When considering charges of bad faith bargaining, the Board will not normally sit in judgment of the substantive terms of the parties collective bargaining proposals; NLRB v. American National Insurance, 343 U.S. 395, 404 (1952). However, evidence of the proposals brought to the table may indicate bad faith in that the proposals are so unusually harsh and unreasonable as to be unworkable. NLRB v. A-1 Kingsize Sandwiches, Inc., 732 F.2d 872, (11th Cir. 1984). The Board notes that there is no evidence in the record indicating that the City has brought unreasonable proposals to the table or engaged in surface bargaining.

The Complainant places great emphasis on the fact that no agreement has been entered into since the 1982-1983 collective agreement. The mere failure to agree cannot be the basis of an unfair labor practice as to either party. Like most comparable collective bargaining statutes, the FPAA does not compel the parties to make concession or agreement. 11 O.S. 1981, § 51-102(5).

The collective bargaining history between the parties hereto reveals that in FY 81-82 and FY 82-83 the parties

operated with the benefit of a collective agreement. In FY 83-84 the parties were unable to agree on the terms of an agreement and went to impasse arbitration. The arbitrator's decision was rejected by the City. In FY 84-85 the parties reached a tentative agreement but the City Manager refused to present the agreement to the City Council. In FY 85-86 and FY 86-87 the parties were again unable to reach an agreement but no impasse was declared. Impasse has been declared for FY 87-88. This negotiating history, although troubling to the Board in its lack of success does not, standing alone, demonstrate a refusal to bargain in good faith.

The Board has before it several instances noted by the charging parties in support of their claim of bad faith. First, there is the claim that the city manager refused to present the 1984-85 agreement to the city council. This action clearly constitutes a refusal to bargain in good faith in contravention of the purposes of the FPAA. Refusal to submit an agreement after both parties have entered into negotiations and agreed to terms constitutes a serious breach of the statutory duties imposed upon the parties by the FPAA. However, this act by the Respondent is not alleged to constitute a separate ULP and appears moot for the purpose of finding a separate ULP in that the fiscal year in question is long past. Such an act, if not moot, or a continuous pattern of similar acts, would be sufficient to establish bad faith bargaining on the part of the Respondent.

Secondly, the charging party has alleged that certain statements attributed to the Fire Chief had the effect of intimidating union in the exercise of their rights. The type of conduct which constitutes coercion under § 51-102(6a)(1) does not present an issue of first impression for the PERB. In FOP Lodge No. 163 v. City of Mustang, Case No. 00136, the PERB held as follows:

. . . 11 O.S.1986, § 51-102 (6a)(1) defining interference, intimidation and coercion as an unfair labor practice tracks closely the language of 29 U.S.C.S. § 158 (a)(1).

Under the National Labor Relations Act in particular 29 U.S.C.S. § 158(a)(1), threats and coercive comments which reasonably tend to interfere with or restrain employees in the exercise of their rights under the Act constitute an unfair labor practice. Hanes Hoisery Inc., 219 NLRB 338 (175). The test is not whether the attempt to intimidate, interfere or coerce succeeded or failed, but that the conduct was such that it tends to interfere with the free exercise of those rights; DeQueen General Hospital v. NLRB, 744 F.2d 6712, 614 (8th Cir. 1984).

Concerning the state of mind of the person who uttered the threat, courts have variously held that the state of mind is irrelevant, NLRB v. Litho Press of San Antonio, 512 F.2d 73, 76 (5th Cir. 1775); that an anti-union motive is a relevant consideration Tri-State Truck Services, Inc., v. NLRB, 616 F.2d 65, 69 (3rd Cir. 1980) and finally, that some conduct may be so inherently destructive of rights under the NLRA that no proof of anti-union motivation is required Vesuvius Crucible Co., v. NLRB, 668 F.2d 162, 169 (3rd Cir. 1983).

The Board is of the opinion the appropriate basis for decision in this case is that the state of mind of the person uttering the threat is relevant; on occasion however, the threats may be so inherently destructive that no proof of motivation is required. The keystone of establishing an unfair labor practice is that the threat tends to interfere with rights protected under the Act. The Board is of the further opinion that the success or failure of the threats to actually intimidate or coerce is not a prerequisite to establishing an unfair labor practice.

The testimony of the witnesses for the charging parties indicates that the comments of the Fire Chief if raised as a ULP charge, may have been violative of § 51-102(6a)(1).

The charging party also presents evidence that the respondent twice granted wage increases without first bargaining to impasse. It is a basic tenet of the FPAA that unilateral changes in conditions of employment are mandatory topics of bargaining. § 51-102 (6A)(5).

It is important to note that none of the actions of the City were alleged to constitute a separate ULP in the original petition on file herein. Rather, it is charged in the original petition merely that the City has refused to bargain in good faith.

It should also be noted that the Complainant raised the following issues as possible ULP's for the first time in its Response to Respondent's Motion for Summary Judgment, to wit:

- (1) failure to present the FY 84-85 tentative agreement to

the city counsel for agreement; (2) unilateral increase in wages, and (3) refusal to resume negotiations.

The Complainant raised the following issues for the first time at the hearing: (1) that a member of the union was threatened with discharge for contacting members of the council; (2) that the fire chief attempted to intimidate members of the union.

The Board does not wish to burden any party with overly stringent procedural requirements. However, when notions of fundamental fairness and due process itself are implicated, the Board will insist that proceedings before the Board comport with fundamental fairness.

As a necessary prerequisite to the finding of a ULP, the Complainant must allege sufficient facts to support the charge in its complaint and put the charge at issue in the hearing. Baker Mine Services, Inc., d/b/a Coppinger Machinery Services, Inc., 122 L.R.R.M. 1153 (1986). Further, the Board will not find a separate ULP based upon evidence introduced and received for the purpose of proving long term bad faith bargaining and not for other purposes, See, United Artists Theatre Circuit, Inc., 121 L.R.R.M. 1283 (1985), unless the complaint is amended prior to or at the hearing and the opposing party has an opportunity to defend the charge as a separate ULP. See, San Antonio Portland Cement Co., 121 L.R.R.M. 1234 (1985).

The defense of a series of actions alleged to constitute a refusal to bargain in good faith may, and in all probability is, quite different than the defense of each action as a separate ULP. The respondent may consider the individual actions, although of questionable defensibility, to be as a group more easily defended in the face of a charge of bad faith bargaining. The respondent may choose to defend on a broader front, i.e., that even if true the acts do not constitute bad faith bargaining, rather than a more narrow defense of separate ULP's presenting opposing testimony and detailed explanations of respondent's actions. The Board therefore is unable to find separate ULP's in this case.

However, bargaining does not take place in a vacuum and if the evidence shows a continuous and frequent pattern of behavior calculated to frustrate the purposes and goals of the FPAA such behavior may be considered by the Board to constitute refusal to bargain in good faith as alleged by the complainant.

The Board is of the opinion that the respondent's actions on the record demonstrate profound insensitivity to the basic purpose and philosophy of the FPAA. Whether these actions, which may constitute individual unfair labor practices, demonstrate an unwillingness to bargain in good faith is far more troubling for the Board. The Board is of the opinion that the actions of the Respondent have seriously compromised the negotiating environment between the parties.

The Board reminds the Respondent that their employees have been denied the economic weapon of the strike by statute, in return for which the employer is required to exercise the utmost good faith. When an employer commits acts which appear to constitute ULP's, the employee is powerless, save by an appeal to this Board, for protection. The Board finds however, that although the facts strongly indicate separate ULP's, such facts do not sufficiently support the allegations of a claim of overall bad faith bargaining over the years. Complainant has failed to establish a persuasive nexus between the acts of the respondent and poisoning of the bargaining environment or refusal to bargain in good faith. Because these acts are either moot or not addressed as separate ULPs the Board is powerless to fashion meaningful relief for the complainant.

The complainant also requests that this Board find that there existed an implied agreement between the parties extending the terms of the 1982-83 agreement, in particular those provisions relating to processing grievances. The Board is not persuaded by the facts in the record that any implied agreement existed between the parties and need not address in detail the legal significance of such an agreement.

The Board is persuaded that those provisions of 11 O.S. Supp. 1985, § 51-111 relating to grievance arbitration apply to agreements negotiated pursuant to the FPAA. Agreements

expiring prior to the effective date of the Evergreen provisions of 11 O.S. Supp. 1985, § 51-111 are not subject to its grievance arbitration provisions.

Therefore, the Board finds that those allegations regarding the city's failure to arbitrate grievances are without merit and are dismissed.

Dated this 20th day of May, 1988.

S/ Nelson Keller
CHAIRMAN

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