

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, AF of L,)
CIO/CLC, STATE OF OKLAHOMA,)
LOCAL 2171,)

Complainant,)

vs.)

CITY OF DEL CITY, OKLAHOMA,)
a Municipal Corporation,)

Respondent.)

and)

FRATERNAL ORDER OF POLICE,)
LODGE NO. 114,)

Complainant,)

vs.)

CITY OF DEL CITY, OKLAHOMA,)
a Municipal Corporation,)

Respondent.)

Case No. 00152
Cons. with No. 00150

ORDER

Now on this 22 day of December, 1987, comes on for decision Respondent's alternative motions to abstain, defer to arbitration, or dismiss. The Board having considered the briefs of counsel filed herein, finds as follows:

1. That Respondent's first proposition raising the bar of res judicata is without merit. The Board is of the opinion that res judicata may act as a bar only after a judgment has been entered, De Watterville v. Simms, 44 Okl. 708, 146 P.224 (Okl. 1915), and is a final judgment, Fleming Bldg. Co. Inc. v. Northeastern Oklahoma Bldg. & Construction

Trades Council, 532 F.2d 162 (10th Cir. 1976). In addition, res judicata may act as a bar only when all four prerequisites therefor are met (1) identity in the things sued for or subject matter of the suit (2) identity of the cause of action (3) identity of parties in the action and (4) identity of the capacity in the person for or against whom the claim is made, Epperson v. Halliburton, 434 P.2d 877 (Okla. 1967).

In this action, the Board has no pleading or evidentiary exhibit before it demonstrating that a judgment has been duly entered in the District Court of Oklahoma County. The Board also does not have any pleading or argument before it indicating that the decision of the District Court constitutes a final judgment or, on the other hand, whether it was merely a denial of Respondent's request for temporary relief. In the latter instance the doctrine of res judicata is not properly invoked. Montgomery v. Moore, 292 P.2d 1040 (Okla. 1956).

Because the Board considers these preliminary requirements of res judicata to be unsatisfied, this order will not discuss in detail the satisfaction or failure to satisfy of the four prerequisites of Epperson v. Halliburton, supra. The Board notes, however, that the complaints are alleging an unfair labor practice which was not at issue before the district court and further that the Fraternal Order of Police was not a party to the suit in the district court.

Therefore, the Board concludes that the defense of res judicata is not available to the Respondents in this action.

2. Respondents also request that the Board defer to arbitration in this matter. The Board has before it Complainants' supplemental brief of November 20, 1987, in which Complainant alleges that Respondents, while asking this Board to defer to arbitration, have filed in the District Court of Oklahoma City, Oklahoma (Case Nos. CJ-87-7881, 7883) an action seeking to enjoin the Complainants from enforcing the arbitration and bargaining provisions of the collective agreements. In fact, on November 16, 1987, the district court entered its Temporary Order restraining Complainant Fraternal Order of Police, Lodge No. 114, from carrying out any arbitration. The Board is of the opinion that deferral to arbitration would be improper where the Respondent is seeking injunctive relief to prevent arbitration.

3. In addition, the Board is not persuaded that Respondent's Proposition II compels dismissal of this action. Although the points raised therein by counsel are well presented, the Board considers these arguments to be premature and require further development of the facts surrounding this controversy prior to applying the legal arguments presented by Respondents.

Therefore, Respondents Motion to Abstain, Defer to Arbitration or Dismiss is denied. The Board will, however, reconsider those arguments presented in Proposition II of Respondent's brief if reasserted by Respondent upon a motion in the nature of summary judgment or as a proposed conclusion of law upon hearing of this matter.

Dated this 9.2 day of December, 1987.



CHAIRMAN

dp:1021

PUBLIC EMPLOYEES RELATIONS BOARD

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INTERNATIONAL ASSOCIATION OF)
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STATE OF OKLAHOMA, LOCAL 2171,)

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ADOPTION OF PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Public Employees Relations Board ("PERB"), having reviewed the record herein, as well as the Proposed Findings of Fact and Conclusions of Law submitted by its duly appointed Hearing Officer, finds that the same should be and are hereby affirmed and adopted as the PERB's Final Order.

March 10, 1988
DATE


NELSON KELLER, Chairman
Public Employees Relations
Board

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PROPOSED FINDING OF FACTS AND
CONCLUSIONS OF LAW

This matter came on for hearing, before the duly appointed undersigned hearing officer, on the 3rd day of March, 1988, on the City of Del City's Application and Petition for Abstention of Public Employees Relations Board, etc. (hereafter "Application"), requesting the Public Employees Relations Board ("PERB" or "the Board") to refrain from conducting a hearing on the merits of the Complainants' above-styled unfair labor practice ("ULP") charges. The Complainants appeared by and through their attorney Richard

A. Mildren; the City, by and through its attorneys, Ted N. Pool and Sherry Blankenship.

The PERB also has before it the Complainants' Motion for Summary Judgment, and a Response thereto filed by the City. The facts material to a resolution of this dispute, and the evidentiary materials attached to the Complainants' Motion, which are not seriously controverted (see, the City's response to the Complainants' Motion for Summary Judgment; first sentence on page 2), make it clear that a full evidentiary hearing is not necessary prior to the entry of a Final Order by the PERB.

PROPOSED FINDINGS OF FACTS

1. The International Association of Firefighters, AFL CIO/CLC, local 2171 (hereinafter "firefighters" or, together with the FOP, "the Unions") is, and was at all times pertinent hereto, the exclusive bargaining representative for certain employees of the Del City Fire Department, City of Del City.

2. The Fraternal Order of Police, Lodge No. 114 (hereinafter "FOP" or, together with the Firefighters, "the Unions") is, and was at all time pertinent hereto, the exclusive bargaining representative for certain employees of the Del City Police Department, City of Del City.

3. The City of Del City is a municipal corporation which operates under a Charter, pursuant to the laws of the State of Oklahoma.

4. Both Unions had negotiated collective bargaining agreements with the City for Fiscal Year 1986-1987. Both Unions agreed, at the request of the City, to certain wage reductions, merit pay plan freezes, and suspension of longevity pay benefits. These proposals, accepted by the Unions, were collectively referred to by the City as its "survival strategy." It was agreed between the parties that the "survival strategy" concessions would terminate at the end of the Fiscal Year 1986-1987 Collective Bargaining Agreement. (See, the Union's Motion for Summary Judgment, Paragraphs 4-7; see also, City's Application, Paragraph 4).

5. The City has adopted, and implemented, a Fiscal Year 1987-1988 budget that incorporates and continues in full force and effect the "survival strategy" concessions described in Proposed Finding of Fact No. 4 above, notwithstanding that no meaningful collective bargaining had taken place between the City and the Unions on these issues prior to their adoption. (see, Gooch and May Affidavits.) (It appears that prior to its otherwise unilateral implementation of these proposals, the City held budget hearing at which Union members and other City employees were permitted to attend.)

6. The City's action in continuing the "survival strategy" into the Fiscal Year 1987-1988 occurred without meaningful collective bargaining and preceded actual impasse, either de facto or de jure, at the bargaining table.

7. On December 21, 1987, the Oklahoma District Court for Oklahoma County issued its Temporary Injunction in Case No. CJ-87-7883, enjoining the parties from submitting the "survival strategy" cluster of issues to impasse arbitration pursuant to 11 O.S. 1981, §§ 51-106 et seq., as amended. This ruling, by the Honorable Jack R. Parr, is presently on appeal to the Oklahoma Supreme Court in Supreme Court Case No. 70233.

8. On January 25, 1988, the Honorable Bryan Dixon, in Case No. CJ-87-7881, in the District Court for Oklahoma County, issued a Temporary Injunction enjoining the parties from submitting to grievance arbitration any claims by the Unions that the City's implementation of the "survival strategy" in Fiscal Year 1987-1988 violated the collective bargaining agreement between the City and the FOP. Judge Dixon's ruling in that case is presently on appeal to the Oklahoma Supreme Court in Supreme Court Case No. 70411.

9. On July 22, 1987, the Honorable David M. Cook, in Case No. CJ-87-7881, had declined to issue a temporary injunction prayed for by the firefighters seeking to enjoin

the implementation by the City of the "survival strategy". There was no appeal taken from that decision.

10. In none of the actions referred to in Proposed Findings of Fact No. 7-9 above was it litigated, nor did the Court rule on the question of, whether a ULP had been committed by the City.

PROPOSED CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and the subject matter of this dispute. 11 O.S. Supp. 1987, § 51-104b of the Fire and Police Arbitration Act ("FPAA"). Following recent Oklahoma Supreme Court pronouncements, the Board may utilize, where persuasive, applicable principles of federal labor law. See, Maule v. Independent School District No. 9, 714 P.2d 198, 201 (Okla. 1985) (construing the school employee collective bargaining statute, 70 O.S. Supp. 1987, §§ 509.1 et seq.); Stone v. Johnson, 690 P.2d 459, 461 (Okla. 1984) (construing the FPAA).

2. Wages, merit pay plans, and longevity pay benefits are issues pertaining to wages and are thus mandatory subjects of collective bargaining pursuant to 11 O.S. 1981, § 51-102(5). See also, NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

3. The implementation by the City of its proposals on the aforementioned mandatorily bargainable wage terms, without first bargaining on these terms with the Unions,

violates the City's duty to bargain in good faith, mandated by 11 O.S. 1981, §§ 51-102(5) and 51-102(6a)(5). See, e.g., NLRB v. Katz, 369 U.S. 736 (1962).

DISCUSSION

Although this case is portrayed by the Unions as a "unilateral change of the status quo" case (compare, City of Tulsa, PERB Case No. 00126), it is more properly characterized as a "failure to bargain" case. See, e.g., Green County, Decision No. 20308-B (Wisconsin ERC 1984), reprinted in Edwards, Clark, and Craver, Labor Relations in the Public Sector; Cases and Materials, The Michie Co., 1985. The Gooch and May Affidavits, uncontroverted by the City, make it clear that the City failed in its duty to bargain over the wage and longevity pay issues.

Paradoxically, it is the City that appear to benefit from the FPAA's "Evergreen Clause" which extends existing contract terms beyond the expiration date of a collective bargaining agreement until such time as a successor agreement is negotiated (See, 11 O.S. Supp. 1987, § 51-105). Conversely, the Unions argue that the "survival strategy" terms expired automatically at midnight on June 30, 1987. However, because the PERB finds that the City's refusal to bargain in good faith prior to June 30, 1987, is a ULP, and because the Temporary Injunctions referred to in Findings of Fact No. 7 and 8 preclude the issuance of a cease and desist

order, the PERB need not reach the issue of the possible application of the Evergreen Clause to this case.

The Unions' access to grievance and impasse arbitration, the primary statutory procedures for resolving labor disputes (§§ 51-111 and 51-106 through 51-110, respectively) have been foreclosed by the Temporary Injunctions referred to above. Because the utilization of these statutory arbitration procedures are part and parcel of the duty to bargain and discuss grievances in good faith (§ 51-102(6a)(5)), PERB is unable to fashion a meaningful and effective cease and desist order, and therefore should decline to do so.

Although the Temporary Injunctions issued by two separate Oklahoma district court judges have relieved the City of any duty to submit to arbitration on the disputed issues, there has been no ruling, binding on the PERB, as to whether the City's conduct constitutes a ULP. The Board is assured by counsel for both parties that this issue was not litigated in district court. This assurance is made plausible by the oft-stated principle that the jurisdiction of the district courts is not properly invoked until proceedings are completed in the administrative agency in which the Legislature has intended to create primary jurisdiction. See, e.g., Martin v. Harrah Independent School District, 543 P.2d 1370, 1372-74 (Okla. 1975); Hughes v. City of Woodward, 457 P.2d 787, 789-90 (Okla. 1969). Compare, 11

O.S. Supp. 1987, § 51-104b. Finally, the Proposed Conclusions of Law offered herein in no way conflict with the injunctive orders issued by Judge Dixon and by Judge Parr. The Proposed Findings of Fact and Conclusions of law merely observe that, well before the injunctive powers of the district court were invoked, the City has violated its statutory duty to bargain in good faith when it implemented the above-mentioned wage terms in a manner which avoided the collective bargaining process.

Respectfully submitted,



NED BASTOW, OBA #10026
HEARING OFFICER
ASSISTANT ATTORNEY GENERAL
CHIEF GENERAL COUNSEL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

LIAISON ATTORNEY TO THE
PUBLIC EMPLOYEES RELATIONS
BOARD

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