IN THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

LOCAL #2839, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO/CLC,	)	
Complainant,	)	
vs.	)	Case No.00125
THE CITY OF OKMULGEE, OKLAHOMA, A MUNICIPAL CORPORATION,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW

OPINION AND CEASE AND DESIST ORDER

This matter came on for hearing before the Public Employees Relations Board ("PERB" or "the Board") on November 6, 1986,on the charging party's unfair labor practice ("ULP) charges. The charging party appeared by and through its attorney, Mr.James Moore, and the Respondent appeared by and through its attorney, Mr. Jim Lindsey. The Board has received documentary and testimonial evidence and reviewed the pleadings and briefs filed herein.

Based upon the foregoing, the Board has reached certain findings of fact and conclusions of law as set out herein below. Because this is an issue of statewide concern the PERB has included a discussion of the relevant legal issues and rationale for its views.

FINDINGS OF FACT

When proposed Findings of Fact are solicited, the PERB is required to rule on these individually. 75 O.S. 1981, § 312.

The proposed Findings of Fact of the Charging Party are treated as follows:

1. The Complainant's proposed Findings of Fact numbered 1-8 are adopted by the Board.
2. Complainant's proposed Finding of Fact numbered 9 is adopted in part by the Board.
3. Complainant's proposed Findings of Fact numbered 10-14 are adopted by the Board.

Because the Respondent City did not submit Proposed Findings of Fact, the PERB need make no comparable rulings.

It should be noted that the post hearing letter and attachments thereto submitted by the Respondent is not properly before the Board, [75 O.S. § 309(e)(g)] and is not relevant to the issue of the occurrence of an unfair labor practice. Therefore, said letter and attachments thereto will not be considered by the Board.

Based upon the record before the Board and upon those rulings listed hereinabove, the Board finds as follows:

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

2. The International Association of Fire Fighters, Local 2839 is and was at all pertinent times the duly elected and acting labor representative and bargaining agent for all Okmulgee fire fighters except probationary employees, the fire chief and the chief's designated administrative assistant.

3. The parties have previously engaged in collective bargaining, most recently executing a contract for fiscal year 1984-85. (Tr. p. 13).

4. The 1984-85 agreement contained negotiated provisions for overtime at Article 15, Section 1. (joint exhibit).

5. The parties disagreed as to whether or not the terms of the 1984-85 collective bargaining agreement applied to the parties during fiscal year 1985-86.

6. On February 10, 1986, the Union gave notice to the City of its intent to negotiate a successor agreement for fiscal year 1986-87. (Tr. p. 50).

7. Prior to April 15, 1986, the City had in effect a Personnel Policies and Procedures Handbook which on page 17 stated as follows:

"WORKING HOURS"

> Hours of work shall be determined by the department head with 40 hours being a minimum and 56 hours being the maximum

normal work week for payroll calculations. (Tr. at pp. 79-80).

8. On April 15, 1986, without first consulting the Union or attempting to negotiate approval, the City posted a memorandum identified as Union Exhibit 2, unilaterally selecting a 27-day work period for purposes of determining overtime liability under 7 (k) of the F.L.S.A. That notice was signed by the City Manager and the Fire Chief. (Tr. p. 46).

9. Subsequent to the selection of the 27-day work period, the City refused to negotiate an alternative work period, instead maintaining it was the City's right to establish the work period. (Tr. p. 23).

10. During negotiations the Union attempted to negotiate an alternative to the 27-day work cycle selected by the City. That proposal was rejected by the City. (Union Exhibit 1, Union Exhibit 3, Tr. p. 45, 47).

11. During the last negotiating session on June 27, 1986, Mr. Paul Corley, personnel director for the City of Okmulgee and its chief spokesman during collective bargaining, advised the Union that the City would grant a 5% wage increase effective July 1,1986, to all fire fighters in the bargaining unit who were not members of the Union. (Tr. p. 25).

12. The City of Okmulgee in fact did grant 5% wage increases effective July 1, 1986, to all fire fighters in

the bargaining unit who were not members of Local 2839. (Tr. pp. 55-56).

13. The City, through its personnel director, admitted that payment of the wage increase on July 1, 1986, to non-union members of the bargaining unit was a practice which discriminated against Union members. (Tr. p. 75).

14. Neither party has declared impasse for purposes of triggering statutory impasse resolution remedies.

CONCLUSIONS OF LAW

1. The Public Employees Relations Board has jurisdiction over the parties in the subject matter of this labor dispute pursuant to 11 O.S.Supp. 1986, § 51-104b. (All statutory citations, unless otherwise noted, are to the Fire and Police Arbitration Act, the "FPAA," codified at 11 O.S.1981, §§ 51-101, et seq., as amended).

2. The Board finds that the City's action of granting a 5% wage increase to non-union members of the bargaining unit constituted an unfair labor practice pursuant to 11 O.S. § 51-102 (6a)(4).

3. The Board finds that issues involving overtime constitute mandatory topics of bargaining and require good faith bargaining and refusal to bargain constitutes an unfair labor practice pursuant to 11 O.S. § 51-102 (6a)(5).

OPINION

A. The first issue presented for resolution by this Board may be summarized as follows:

1. Does the city's act of granting 5% pay increases to non-union employees, to the exclusion of union members, constitute an unfair labor practice?

Under the provisions of 11 O.S. § 51-102(6) an unfair labor practice is defined in pertinent part as follows:

> 6. "Unfair labor practices" for the purposes of this article shall be deemed to include but not be limited to the following acts of conduct.
>
> 6a. Action by corporate authorities:
>
> (4) discharging or otherwise disciplining or discriminating against a police officer or firefighter because . . . of his election to be represented by the bargaining agent.

The city's action of granting pay raises to only non-union employees to the exclusion of union members clearly violates the provisions of 11 O.S. §51-102(6) listed hereinabove. These actions are on their face discriminatory as to union members and constitute an unfair labor practice. Radio Officers Union v. NLRB, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed.455 (1953). See also Howard Johnson Company and International Union of Operating Engineers, Local 68, AFL-CIO, 172 NLRB 763 (1968).

The Board is of the opinion that such discriminatory practices are inherently destructive of rights guaranteed by

the FPAA and do not require a specific showing of anti-union motivation. NLRB v. United Aircraft Corporation, 490 F.2d 1105 (2nd Cir. 1973).

The Board therefore finds that the actions of Respondents were violative of § 51-102(6a)(4) in that the action of the city discriminated against members of the union, constituting an unfair labor practice.

B. The second issue presented to the Board for determination is as follows:

> 1. Are adjustments to the work period mandatory topics of bargaining and if so, does a unilateral change of work period constitute an unfair labor practice?

Generally, changes in public employees' work schedules, hours and work periods are considered mandatory topics of bargaining. Wichita v. Unified School District 259, Sedgwick County, Kansas, 117 LRRM 3137 (Kan. Sup. Ct. 1983). San Mateo City School District v. Public Employment Relations Board, 111 LRRM 3050 (Calif. App. 1981); Orange County School Board v. Palowitchy, 109 LRRM 2137 (Fla. Dist. Ct. App. 1979). Under the FPAA [§ 51-102(5)], the selection of a particular work period that directly affects overtime and compensatory time constitutes a mandatory topic of bargaining. See also, NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962); Braswell v. Motor Freight Lines, 141

NLRB 1154 (1963) reaching similar conclusions under federal labor law.

In this case, the city unilaterally imposed a new 27-day work period pursuant to 29 U.S.C. § 207(7)(K) (Fair Labor Standards Act) (see Finding of Fact No. 8).

Despite the union's request to negotiate the issue, the city refused to bargain on the work period claiming it was entitled, pursuant to Section 207(7)(k) to unilaterally set the work period at 27 days.

As stated above, issues involving hours are mandatory topics of bargaining under the FCAA. The fact that Section 207(7)(k) allows the city to set a 27-day work period is merely a permissive statement that such a work period does not violate Section 207(a) and does not require the City to establish a particular work period or excuse the city from duties imposed by state statutes. The Board therefore finds that the city is not relieved of its obligation to bargain on issues directly related to hours by the provision of §207(k). See NLRB v. Boss Manufacturing Company, 118 F.2d 187(7thCir.-1941). See generally, Alley, Duvall and Kornreich, Local Governments and the Fair Labor Standards Act: The Impact of Garcia v. Santa and the 1985 FLSA Amendments, 5 Stetson L. Rev. 716, 791-793. (1986).

The Board is therefore persuaded that the changes in work period instituted by the city are mandatory subjects of bargaining pursuant to §51-102(5). The Board is also

persuaded that the city refused to bargain with the union on this mandatory topic of bargaining and that this refusal constituted an unfair labor practice as defined in 11 O.S. §51-102(6a)(5).

CEASE AND DESIST ORDER

The City of Okmulgee is hereby ordered, pursuant to 11 O.S.Supp.1986, § 51-1046(c)and consonant with the findings of fact, conclusions of law, and opinion entered herein, to cease and desist from the date of this order hence forward from issuing pay increases to non-union firefighters to the exclusion of union members and is further ordered to cease and desist from refusing to bargain on the issue of establishment of a pay period.

The city is further directed to report to the PERB, within thirty (30) days from the date of this Order, the steps it has taken to comply with this Order.

Signed this 24th day of December, 1987.

CHAIRMAN

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