PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

LOCAL 2566 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Complainant, v. CITY OF CUSHING, Respondent.	)	Case No. 00115

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND CEASE DESIST ORDER

This matter came on for hearing before the Public Employees Relations Board ("PERB" or the "Board") on September 4, 1986. This hearing completed proceedings begun, but suspended by agreement of the parties, on May 7, 1986. The Complainant, Local 2565, International Association of Firefighters, AFL-CIO/CLC ("Local 2565" or the "Union") appeared by and through certain of its officers and officials, and its spokesman, Mr. Tom Riddle. The Respondent, City of Cushing, Oklahoma ("City") did not appear. The Board, finding on the record that the City had adequate and proper notice of the hearing, proceeded to receive evidence on the Union's Complaint. Subsequent to the hearing, Mr. Stephen L. Andrew, newly engaged counsel for the City, entered his appearance. Both parties have made post-hearing written submissions to the Board which the Board has reviewed along with the evidentiary materials in the record.

ISSUES

The Union has alleged that the City implemented certain unilateral changes in the hours, overtime, and compensatory time employment conditions of its firefighters, in violation of its duty first to bargain in good faith with the Union pursuant to 11 O.S. 1981, § 51-102(6a)(5) (all statutory references herein are to Title 11 of the Oklahoma Statutes unless otherwise noted). It appears that the changes in working conditions imposed by the City were motivated by recent amendments to the Fair Labor Standards Act ("FLSA"), 29 U.S.C., §§ 201 et seq., brought about by Pub. L. 99-150, signed into law on November 13, 1985, and made effective on April 15, 1986.

The City, in its Post-hearing Brief, offers several reasons why the Union's Complaint is not well-founded:

> 1) The City believes in good faith that the Union does not represent a majority of the firefighters.
>
> 2) There is presently no collective bargaining agreement in effect covering overtime.
>
> 3) The parties are at impasse on the issue of implementation of FLSA standards.

FINDINGS OF FACT

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. Local 2565 is and was at all pertinent times, the duly elected and acting labor representative and bargaining agent for

all Cushing firefighters except probationary employees, the Fire Chief, and the Chief's designated aide.

3. As of the date of the hearing, only five of the City's eighteen firefighters were members of the Union.

4. There has been no assertion by the City, prior to the submission of its Post-hearing Brief, that the Union is not the appropriate and exclusive representative of the firefighters. There is no evidence that the City has declined to bargain with the Union based on a good faith doubt as to the Union's majority status.

5. The City has bargained with the Union as to wages, hours, and other terms and conditions of employment since 1982-83. Collective bargaining sessions between the City and the Union occurred in 1983, 1984, 1985 and as recently as May 14, 1986 and June 26, 1986.

6. A comprehensive collective bargaining agreement ("CBA") between the parties was negotiated and excuted for the 1982-83 fiscal year. The CBA, at Article II, section 3, provided as follows:

> "The term of this Agreement shall not succeed one year; provided, however, any such Agreement shall continue from year to year and be automatically extended for one year terms unless written notice of request for collective bargaining is give by either the employer or the Union at least thirty days before the anniversary date of such negotiated agreement; provided further, by mutual consent, this Agreement shall remain in full force and effect after June 30, so long as collective bargaining is in progress."

7. No comprehensive successor agreement to the 1982-83 CBA has ever been negotiated, although collective bargaining has occurred in each of the succeeding years.

8. The evidence is inconclusive as to whether the 1982-83 CBA was extended beyond its June 30, 1983 expiration date by mutual consent of the parties pursuant to Article II, section 3. Union officers testified as to their belief that the 1982-83 CBA has, in effect, been "rolled over" each succeeding fiscal year and is still in full force and effect. There was credible hearsay testimony that the City believes that there is no contract presently in existence. There is no written evidence before the Board indicating that the contract terms were extended beyond June 30, 1983.

9. Under the 1982-83 CBA, the standards for overtime pay were set out at Article XIX. The Union's uncontested evidence was that the City complied with the provisions of Article XIX from 1982-83 until approximately April, 1986, the effective date of the FLSA amendments.

10. The Union demanded bargaining over the structure and implementation of a new overtime, compensatory time plan. It is unclear from the record whether this dispute centers around the City's "7(k)" election of a work period, or whether it involves a "7(o)" imposition of a compensatory time, overtime provision. (Both references are to 29 U.S.C. § 207, as amended by P.L. 99-150). In short, the Union's evidence did not establish clearly the nature of the changes unilaterally imposed by the City.

11. The City has refused to negotiate with the Union as to the terms and implementation of a new overtime, compensatory time policy, contending that the issue is one of inherent management rights.

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and the subject matter of this labor dispute pursuant to § 51-104b.

2. The City's assertion that the Union does not represent a majority of the firefighters is not offered timely. This issue was first raised by the City in its Post-hearing Brief. Although a revised overtime, compensatory time plan was implemented by the City on or about April 15, 1986, the City continued to recognize and bargain with the Union in May and June of 1986. The City's presence at the bargaining table is inconsistent with its recent assertion of the Union's non-representative status.

3. The only basis for the City's assertion that the Union lacks majority support is that only five of eighteen bargaining unit members have joined the Union. This claim is rejected for two reasons. First, bargaining agent support is not necessarily reflected in Union membership. Nor does the Fire and Police Arbitration Act ("FPAA") require a showing of union membership to support a finding that a union is the exclusive representative. See, § 51-103. Therefore, the single fact of sub-majority union membership is not substantial and objective, it is not reasonable under the circumstances, and it is insufficient to overcome the continuing presumption of majority union support. See, Peoples

Gas System, Inc. v. N.L.R.B., 629 F.2d 35, 37 (D.C. Cir. 1980), a case cited with approval by the City.

The second reason for rejecting the City's claim is that, even assuming a reasonable basis for the City's doubt, an employer may not erode a union's majority through unfair labor practices and then justify its refusal to bargain on the ground that the union no longer represents a majority of bargaining unit members. However, because the PERB finds that the Union is still the recognized exclusive agent, it need not find conclusively a causal connection between the City's conduct in this matter and an apparently declining Union membership.

4. The Board declines to find that the 1982-83 CBA is still in full force and effect. First, and most important, the City's duty to bargain in good faith on mandatory subjects is not dependent on the present existence of a CBA; therefore such a finding is unnecessary to the Board's decision. The duty hinges, rather, on a properly certified bargaining agent's demand for bargaining and the mandatory nature of the terms or conditions sought to be bargained. The Board is also reluctant to bootstrap a contractual "evergreen" clause into a four-year contract extension when such a result is not necessary to support the conclusions reached by the PERB. Therefore the claims and arguments of the parties with respect to the alleged contract extensions are moot.

5. The PERB concludes that the overtime and compensatory time proposals are mandatory topics of bargaining under the FPAA pursuant to § 51-102(5) and 51-102(6a)(5). See also, NLRB v Katz,

369 U.S. 736 (1962); Braswell v. Motor Freight Lines, 141 N.L.R.B. 1154, 52 L.R.R.M. 1467 (1963), reaching similar conclusions under federal labor law. For cases involving the public sector, see, San Mateo City School District v. Public Employment Relations Board, 11 L.R.R.M. 3050 (Calif. App. 1981); Orange County School Board v. Palowitch, 109 LRRM 2137, (Fla. Dist. Ct. App. 1979); Wichita v. Unified School District 259, Sedgwick County, Kansas, 117 LRRM 3137 (Kan.Sup. Ct. 1983); Ramapo-Indian Hills Education Association v. Ramapo-Indian Hills Regional High School District, Board of Education, 112 LRRM 2062 (N.J. Super.Ct.App. Div. 1980); East County Bargaining Council v. Centenial School District 28JT, 120 LRRM 2492 (Ore. Ct.App. 1984). Of course, the plain language of the FPAA, § 51-102(5), requiring the parties "to confer in good faith with respect to wages, hours and other conditions of employment" speaks for itself. (emphasis added)

6. The duty to bargain in good faith is triggered whenever an employer seeks to make unilateral changes in mandatory terms of employment. The duty to bargain in good faith is not exhausted by engaging in a few, or many, unproductive meetings at the bargaining table, notwithstanding the FPAA's provision that good faith collective bargaining does not require agreement. Instead, the fullfillment of the duty, where, as here, the employer seeks to make unilateral changes in mandatory terms and conditions of employment, requires participation in the statutory impasse resolution procedure set out in §§ 51-106 through 51-109. This duty, for the City, is described in the following terms:

> "refusing to bargain collectively or discuss grievances in good faith with the designated bargaining agent <u>with respect to any issue coming within this article</u>." Section 51-102 (6a)(5)

(Emphasis added)

The emphasized language means simply that the duty to bargain in good faith extends to other provisions "within this article," e.g., the impasse resolution procedure set out in the statutes cited above.

7. The Board's Findings and Conclusions are not inconsistent with the City's duty to comply with the FLSA. Congress allowed public employers approximately five months to comply with the 1985 FLSA Amendments. In all but the most unusual circumstances, this would constitute ample time for an employer, in this case the City, to comply with its bargaining obligations under Oklahoma law. <u>See esp</u>., Sections 51-105 through 51-109 and § 51-112. Here, of course, the City made no apparent attempt prior to implementation of the unilateral changes, to bargain with the Union on these issues. Therefore the City's unilateral acts cannot be excused by reference to any alleged duty to comply with FLSA requirements.

8. Other jurisdictions have found, as the Board does today, that a <u>declaration</u> of impasse, without first exhausting statutory impasse resolution remedies, is an insufficient defense for unilateral changes in mandatory subjects of bargaining. <u>See e.g.</u>,

Green County, Decision No. 20308-B (Wisconsin Employment Relations Commission 1984) and the cases cited in footnote 16 of that decision. We recognize that in private sector labor relations once an impasse in bargining is reached the parties may resort to a test of power: the employer by changing the status quo, and the union by striking. The Oklahoma Legislature has, of course, prohibited strikes by firefighters. Section 51-101(A). It is unlikely that the drafters of the FPAA intended to further unbalance the disparity in relative bargaining power by limiting the union to impasse arbitration while permitting employers to make unilateral changes in basic conditions of employment at the same time. In fact, the quid pro quo for the absolute strike prohibition is that cities are held to the highest standard of good faith bargaining. Stone v. Johnson, 690 P.2d 459, 462 (Okl. Cr. 1984). Both parties have a duty to participate in the FPAA's impasse resolution procedures when an impasse is reached. Therefore the declaration of an impasse or the fact of an impasse is not ordinarily sufficient to support a unilateral change in a mandatory term or condition of employment. We would also call to the City's attention authority from other jurisdictions reaching the same conclusions. See e.g., Wasco County v. AFSCME Local No. 2752, 613 P.2d 1067, 1070 (Ore. 1980); Galloway Township Board of Education v. Galloway Township Education Association, 393 A.2d 218 (N.J. 1978), cited with approval in FOP Lodge No. 93 et al. v. City of Tulsa, PERB No. 00126 (October 26, 1986).

9. The PERB concludes that the City's refusal to negotiate on mandatory topics of collective bargaining, prior to the unilater-

al implementation of work rules or conditions, is violative of the City's duty to bargain in good faith pursuant to § 51-102(6a)(5).

10. The PERB concludes that neither party was sufficiently diligent in initiating collective bargaining over the impact of the FLSA Amendments, Pub.L. 99-150, on the terms and conditions of employment for firefighters.

11. The PERB concludes that the conduct of the parties reflects an inadequate appreciation that the duty to utilize statutory impasse resolution procedures is frequently part of the duty to bargain in good faith purusant to 51-102(6a).

12. The PERB concludes that the remedial purposes of the FPAA are not served by the issuance of a cease and desist order which might have retrospective impact, when the potential impact of such an order cannot reasonably be ascertained. The Board has determined that the policies of the Act are best served in this case by an order which is prospective only. This is especially true when the record does not establish with precision the employer conduct complained of.

Nelson Keller

NELSON KELLER
Chairman of PERB

4-28-87
Date

PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

LOCAL 2566 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	)	
Complainant,	)	
v.	)	Case No. 00115
CITY OF CUSHING,	)	
Respondent.	)	

CEASE AND DESIST ORDER

1. The PERB hereby issues its declaratory ruling and order that the length of the work period, hours of work, overtime work, and compensatory time are mandatory subjects of bargaining pursuant to 11 O.S. 1981, § 51-102(5) and § 51-102(6a).

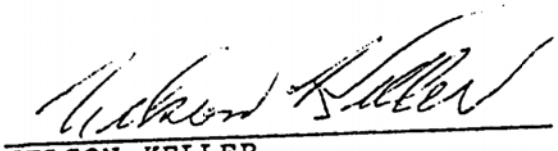
2. The City is herewith ordered to cease and desist, from the date of this order henceforward, from refusing to bargain in good faith on the topics enumerated in paragraph 1, above. In any current or future negotiations, the City's refusal to bargain on these issues may give rise to a finding that a ULP has been committed.

3. With respect to the unilateral changes complained of by the Union, the City is ordered within ten (10) days of the issuance of this Order, to meet and confer with the Union in a good faith effort to reach agreement on these issues. If negotiations for 1987-88 CBA are underway, the bargaining session ordered herein may be conducted as an adjunct to such negotiations.

4. The City is herewith ordered to cease and desist from any further unilateral changes in existing wages, hours, and other

conditions of employment for so long as the Union is the representative of the majority of firefighters and asserts the right to represent the City's firefighters with respect to those issues.

5. The City and the Union are urged to take note of the deadlines for bargaining imposed by the FPAA, especially by §§ 51-105 through 51-108 and 51-112. Compliance with these impasse resolution deadlines is part and parcel of the duty to bargain in good faith, especially when the City wishes to make changes in wages, hours or other conditions of employment.



NELSON KELLER,
Chairman of PERB

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Date