IN THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FRATERNAL ORDER OF POLICE, TULSA LODGE NO. 93 and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, TULSA LOCAL 176	)	
Charging Parties,	)	
vs.	)	Case No. 00126
CITY OF TULSA	)	
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 August 19, 1986, on the Charging Parties' unfair labor practice ("ULP") charge. The Charging Parties appeared by and through certain of their officers and their attorney, Don M. Bingham; the Respondent appeared by and through certain of its managerial employees and Assistant Municipal Counselor, Patrick T. Boulden. The Board received documentary and testimonial evidence, some of which was stipulated to by the parties. The Board also has reviewed the post-hearing briefs submitted by the parties, their Joint Supplemental Stipulation of Evidence, and their the Proposed Findings of Fact and Conslusions of Law.

The Board notes the Brief of Intervenor (sic) Oklahoma Municipal League ("OML") which, in combination with the briefs of the parties, has been of material assistance to the Board in reaching its decision. The OML did not participate in the

presentation of evidence at the hearing. Although its Motion to Intervene must be denied because the OML is not itself a potentially affected party (See 75 O.S. 1981, § 318 and PERB Rule IV(g)), its brief has been received and utilized by the Board in framing the legal issues for decision. OML's participation in the proceeding is thus analogous to that of an amicus curiae.

Based upon all of the foregoing, the PERB has reached certain Findings of Fact and Conclusions of Law, as set out herein below. Because this is an issue of first impression for the PERB, and is also of substantial statewide interest, the PERB has included a discussion of the relevant legal issues and the supporting rationale for its decision.

FINDINGS OF FACT

1. The City of Tulsa, Oklahoma 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 Fire Fighters, Local 176 ("Local 176") is, and was at all pertinent times, the duly elected and acting labor representative and bargaining agent for all Tulsa fire fighters except probationary employees, the Fire Chief, and the Chief's designated aide.

3. The Fraternal Order of Police, Tulsa Lodge No. 93 ("Lodge 93"), is, and was at all pertinent times, the duly elected and acting labor representative and bargaining agent for all Tulsa police officers except probationary officers, the Chief of Police, and the Chief's designated aide.

4. In 1984, Local 176 and Lodge 93 (hereinafter when

referred to collectively, "the Bargaining Agents", "the Unions", or "Charging Parties") entered into separate written labor agreements (hereinafter the "Agreement"or "Agreements") with the City of Tulsa (hereinafter "City"), both of which became effective July 1, 1984.

5. Both Agreements contain provisions for Satisfactory Performance Increase(s) (hereinafter "SPI(s)") which is, in effect, a merit increase in compensation over and above ordinary wages, provided to qualifying members of the bargaining units on the anniversary hiring date of each employee.

6. From July 1, 1984, through June 30, 1986 the City paid to each qualifying member of the bargaining units an annual SPI.

7. The City and the Bargaining Agents have been engaged, pursuant to 11 O.S. 1981 §§ 51-105 and 51-112, in negotiations for successor collective bargaining agreements. Although the City and Local 176 have subsequently reached impasse, declared by Local 176 on August 19, 1986, pursuant to 11 O.S. 1981, § 51-106, the statutory impasse resolutions procedures of §§ 51-106 through 51-110 have not been invoked. There is no evidence before the PERB indicating a statutory declaration of impasse between the City and Lodge 93.

8. On July 8, 1986, authorized representatives of the City informed the Unions that the City did not intend to pay any SPI during its 1986-1987 fiscal year (July 1, 1986, to June 30, 1987).

9. The Unions were made aware, prior to July 8, 1986, that the City was contemplating discontinuation of the SPI's. There is some evidence that the possible suspension of SPIs was mentioned

to the unions at the bargaining table. It is not disputed, however, that any discussion on this issue between the parties terminated prior to formal, or defacto, impasse.

10. The City has not paid any SPIs subsequent to June 30, 1986. There is no evidence that the City intends to resume payment of SPIs.

11. Subsequent to the City's notification on July 8, 1986, of its intent to discontinue payment of the SPIs, the Unions presented to the City separate written grievances, each alleging that non-payment of SPIs constituted a violation of its respective Agreement.

12. The Agreements each provide a formal grievance procedure to resolve such grievances, including several steps of review by City representatives including, if necessary, the final step of mandatory and binding third-party arbitration.

13. As of the date of the last PERB hearing in this matter (August 19, 1986), the City had begun to consider the two grievances and was engaged in processing them with the Bargaining Agents pursuant to the collective bargaining Agreements.

14. At the PERB hearing held on August 19, 1986, the City stated that the grievance process was ongoing at that time and announced that it intended to continue its consideration and discussion of the two grievances, although the statements of counsel for the City in oral argument suggested that the City might repudiate the negotiated grievance procedure.

15. On or about August 29, 1986, the parties submitted a Joint Supplemental Stipulation of Evidence from which it is

apparent that the City would neither continue to participate in the contractual grievance procedure nor submit to binding arbitration over the two grievances.

16. The action by the City in suspending payment of the SPIs was unilateral. That is, there is no evidence of substantial effort by the City to bargain to and through impasse these issues with the Union at the negotiating table. (See Conclusions of Law, Nos. 7 and 8).

17. To date, the parties have neither executed nor concurred in principle upon any new or successor collective bargaining agreement.

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and the subject matter of this complaint pursuant to 11 O.S. Supp. 1985, § 51-104b.

2. The scope of PERB's inquiry is whether the City breached its duty to bargain in good faith pursuant to 11 O.S. 1981, §§ 51-101, et seq., as amended (the Fire and Police Arbitration Act hereinafter ("FPAA" or "the Act").

3. Payment of the SPIs, or the suspension of such payments, is an issue pertaining to the wages paid members of the bargaining units and is thus a mandatory subject of collective bargaining pursuant to 11 O.S. 1981, § 51-102(5).

4. A public employer does not have unfettered discretion to change or abrogate bargained terms of an otherwise valid collective bargaining agreement simply by invoking the public interest.

5. The unilateral changes by the City in wages, hours, or terms or conditions of employment pending negotiation of a successor collective bargaining agreement violated the City's duty to bargain in good faith.

6. The City's "budget decision" to suspend SPIs without first negotiating to impasse is violative of its duty to bargain in good faith.

7. The Unions did not knowingly and voluntarily relinquish or otherwise waive their right to negotiate on the SPIs prior to the unilateral suspension of SPIs by the City.

8. The "impasse defense" to the ULP charge is not available where, as here, the unilateral changes were made prior to any declaration of impasse. Under Oklahoma law the duty to bargain in good faith extends through the impasse procedure. 11 O.S. Supp. 1985, § 51-102(6a).

9. The City's duty to avoid unilateral changes in contractual terms of employment is mandated by § 51-105. There is, however, an independent duty, imposed by §§ 51-102(5) and, 51-102(6a)(5), to bargain in good faith which also prohibits unilateral changes during the pendency of collective negotiations, even when the predecessor agreement has expired.

10. The charging parties have alleged and/or proven ULPs under § 51-102(6a) generally, § 51-102(5), § 51-102(6a)(5), § 51-105, and § 51-111.

11. Violations of legislative commands in the FPAA to bargain in good faith, other than those specifically enumerated in §

51-106(6a) can give rise to a ULP charge (See the introductory language to § 51-106(6a)).

RULINGS ON PROPOSED FINDINGS OF FACT

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

The submittal of the Charging Parties are treated as follows:

1. Proposed Findings 1-4, 6-14, and 21 have been substantially adopted by the PERB.

2. Proposed Findings 5, 15, and 16-20, identify items which are part of the record or recite procedural steps in the hearing of this Complaint. To the extent they are not incorporated in the PERB's Order and Opinion, they are rejected as unnecessary, redundant, or not germane.

Because the Respondent City did not submit Proposed Findings of Fact, the PERB need make no comparable rulings; the City did, however, include some "Asserted Facts" in the "Brief of Respondent". The "Asserted Facts" cannot be addressed individually because they are not, in most instances, asserted individually. It can be said that, none of the facts asserted by the City have been rejected by the PERB as untrue, except the apparent assertion that the City has satisfied its obligation to negotiate in good faith which, in any event, is a mixed question of fact and law. The legal significance of the Respondent's other "Asserted Facts" is treated in the body of the Opinion.

It should also be noted that the post-hearing affidavit of Ronald F. Fisher, dated August 28, 1986, is not properly before the PERB. Mr. Fisher was available to testify at the hearing; in

fact, the parties stipulated to his testimony. To permit the City to modify Mr. Fisher's testimony by a later affidavit, which is obviously not subject to cross-examination, is unfair to the Charging Parties. See, 75 O.S. 1981 § 310(3). On the other hand, we note that even taking the allegations of the Fisher Affidavit at face value and in the light most favorable to the City, the PERB would have to reach the same conclusion. Only bargaining through impasse meets the statutory duty of good faith and it is obvious that the City's conduct falls short of that standard.

OPINION

INTRODUCTION

In this case a primary issue of first impression in Oklahoma has been raised by the charging parties:

> What is the extent, if any, of a municipal employer's duty to bargain in good faith with its union(s) over certain wage provisions which the employer wishes to suspend or terminate during an apparent hiatus between the expiration date of the collective bargaining agreement and the consummation of a successor agreement?

A cluster of related questions have been posed by the parties and amicus OML which require the PERB to draw conceptual boundaries between and among statutory and contractural grievance procedures; between grievance procedures to resolve contractual disputes and unfair labor practice rights and remedies contained in the Act; and between both of the foregoing categories and the Act's impasse arbitration procedure. Finally, the City has challenged

the constitutionality of the so-called "Evergreen" clause of 11 O.S. Supp. 1985, § 51-105. (The operative provision of § 51-105, Evergreen, provides that "until a new agreement is reached, the currently existing written agreement shall not expire and shall continue in full force and effect.") The OML also questions the constitutional viability of Evergreen but suggests, correctly, that this matter may properly be disposed of without reference to the constitutionality of Evergreen.

The PERB concludes, specifically, that the suspension of SPIs by the City as described above in its Findings of Fact and Conclusions of Law, constitutes an unfair labor practice. The PERB also finds that the City's unilateral suspension of the grievance arbitration procedure is an unfair labor practice. Although these conclusions flow naturally from Evergreen, they have independent sources in Oklahoma law, which are discussed below.

Because, as the parties suggest, the issues raised are of substantial state-wide interest, summary disposition is inappropriate. The PERB takes this opportunity to explain its decision in this difficult area of public sector labor law and supplements its Findings of Fact and Conclusions of Law with the following discussion and analysis. 75 O.S. 1981, § 309(e)(6). This discussion first analyzes the non-Evergreen independent bases for PERB's findings. There follows a brief description of Evergreen and the way in which it codifies and cements the concept of the dynamic status quo. Finally, the PERB discusses the rationale for its finding that the City's suspension of the grievance arbitration procedure is an independent unfair labor practice.

The Unions' charge that the City, by its July 8, 1986 letter, had unilaterally abrogated a wage term (the SPIs) which had been incorporated in its 1984-1986 collective bargaining agreement with the City is two-fold. First, it violates the Citys' duty to bargain in good faith on mandatory subjects; second, it violates the duty to discuss grievances in good faith. The PERBs attention has been directed to 11 O.S. 1981, § 51-102(6a)(5), which provides:

> ""Unfair Labor Practices" for the purpose of this article shall be deemed to include but not be limited to the following acts and conduct:
> 6a. Action by corporate authorities:
> . . .
> (5) Refusing to bargain collectively or discuss grievances in good faith with a designated bargaining agent with respect to any issue coming within the purview of this article; . . .

The City responds by arguing that it has, in fact, bargained in good faith relative to the SPIs; that the conduct complained does not fit the statutory definition of a ULP; that the Union has waived its right to have the suspension of SPIs negotiated; that the collective bargaining agreement containing the SPIs has expired by its own terms; and that the Evergreen provision of § 51-105 is unconstitutional for a variety of reasons. The arguments urged by OML, although occasionally differing in form and presentation, are not substantially dissimilar from those advanced by the City of Tulsa.

ANALYSIS AND DISCUSSION

A. Federal decisional law under the National Labor Relations Act.

When, and for what reasons, may the City suspend SPIs in a manner consistant with its duty to bargain in good faith pursuant to § 51-102(6a)(5)? Both parties and OML have cited us to federal decisional law construing rights and obligations under the National Labor Relations Act and the various amendments thereto presently codified at 29 U.S.C. §§ 151 et seq. The Oklahoma Supreme Court has recently expressed its willingness to utilize federal case law in deciding cases under Oklahoma's public employee collective bargaining statutes. See, Maule v. Independent School District No. 9, 714 P. 2d 198, 201 (Okl. 1984) (construing the teacher bargaining statute, 70 O.S. Supp. 1985 §§ 509.1 et seq); Stone v. Johnson, 690 P. 2d 459, 461 (Okl. 1984) (construing the FPAA).

The federal courts have long recognized that when, during the term of a collective bargaining agreement, a bargaining proposal seeks to modify a provision contained in the agreement, the provision can be changed only with the mutual consent of the parties. See, e.g., NLRB v. Lion Oil Company, 352 U.S. 282, 285 (1957). Under Federal Law, the unilateral change rule also applies to the period following the expiration of a collective bargaining agreement, during which time the parties may not alter the status quo concerning the employer-employee relationship without first bargaining to impasse. See e.g., NLRB v. Haberman Construction

Company, 618 F.2d 288, 302 (5th Cir. 1980), enforced in part, 641 F.2d 351 (1981); Bay Area Sealers, 251 NLRB No. 17, 105 LRRM 1545 (1980).

Although the federal rule is relatively easy to ascertain, two questions critical for the PERB's decision arise: (1) Does the "status quo" referred to by the federal courts include merit increases of the type contemplated by the SPIs in the present case; and (2) if the first question is answered in the affirmative, should the federal rule be applied to public employee labor disputes under the FPAA.

The federal courts have found that scheduled or anticipated wage or merit increases are part of a dynamic status quo which the employer is bound to maintain unless bargaining results in a successor agreement or an impasse, and that unilateral changes by the employer violate the duty to bargain in good faith. See, Reed Seismic Co. v. NLRB, 440 F.2d. 598, 601 (5th Cir. 1971); Hinson v. NLRB, 428 F.2d 133, 138 (8th Cir. 1970). Thus, if the Federal rule were to be applied, the SPIs could not be suspended unless one of two conditions were met: either the parties mutually agreed to the suspension, or the issue had been bargained to impasse with the union.

B. Application of Federal law to various state public employee bargaining statutes.

The more difficult question involves the application of the federal rule, an issue which, although it is not considered by the Oklahoma courts, has received thoughtful treatments in a number of other states, a majority of which follow the federal rule

set out above, or some variant thereof. While we recognize significant differences in public and private employment (e.g., prohibition of public employee strikes), we find that in this instance, the federal and state labor policies construing parallel statutes are compatible. Title 11 O.S. 1981, § 51-102(5), defining the term collective bargaining, is virtually identical to 29 U.S.C. § 158(d), and provides, in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . [emphasis added]

The duty to bargain in good faith is considered so important by the Oklahoma Legislature, that the failure to act in accordance therewith is considered a ULP, whether by management, § 51-102(6a)(5), or by the union, § 51-102(6b)(3). Federal labor law reflects similar policy judgments. 29 U.S.C. § 158(a)(5) and 29 U.S.C. § 158(b)(3).

The ultimate policy advanced by both statutes is the peaceful resolution of labor disputes via the collective bargaining process. See, Smith County Education Association v. Anderson, 676 S.W.2d 328, 339 (Tenn. 1984) in which the Tennessee Supreme Court found that the federal and state labor policies on

unilateral changes were not divergent. In Anderson, the Tennessee Supreme Court held, inter alia, that the employer-school district was required to continue paying insurance premiums and withholding union dues for bargaining unit members after the contract expiration date but before a successor agreement had been negotiated. The Court's analysis hinged on the conclusion that unilateral action implementing a proposal by an employer during negotiations is inconsistant with its duty to bargain in good faith. The Supreme Court of Pennsylvania has frequently reached a similar result when considering the alteration of contractual fringe benefit provisions following the expiration of a collective bargaining agreement. The leading Pennsylvania case is Cumberland Valley District, Etc., 394 A.2d 946, 950 (Penn. 1978) See generally, Annot. "What Constitutes Unfair Labor Practice Under State Public Employee Relations Acts", 9 A.L.R. 4th p. 20 (1981), collecting cases from the various jurisdictions.

But the issue presently before the PERB is somewhat different. Here, we have not a reduction of benefits, but rather a refusal to implement an otherwise automatic contractual wage increase (the SPIs). The question then becomes whether the automatic step increase (the SPI) is part of the status quo which the employer may not lawfully alter during the pendency of contract negotiations. Several courts have answered that question in the affirmative for reasons we find persuasive.

In Moreno Valley Unified School Dist. v. Public Employment Relations Board, 191 Cal. Rptr. 60 (App. 1983), the appellate court discussed with approval the California PERB's rationale for

labeling unilateral suspension of salary step increases an unfair labor practice:

> "One reason unilateral changes are disfavored is their destablizing and disorienting effect on employer-employee affairs. . . and negotiating prospects may also be damaged as employers seek to negotiate from a position of advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer certainly delays, and may eventually totally frustrate, the process of arriving at a contract.
>
> "A second reason to prohibit unilateral changes of employment conditions is to protect employer-employee freedom of choice in selecting an exclusive representative. Employer unilateral actions derogate the representative's negotiating power and ability to perform as an effective representative in the eyes of the employees. . . .
>
> "Third, the rule against unilateral changes promotes negotiating equality consistent with the statutory design . . . . An employer's unilateral act prior to negotiations inherently tips the negotiating balance so carefully structured by the various provisions of the [California bargaining statute]. In short, the bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters." Id. at 66.

We find this reasoning compelling, especially as it relates to balancing the negotiating power of the parties. This is especially true when viewed in light of Oklahoma's statutory bargaining scheme which reserves final decisionmaking authority, following exhaustion of the impasse procedure, to the municipal employer. 51 O.S. 1981, § 51-108. The Court in Moreno, it should be noted, construed a statute which explictly makes failure

to participate in statutory impasse procedures an unfair labor practice. Although Oklahoma's list of ULPs, does not include failure to participate in good faith in statutory impasse procedures, we believe, for reasons described below, that such a duty is clearly inferrable from the FPAA.

The Indiana Supreme Court also has held that salary increments are part of the status quo, from which no unilateral changes may be made, even after expiration of the contract, pending agreement on a successor contract. In Education Employment Relations Board v. Mill Creek Classroom Teacher's Association, 456 N.E.2d 709 (Ind. 1983), the Court expressed, in these terms, its concern for avoiding a disturbance in the delicate bargaining balance:

> "If school corporations are not required to pay the increments, they are free to use the increments as a bargaining tool. For instance, an employer may be encouraged to prolong negotiations past the expiration of the existing agreement to gain bargaining leverage. In effect, this tactic would exact a penalty on the employees and their bargaining agent for exercising their rights under an existing agreement. The employees would be deprived of the present use of the increments to their salary even though they may later recover these increments as part of a new contract. Maintenance of the status quo after expiration of a contract and during negotiations for a new contract is important because it serves to continue the balance in the bargaining power of the parties as well as provide the flexibility necessary to reach agreement in the give and take inherent in the collective bargaining process." Id. at 712

It should be noted that the Indiana court in reaching its

decision in the Mill Creek case was applying its own version of the Evergreen statute. Id. at 711. As the Michigan Court of Appeals has pointed out, the employers use of self-help measures such as unilateral suspension of salary step increments should be avoided, particularily in light of Michigan's strike prohibition for public employees. Local 1467, International Association of Firefighters, AFL-CIO v. City of Portage, 352 N.W. 2d 184 (Mich. App. 1984). The Oklahoma Supreme Court also has recognized the relative disparity in bargaining power between public employees and employers in holding public employers to the highest duty of good faith in its collective bargaining relationship with employee organizations. Stone v. Johnson, supra at 462.

The Supreme Court of New Jersey, applying a statute which requires negotiations with the Union of an employer's proposed modifications in working conditions, has affirmed a New Jersey Public Employers Relations Commission order holding that annual salary increments are part of the status quo which the employer is required to maintain during contract negotiations. Galloway Township Board of Education v. Galloway Township Education Association, 393 A.2d 218 (N.J. 1978). In explaining its decision, the New Jersey Supreme Court stated:

> "Such conduct [a unilateral change] by a public employer would also have the affect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues

negotiated on their behalf by their majority representative."

As OML and the City point out, a few jurisdictions have rejected the dynamic status quo doctrine. The Pennsylvania Supreme Court, for example, although it subscribes generally to the federal rule with respect to unilateral changes, has also held that salary increments are not part of the status quo which must be preserved pending negotiation of successor contracts. Fairview School District v. Commonwealth Unemployment Compensation Board of Review, 454 A.2d 517, 520 (Penn. 1982). The Pennsylvania court apparently was persuaded that notwithstanding the suspension of the increments, a successor agreement could make them retroactive to the beginning date of the new contract. It is worth noting that the balance of bargaining power is less likely to be disrupted by such a unilateral change because Pennsylvania public employees enjoy the statutory right to strike. In fact, in the Fairview case, it appears that a school teacher strike occurred in response to a unilateral change in SPIs by the employer. Such coercive weapons, obviously are not available to public employees in Oklahoma nor are they regarded as desirable. See, 11 O.S. 1981, § 51-101(A).

OML and the City both cite Board of Cooperative Educational Services of Rockland County v. New York State Public Relations Board, 363 N.E. 2d 1174 (N.Y. Ct. App. 1977), referred to hereafter as "BOCES", in support of their argument that salary increments are not part of the status quo the employer is required to maintain. BOCES overruled Triborough Bridge & Tunnel Authority,

5 PERB § 3037 (N.Y. PERB, July 28, 1972) cited by the Unions, the case which had established the dynamic status quo rule in New York. However, the BOCES decision has itself been overruled by the New York Legislative. McKinney's Civil Service Law, § 209-a, subd. 1(e) (1982). This amendment is, in effect, an "Evergreening" statute. The applicable law in New York is now in accord with the majority rule. See, Cobleskill Central School District v. Newman, 481 NYS 2d 795 (A.D. 3 Dpt. 1984) (holding that salary increments are part of the dynamic status quo in the interim between collective bargaining agreements).

In Maine, the PERB and the Maine courts have followed the old BOCES rule and rationale. See, M.S.A.D. No. 43, Etc. v. M.S.A.D. No. 43, Etc., 432 A. 2d 395, 3 (Me. 1981). In Vermont, the other state permitting unilateral post-expiration contract changes without a corresponding right to strike on the part of public employees, a closely divided Supreme Court so construed a Vermont statute permitting the Governor to create temporary rules and regulations following the expiration date of a contract. Vermont State Employees Association, Inc. v. State of Vermont, 357 A. 2d 125 (Vt. 1976).

In some instances, states have held that post-expiration contractual changes are the employers prerogative after finding a legimate inpasse has been reached. See, e.g. Newton Branch of the Massachusetts Police Association v. Newton, 484 N.E. 2d 1326, 1330 (Mass. 1985). Several states go further, and require exhaustion of impasse procedures prior to unilateral action by an employer. See e.g., Wasco County v. American Federation of State,

County, Municipal Employees, Local No. 2752, 613 P. 2d 1067, 1070 (Ore. 1980); Galloway Township, supra at 231, Moreno, supra at 67-68; Green County, Decision No. 20308-B, Wisconsin Employment Education Relations Commission, 1984.

The Oklahoma Legislature's intention to impose a similar duty to bargain in good faith through impasse is found most explicitly in the Evergreen statute, 11 O.S. Supp. 1985, § 51-105.

> 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 Firefighters or Police officers within ten(10) days after receipt of written notice from said bargaining agent requesting a meeting for collective bargaining purposes. The obligation 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 Firefighters 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 in effect. [emphasis added]

The Oklahoma Supreme Court's commitment to the principle of good faith bargaining has been expressed eloquently in Stone v. Johnson, 690 P. 2d 459, 462 (Okl. 1984). We quote from it at length:

> The imposition of the highest standard of good faith on the part of the representatives of the Municipal employer is consistent with the purposes of the Firefighters and Policemens arbitration law. While the private employee who, when confronted with an impasse in negotiations or with an unfair labor practice committed during negotiations, has the option to strike, the Firefighter or Policeman is denied this option. In partial compensation for the denial of the traditional economic weapons of labor, the Firefighters and Policeman's arbitration law provides a method of arbitration for issues unresolved by negotiation. To allow a municipal employer to force negotiations to an impasse by insistance on a proposal of, at best, questionable legal tenability, resulting in a process of arbitration, which is then not binding on the municipal authority would be to deny the right to engage in effective collective bargaining reserved to these public employees by 11 O.S. 1981, § 51-101(A). This strong policy of requiring absolute good faith in bargaining is necessary to counter-balance the absence of the right to strike in the absence of the availability of binding arbitration. The duty to bargain in good faith, through the impasse procedure, is also readily inferable from § 51-108 which provides in pertinent part:
>
> . . . if the majority opinion of the arbitrators is not adopted, the corporate authority shall be required to resume the collective bargaining process as provided in § 51-105 of this title. [emphasis added]

In sum, a majority of jurisdictions have construed the duty to bargain in good faith to encompass the payment of automatic merit increases after expiration of a collective bargaining agreement and pending the negotiation of a successor agreement. The rationale utilized by the courts in arriving at this conclusion, is persuasive to the PERB because it accords with the policy of the Oklahoma statutory bargaining scheme as explicated by the Oklahoma Supreme Court, especially in Stone v. Johnson, supra.

C. Suspension of the SPIs : a mere breach of contract or a ULP?

The argument advanced by the City, and by OML, that this is simply a breach of contract claim for which a ULP will not lie, misperceives the state of the federal labor law upon which it relies. (In fact, OML proposes that PERB defer to grievance arbitration of the contractual breach allegations of the charging parties. OML Brief, p. 7). The question here is not whether the City breached a contractual duty to pay SPIs. It is, rather, whether the City breached its statutory duty to negotiate with the unions over a particular mandatory issue. See, e.g. NLRB v. Lion Oil Company, supra at 292. Characterizing the dispute as a breach of contract problem ordinarily implies that there is an alternative remedy, namely contractual grievance arbitration, for its complete resolution. Even were that true, a survey of various state public employment relations boards indicates that with near unanimity these boards have found the discretionary power to defer to grievance arbitration to be inherent in their statutory grant of jurisdiction over ULPs. See, Hayford & Wood, Deferral to Grievance Arbitration and Unfair Labor Practice Matters: The Public Sector Treatment, 32 Labor L.J., 679, 683 (1981).

In any event, deferral is inappropriate where one party is unwilling to permit substantive issues to be submitted to arbitration. See Hayford & Wood, Id. at 686, and the cases cited thereat. The City has not extended its assertion that this is in essence a breach of contract claim to its logical conclusion, a request for deferral to the grievance arbitration process

initiated by the unions, nor could it do so in good faith given its recent claim that it is no longer bound by the grievance arbitration procedure.

In essence, the City's claim that the conduct complained of cannot be considered as a ULP must fail under the federal labor law whose application it urges upon the Board. Unilateral changes in bargained contract terms, whether the contract is currently effective or expired, may give rise to a ULP charge if negotiations are underway for a successor agreement. Although there are circumstances in which a claim may have the attributes both of a ULP and of an arbitrable breach of contract, deferral to grievance arbitration is within the sound discretion of the PERB and is inappropriate where, as here, the employer is unwilling to submit to grievance arbitration.

D. The City's contention that Evergreen is financially burdensome.

The City has also argued that Evergreen imposes unacceptable financial burdens on it. (The City's evidence indicated the potential cost of SPIs to be approximately $332,000.00 in a 1986-87 budget projected to be in excess of $100 Million.) Nowhere else in the Act, and in particular in those statutes dealing with ULPs and the duty to bargain in good faith, is the City's financial condition made a factor in ascertaining its rights and responsibilities. Only in the impasse arbitration statute does the Legislature require consideration of the City's finances in trying to strike a balance between the City's rights and responsibilities in collective bargaining. That issue is appropriately addressed in the statutory impasse procedure in which

the arbitration panel specifically is directed to consider revenues available to the City in rendering its decision as to the terms of the collective bargaining agreement. 11 O.S. 1981, § 51-109(4).

PERB also rejects the City's "waiver" argument. "Waiver", in Oklahoma, has traditionally meant the voluntary and intentional relinquishment of a known right. Archer v. Wedderein, 446 P. 2d 43, 45 (Okl. 1968). While the unions could arguably have been more diligent at the bargaining table, their conduct falls far short of the unmistakable evidence of intent to waive required by the law. In fact, the prompt filing of grievances and ULP charges after July 8, 1986 indicates that the unions did not intend to waive their right to negotiate the SPIs. Foley Education Association v. Independent School District, 353 N.W. 2d 917 (Minn. 1984), cited by OML in support of its waiver argument is clearly distinguishable on its facts. In that case the union executed a new collective bargaining agreement after withdrawing negotiating proposals which would have prevented the unilateral management action it later complained of. Here, there was never an executed successor agreement; indeed bargaining was ongoing, not completed as in Foley. The waiver defense, otherwise available in the unilateral change context, is not applicable to these facts.

Nor does the language in both contracts, providing that the City could nullify its contracts by the simple failure to appropriate monies to fund the agreements constitute a clear and unmistakable waiver of the unions' right to have the suspension of SPIs issue negotiated through impasse. See e.g., General Electric Company v. NLRB, 414 F. 2d 918, 923 (4th Cir. 1969);

American Oil Co. v. NLRB, 602 F. 2d 184, 188 (8th Cir. 1979).

E. Does Evergreen mandate an "eternal" contract?

The PERB rejects the City's argument that Evergreen locks the City into an "eternal" contract. Evergreen has the effect of providing an interim agreement by operation of law, pending the negotiation of a successor agreement. Under the Act, the City is required only to negotiate in good faith with the Union. The City is not bound to agree to a union proposal, to make consessions, 11 O.S., 1981 § 51-102(5), nor is it bound to implement the report and recommendations of the arbitration panel. 11 O.S. 1981, § 51-108. In fact, Evergreen furthers the legislative purpose promoting impasse arbitration by equalizing the incentives for the parties to utilize the procedure. Both parties have a duty, facilitated by Evergreen, expeditiously to implement impasse mechanisms for the speedy resolution of collective bargaining disputes.

The Oklahoma Legislature clearly intended that the parties utilize the statutory impasse procedures, and not such self-help measures as unilateral changes in wage conditions, as a means of resolving labor disputes in public employment. The Legislature, in amending § 51-105 and inserting the Evergreen provision, has determined that the impasse resolution mechanism should be permitted to work without disturbance either by the bargaining agent (strike or slow-down) or by the employer (unilateral change in bargained terms) during the especially delicate and emotionally charged interim of negotiating successor

collective bargaining agreements. In fact, § 51-105 appears designed specifically to prohibit action of the type challenged herein by the charging parties. The Legislature has itself chosen to impose the terms and conditions of employment for municipal employees during the interim period, rather than leave them to unilateral or bilateral determination by the parties. Its choice of the interim terms is based on the rights, responsibilities, and expectations embodied in the predecessor agreement. This statutory requirement does not fetter the managerial discretion of the employer; it merely delays unilateral implementation of proposals pending the resolution of the collective bargaining process, including impasse resolution. The PERB is not inclined to characterize this legislative balancing of interests as violative of the Oklahoma Constitution under any of the theories advanced by the City (and OML).

In any event, the PERB's decision today would not be substantially different should Evergreen not be applied. This is true because prior Oklahoma law, as discussed at length above, requires the City, at a minimum, to bargain to impasse prior to making unilateral changes in terms and conditions of employment, even after the expiration date of an old contract, but during negotiations for a successor agreement. The PERB finds that the Act requires both parties to bargain in good faith up to, during, and through the statutory impasse procedure.

F. Suspension of the grievance procedure.

The Union's assertion that the City's failure to discuss grievances in good faith is a separate ULP may be dealt with in

more summary fashion. We find the City's refusal to participate in the grievance arbitration process provided in the collective bargaining agreement, and mandated by 51 O.S.Supp.1985, § 51-111, is a ULP. (Because we decide that the suspension of the grievance arbitration procedure is a ULP, we do not address the preliminary question as to whether a unilateral action pending grievance arbitration is per se a ULP). The requirement that the Union and the City be bound by third-party grievance arbitration is more than contractual. The legislative policy in favor of the prompt resolution of labor disputes by whatever arbitration machinery is available, has received strong endorsement from the Oklahoma Supreme Court. City of Midwest City v. Harris, 561 P.2d 357, 359 (Okl.1977); Voss v. City of Oklahoma City, 618 P.2d 925, 928 (Okl.1980).

The PERB's order directing the City to cease and desist from its unfair labor practices is attached hereto and incorporated herein as Exhibit "A".

CONCLUSION

In this decision, the PERB finds that the City violated its duty to bargain in good faith under the Fire and Police Arbitration Act when it suspended the virtually automatic annual merit increases (SPIs) provided in its collective bargaining agreements with Local 176 and Lodge 93. The duty to negotiate in good faith prohibits changes in existing terms of employment during bargaining for a new contract. To permit the employer to alter or suspend existing terms or conditions before utilizing the statutory procedure for resolving bargaining impasses would upset the

delicately balanced mechanism the Legislature has established for ensuring labor peace in this critical area of public service employment.

The same is true of the City's decision not to participate in the grievance arbitration procedure mandated by the Legislature. Although these conclusions are clearer under Evergreen than otherwise, the PERB would reach the same result under the law prior to Evergreen. Thus, the alleged unconstitutionality of Evergreen is not critical to the result PERB reaches today. The duty to bargain through impasse and the duty to arbitrate grievances are Legislative substitutes for the test of economic strength (strikes, lock-outs, and unilateral changes in terms of employment) that so frequently disrupts the private sector bargaining environment. Such tactics, on either side, cannot be permitted to replace good faith collective negotiations under the FPAA.

Donald L. Copelin
Acting Chairman

Signed at Oklahoma City, Oklahoma
on the 16 day of October, 1986

On behalf of
Public Employees Relations Board

Donald L. Copelin
Donald L. Copelin, Acting Chairman

CIV-L- 3288
Boston

IN THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

RECEIVED
JAN 23 1987
ATTORNEY GENERAL
of Oklahoma

FRATERNAL ORDER OF POLICE, TULSA LODGE NO. 93 and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, TULSA LOCAL 176	)	
Charging Parties,	)	
vs.	)	Case No. 00126
CITY OF TULSA, OKLAHOMA, a municipal corporation,	)	
Respondent.	)	

CORRECTION ORDER

The "Findings of Fact, Conclusions of Law, Opinion, and Cease and Desist Order", issued in the above-styled matter by this Board on October 16, 1986 is hereby corrected in the following particulars only:

1. The eleventh Conclusion of Law, on pages 6-7, should read:

"Violations of legislative commands in the FPAA to bargain in good faith, other than those specifically enumerated in § 51-102(6) can give rise to a ULP charge. (See the introductory language to § 51-102(6).)

2. In the body of the Opinion, language from the text was erroneously identified as quoted material. Page 21, as corrected, should read:

The imposition of the highest standard of good faith on the part of the representatives of the Municipal employer is consistent with the purposes of the Firefighters and Policemens arbitration law. While the private employee who, when confronted with an impasse in negotiations or with an unfair labor practice committed during negotiations, has

> the option to strike, the Firefighter or Policeman is denied this option. In partial compensation for the denial of the traditional economic weapons of labor, the Firefighters and Policeman's arbitration law provides a method of arbitration for issues unresolved by negotiation. To allow a municipal employer to force negotiations to an impasse by insistance on a proposal of, at best, questionable legal tenability, resulting in a process of arbitration, which is then not binding on the municipal authority would be to deny the right to engage in effective collective bargaining reserved to these public employees by 11 O.S. 1981, § 51-101(A). This strong policy of requiring absolute good faith in bargaining is necessary to counter-balance the absence of the right to strike in the absence of the availability of binding arbitration. (Emphasis supplied)

The duty to bargain in good faith, through the impasse procedure, is also readily inferable from § 51-108 which provides in pertinent part:

> . . . if the majority opinion of the arbitrators is not adopted, the corporate authority shall be required to resume the collective bargaining process as provided in § 51-105 of this title.

In sum, a majority of jurisdictions have construed the duty to bargain in good faith to encompass the payment of automatic merit increases after expiration of a collective bargaining agreement and pending the negotiation of a successor agreement. The rationale utilized by the courts in arriving at this conclusion, is persuasive to the PERB because it accords with the policy of the Oklahoma statutory bargaining scheme as explicated by the Oklahoma Supreme Court, especially in Stone v. Johnson, supra.

Apart from the corrections noted above, the "Findings of Fact, Conclusions of Law, Opinion, and Cease and Desist Order" are re-affirmed as previously issued.

DONE BY ORDER OF THE PUBLIC EMPLOYEES RELATIONS BOARD ON THE 27TH DAY OF JANUARY, 1987.

NELSON KELLER, CHAIRMAN