

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

IN THE MATTER OF: )  
 )  
BETHANY LODGE NO. 161, )  
FRATERNAL ORDER OF POLICE )  
 )  
Charging Party, )  
 )  
-and- ) Case No. 00137-P  
 )  
CITY OF BETHANY, )  
OKLAHOMA, )  
 )  
Respondent. )

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Public Employees Relations Board ("PERB" or "The Board") on December 15, 1986, on the Charging Party'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, David A. Davis and certain of its officials. 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 question presented in this case may be stated as follows:

Did the Respondent engage in surface bargaining thereby violating its duty to bargain in good faith with the Charging Party?"

The Board finds that while the Respondent undoubtedly engaged in "hard bargaining," its conduct did not evidence an

intent not to reach an agreement with the Charging Party and is therefore not violative of the Fire Police Arbitration Act ("FPAA" or "ACT"), codified at 11 O.S.1981, §§ 51-101 et seq., as amended. The PERB has reached Findings of Fact and Conclusions of Law outlining this result as set out herein below.

#### FINDINGS OF FACT

1. The City of Bethany, Oklahoma, ("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 Fraternal Order of Police, Lodge No. 161, ("Lodge No. 161" or "the Union") is, and was at all pertinent times, the duly elected and acting labor representative and bargaining agent for all Bethany police officers except probationary employees, the Chief of Police, and the Chief's designated aide. *W.B.*

3. At the time of the filing of the instant ULP charge, the parties were operating under a two-year contract, which became effective on July 1, 1985, and which terminated on June 30, 1987. The contract provided a reopener provision for fiscal year 1986-1987 with respect to three contractual provisions only: the contractual pay plan, uniform allowances, and insurance benefits.

4. The Union notified the City on or about February

13, 1986, of its intent to bargain those items subject to the reopener provision.

5. The first few bargaining sessions were devoted to non-mandatory topics, in particular the "ground rules" which would govern the bargaining sessions. The evidence presented indicates that the City pressured the Union to change one of the members of its negotiating team as a prerequisite for meaningful negotiations and that the Union acquiesced. (The Union has not raised this conduct as an independent ULP.)

6. The evidence indicates that the bargaining parameters provided by the City for its negotiators contemplated maintenance of the contractual status quo, in two of the three contractual issues subject to reopeners.

7. A tentative agreement was reached on one of the three outstanding issues notwithstanding that the City did not move from its initial bargaining position.

8. The Union pressed for change in the wage and taking the lead in insurance benefits area, the City offered no counter-proposals in those two areas. The City received and discussed Union proposals but did not indicate a willingness to depart from its initial positions.

9. The parties engaged in meaningful give and take dialogue on the uniform allowance issue.

10. The Union declined to participate in mediation, declined to pursue impasse arbitration, and declined to

participate in negotiation sessions during the pendency of its ULP charge.

11. There is no evidence that the City intended totally to frustrate the collective bargaining process or intended not ultimately to reach agreement with the Union on the outstanding issues.

The Union's Proposed Findings of Fact Nos. 1-8, 10, and 12 have been substantially incorporated into the PERB's Findings. Proposed Findings of Fact Nos 9 and 11, while substantially correct, are rejected only to the extent they tend to characterize the City as wholly intransigent, which conclusion is belied by PERB Findings No. 7 and 9. With respect to the Union's Proposed Finding of Fact No. 11, and the various subdivisions thereof, the PERB finds that they have been substantially incorporated in the Board's own Findings except to the degree that they characterize the City's position. The City's Proposed Findings of Fact Nos. 1-9 have been substantially incorporated into the PERB's Findings.

#### CONCLUSIONS OF LAW

1. The FPAA requires the parties to bargain in good faith with the sincere intent to reach a collective bargaining agreement. Title 11 O.S.1981, § 51-102(6a)(5). Stone v. Johnson, 690 P.2d 459 (Okl. 1984). The Act does not require either part to make concessions or to reach agreement. Title 11 O.S.1981, § 51-102(5).

2. The duty to bargain in good faith is not satisfied by merely going through the motions of collective bargaining without the intention of reaching a collective bargaining agreement. Such conduct is described by the term "surface bargaining" which, when supported by relevant and probative evidence, violates the duty to bargain in good faith and is thus an unfair labor practice.

3. In determining whether the City has engaged in surface bargaining, the Board may not sit in judgment upon the substantive terms of the parties collective bargaining proposals. NLRB v. American National Insurance, 343 U.S. 395, 404, 96 L.Ed. 1027 (1952). At the same time, enforcement of the duty to bargain in good faith may require some examination of the proposals advanced by the parties, because they may be the only available indicia of bad faith. See, NLRB v. A-1 Kingsize Sandwiches, Inc., 732 F.2d 872, 874 (11th Cir. 1984).

4. Deciding when a party has reached the point when hard bargaining ends and obstructionist intransigence begins is an inescapably elusive inquiry. NLRB v. Big Three Industries, 497 F.2d 43, 46-47 (5th Cir. 1974). However, the Board is unable to find in this case that as a matter of law the City's proposals were so unusually harsh and unreasonable as to be predictably unworkable. A-1 Kingsize Sandwich, supra at 877. See generally, Morris (ed), The Developing Labor Law, B.N.A., 1983, pp. 579 et seq., and the Second

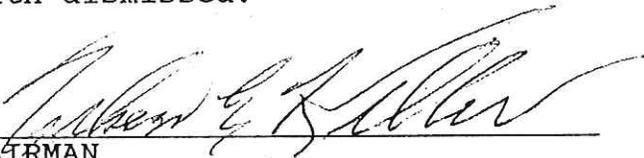
Supplement thereto, 1982-1985, pp. 218-222, collecting cases on surface bargaining. The cases generally indicate a level of egregious conduct not evidenced in this case. Nor does the City's conduct reflect an unwillingness ultimately to reach a collective bargaining agreement with the Union. In fact, in the instant case the City was already locked into an agreement with the Union on all issues save the three subject to reopeners. The fact that by the terms of the reopener provision only three contract proposals could be placed on the table also, to some degree, limited the parties' give-and-take flexibility and makes it more difficult for the Board to assess the City's conduct. The evidence in this case does not, however, support a conclusion that the City engaged in surface bargaining.

The FPAA mandates that the parties bargain in good faith on all matters involving wages, hours, and other terms and conditions of employment. The failure to do so constitutes an unfair labor practice. Like most comparable collective bargaining statutes, the FPAA does not compel the parties to make concessions or reach agreement. Section 51-102(5). In fact, the FPAA, like many public sector statutes, but unlike the National Labor Relations Act, establishes an elaborate impasse arbitration procedure to assist the parties in reaching agreement. Sections 51-107 through 51-110. The Legislature apparently intended that this impasse resolution procedure would be triggered by the parties failure to reach

agreement within thirty (30) days of the onset of bargaining. Section 51-106. Unlike the NLRA, which regulates an industrial system of collective bargaining in which a final resolution of bargaining disputes is achieved through a test of the relative economic strength of the parties, the FPAA is designed to avoid this type of confrontation.

For these reasons, the federal case law describing and applying the concept of surface bargaining has more limited scope and applicability in construing the parties obligations under the FPAA than it does under the NLRA. That is not to say that a fact pattern supporting a charge of surface bargaining could not arise under the Act. Indeed, many such scenarios could be envisioned. In the instant case, however, where the City's proposals are more reflective of hard bargaining than of surface bargaining, and where applicable impasse resolution procedures have not been utilized, indeed have been resisted by the Union, a finding that a ULP has been committed would be inappropriate. The Unions unwillingness to utilize the FPAA impasse resolution procedure undermines, to some degree its claim that the City was solely responsible for the parties' failure to reach an agreement. The filing of a ULP charge does not relieve the charging party of the duty to bargain in good faith. NLRB v. Southland Cork Co., 342 F.2d 702 (4th Cir. 1965).

The Complaint is herewith dismissed.

  
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CHAIRMAN

10/27/87  
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