

1. The International Association of Firefighters, Local 2171, AFL-CIO/CLC (Union), is the exclusive bargaining representative for certain employees of the Del City Fire Department, City of Del City.

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

3. The Collective Bargaining Agreement in effect at the time the Union's grievance was filed, was the Agreement for the fiscal year 1985-1986.

4. In the spring of 1986, the Union gave timely notice of intent to negotiate a successor agreement for fiscal year 1986-1987. The parties initiated bargaining and continued until June 1, 1987, when the Union and the City entered into an agreement for fiscal year 1986-1987, retroactive to July 1, 1986.

5. In the spring of 1987, the Union began negotiations with the City for a Collective Bargaining Agreement for fiscal year 1987-1988.

6. Pursuant to Garcia v. San Antonio Metropolitan Transit Authority, __ U.S. __, 105 S.Ct. 1005, __ L.Ed.2d __, (1985), and by legislative amendment, the Fair Labor Standards Act, (FLSA), 29 U.S.C. §§ 201, et seq., became applicable to cities, effective April 15, 1986. Pursuant to Section 7(k), the FLSA required a city to pay overtime compensation by calculations based upon a "work

period" which could range from 7 to 28 days. (See also, 29 CFR Part 553).

7. On or about August 1, 1985, the City selected a 27 day work period with 204 hours of work as the threshold for triggering overtime under FLSA, as set forth in the Personnel Services Bulletin, dated August 1, 1985. Before implementation, this Bulletin was withdrawn. On or about May 9, 1986, the City reissued the Bulletin and implemented a 204 hour - 27 day - work period for calculation of FLSA overtime.

8. On or after May, 1986, the City did not change its previous method of computing overtime as required by the existing agreement. In the event an employee earned overtime pursuant to the Agreement, but did not qualify for overtime compensation pursuant to FLSA, he was entitled to keep the overtime paid pursuant to the Agreement. This practice has continued to the present.

9. On or about May 12, 1986, the Union filed a grievance with the City regarding the City's implementation of the FLSA work period. The language of Article XIV, Standard Work Week, has not changed in any subsequent contract.

10. The referenced grievance and subsequent arbitration were processed pursuant to Article IX of the Agreement. Pursuant to this Agreement, the Union requested arbitration on the following issue:

Did the City violate the contract, Article X, XI, and XIV, and 11 O.S. § 51-103(A) when they unilaterally changed the work week/period for triggering overtime under FLSA and time and one-half premium penalties to half time without any agreement with the bargaining agent?

(Award of Edmund M. Schedler, Jr., FMCS File No. 87-29158, page 2).

11. A hearing on the referenced grievance was held before the arbitrator, Edmund M. Schedler, Jr., January 12, 1988. Both sides were present, presented sworn testimony of witnesses, and were afforded the opportunity to present evidence and to cross examine other witnesses.

12. On or about April 12, 1988, Arbitrator Schedler issued his award in which he found:

After careful consideration of all the evidence and upon the foregoing Findings of Fact, I find that the City of Del City, Oklahoma, did not violate the agreement and/or 11 O.S. § 51-103(A), when management selected the 27 day work period under the Fair Labor Standards Act. The grievance is denied and dismissed. (Award, Exhibit V, p. 18).

13. In addition, Arbitrator Schedler held:

Clearly, the subject in question was discussed at the bargaining table. That is what negotiations are all about; however, the City was unwilling to make a concession on the City's right to select a 27-day cycle.

O.S. 11 §51-102 part 5 defines collective bargaining. It is the mutual obligation of the City representatives and Union representatives to meet a reasonable times and to confer in good faith with respect to wages, hours, and other conditions of employment. Furthermore, the parties are to execute a

written contract incorporating any agreement reached, if requested by either party. However, collective bargaining shall not compel either party to agree to a proposal or require the making of a concession. The adoption of the FLSA work period was a budgetary decision and the City was under no statutory obligation to make a concession on adopting the 27-day cycle. (Aware, Exhibit V, p. 16)

14. The Union subsequently filed this charge with PERB alleging:

On May 9, 1986, the City of Del City implemented a 27-day work period for the purpose of complying with 29 U.S.C. 201 without securing an agreement with the Bargaining Agent or invoking the impasse procedures in accordance with O.S.A. 11 (1985) § 51-105 through 51-110. (Charge; Case PERB; No. 00176).

15. The parties disagree as to the nature and extent of their discussions, if any, which preceded or came after the City's implementation of the 27-day/204 hour overtime policy contained in its May 9, 1986 Bulletin. The parties do agree that there was no impasse declared with respect to the issue of said FLSA implementation, no interest arbitration regarding said issue and no agreement of the parties on said implementation.

16. The City unilaterally changed the definition of the work period to a 27-day period based upon FLSA requirements and did not bargain through impasse (Tr. p. 26). The City's position was that they were not required by the FPAA to bargain on the issue (Tr. 28).

17. The 27-day work period was more favorable to the Union than the contract provision relating to overtime then currently in effect, but was the less advantageous option of those available under the FSLA (Tr. pp. 47, 48).

PROPOSED CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and the subject matter of this dispute. 11 O.S. Supp. 1988, § 51-104(b) of the Fire and Police Arbitration Act (FPAA).

2. Methods of calculating overtime hours for employees are mandatory subjects of collective bargaining through impasse, pursuant to 11 O.S. 1981, §§ 51-102. See also, NLRB v. Boss Manufacturing Company, 118 F.2d 329 (Okla. 1985).

3. The City's unilateral change of overtime policies, absent good faith bargaining through impasse, constitutes an Unfair Labor Practice pursuant to 11 O.S. 1981, § 51-102(6a)(5).

DISCUSSION

The PERB has previously held in Firefighter's Local 2784 v. City of Broken Arrow, PERB Case No. 104, that generally the Board will defer to arbitration in matters concerning the enforcement, interpretation or application of a collective agreement. In matters concerning statutory law the Board held in Broken Arrow, id., as follows:

The operative considerations as to deferral or non-deferral are different, however, when arbitrators construe statutory law which is external to the collective bargaining agreement. The reason for declining to defer

to a grievance arbitrator's award on statutory issues has been well stated by the Wisconsin Employment Relations Commission:

An Arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. On the other hand, the Legislature has entrusted to the Commission in the first instance the responsibility to resolve questions of law and legislative policy and has made Commission decisions subject to further judicial review.

(Citations omitted.)

The same considerations apply in Oklahoma. The decisions of this Board are, unlike arbitral awards, subject to judicial review pursuant to 75 O.S.1981, §§ 318-323.

The National Labor Relations Board ("NLRB") has been unable to articulate entirely consistent norms for reviewing arbitral awards on statutory issues. Compare, Spielberg Manufacturing Co., 36 LRRM 1152 (1955); Electronic Reproduction Service, 87 LRRM 1211 (1974); Suburban Motor Freight, 103 LRRM 1113 (1980).

The PERB adopts, for application here, the standard described by Hayford and Wood [See Hayford and Wood, "Deferral to Grievance Arbitration in Unfair Labor Practice matters: The Public Sector Treatment", 32 Labor L.J. 679, 680-681 (October, 1981)] in summarizing public sector treatment of post arbitration deferral by public employment relations boards around the country:

Generally, the arbitrator's award will be adopted as dispositive of the unfair labor practice charge, if upon review the PERB concludes that: the unfair labor practice issue was

raised and fully litigated therein; the arbitral proceeding was fair and free from serious procedural irregularities; and the result reached by the arbitrator was consistent with the relevant agency case law and the protections afforded by the statute."

(Emphasis supplied.) (Citations omitted.) The Board is persuaded by Complainant's argument that the arbitrator misconstrued the duty to bargain under the FPAA on mandatory topics of bargaining.

This Board has previously held that changes in work schedules, hours and work periods are mandatory topics of bargaining. See IAFF Local 2839 v. City of Okmulgee, PERB Case No. 125; Local 2085 International Association of Firefighters AFL-CIO/CLC v. City of Bethany, PERB Case No. 130, Local 2566 International Association of Firefighters v. City of Cushing, PERB Case No. 115.

In IAFF v. Okmulgee, id., this Board held:

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. . . . issues involving hours are mandatory topics of

bargaining under the FPAA. 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 provisions of § 207(k). See NLRB v. Boss Manufacturing Company, 118 F.2d 187 (7th Cir. 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 mere fact that the FLSA requirements were discussed by the parties does not constitute good faith bargaining under the FPAA. If a city unilaterally implements its proposal without bargaining through impasse, it has committed an unfair labor practice. Fraternal Order of Police Lodge No. 93 and IAFF Local 176 v. City of Tulsa, PERB Case No. 126. The arbitrator's decision is obviously at odds with the pronouncements of their board in Okmulgee, id., Bethany, id.; City of Tulsa, id.

In Local 2566 International Association of Firefighters v. City of Cushing, PERB Case No. 115, this Board, in holding that overtime proposals are mandatory topics of bargaining under the FPAA, stated as follows:

The duty to bargain is triggered whenever an employer seeks:

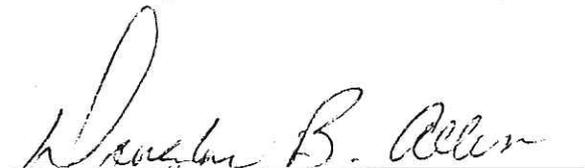
to make unilateral changes in mandatory terms of employment. The duty to bargain in good faith is not exhausted by engaging in a few, or many unproductive meetings at the

The Board finds that the City has committed an Unfair Labor Practice by unilaterally adopting the 27 day work period. As a result thereof, a Cease and Desist Order should issue forbidding unilateral changes in the method of paying overtime which is a mandatory topic of bargaining.

CEASE AND DESIST ORDER

The City of Del City, Oklahoma, is ordered to Cease and Desist from implementing any changes in the method of computing and paying overtime without first satisfying its duty to bargain in good faith with the certified collective bargaining agent.

Dated this 7th of July, 1989.



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