

2. Proposed Findings Nos. 10 and 17 are accepted in part and rejected in part by the Board as is reflected in the Findings of Fact set out hereinbelow.

3. Proposed Finding No. 19 is rejected as being argumentative.

The Respondent's proposals are treated as follows:

1. Proposed Findings Nos. 1, 2, 5, 6, 11, 16, 21, 22 and 23 are substantially accepted by the Board.

2. Proposed Findings Nos. 4, 7, 8, 13, 15, 19, 20 and 23 are accepted as correct but rejected as irrelevant for the purposes of this decision.

3. Proposed Finding No. 3 is rejected as a Conclusion of Law.

4. Proposed Findings Nos. 9, 10, 14, 17 and 18 are accepted in part and rejected in part as is reflected in the Findings of Fact set out hereinbelow.

5. Proposed Finding No. 12 is rejected in that wages were discussed by the parties on June 25. (Tr. p. 23 & 46).

FINDINGS OF FACT

1. The Fraternal Order of Police (FOP) Lodge 193 (Union) is, and at all times material herein, has been the exclusive bargaining representative for the Certified Bargaining Unit of the Nichols Hills Police Department, City of Nichols Hills.

2. The City of Nichols Hills (City) is and was at all pertinent times, a municipal corporation, duly organized and existing under the laws of the State of Oklahoma.

3. Douglas Henley was at all pertinent times City Manager and the Chief Executive Officer and head of the administrative branch of the City's government, and is responsible for execution of laws and policies of the City. (Respondent's Exhibit 1, pg. 6).

4. On February 24, 1987, the Union was certified as the bargaining agent for Uniformed Police Officers of the City of Nichols Hills. (See Stipulations).

5. At the time of the certification, there existed a policy with respect to wage increases to be received by the members of the Collective Bargaining Unit. That is, under Section 1-60 of the City Code of the City of Nichols Hills, the following was provided:

There is hereby established three (3) rates of salaries or wages in some positions or jobs of the City of Nichols Hills, as follows:

- (a) Rate A - Starting salary or wage.
- (b) Rate B - Merit increase after six months' continuous service with a recommendation of department head and approval of the City Council.
- (c) Rate C - Merit increase after one (1) year's continuous service with a recommendation of department head and approval of the City Manager and City Council.

Thus, the City code provided for an increase in wages after six months of service, and after one year of service. Further, under Section 1-62, specific longevity increases were provided for, providing:

- (a) Members of the fire and police departments, including chiefs, shall draw longevity pay which shall be in addition to their regular pay for service to the City of Nichols Hills. Longevity pay shall become effective after the employee has served two (2) years with the city. Longevity pay shall be computed as follows:

Thus, the City Code provided the longevity increases over the course of employment. Finally, at Section 1-61, the City Code provided for salaries or wages to be set either by the budget or "as otherwise fixed" from time to time by the City Council. [City Code Respondent's Exhibit 3 as supplemented].

As provided by the City code, the City established a formal wage scale. That is, Charging Party's Exhibit No. 1 shows the various pay rates for police officers from patrol officer to police chief. This pay schedule provided, in accordance with the City Code, an entry level position, with successive longevity increases. [Charging Party's Exhibit 1].

6. The wage schedule contained in Charging Party's Exhibit 1 was instituted and placed in the Police Officers Training Manual as the official wage schedule. (Tr. 48, testimony of Sgt. Bob Springer).

7. On February 23, 1987, immediately upon certification, the Union executed a demand to bargain. Specifically, in regard to wages, the Union requested:

In accordance with the provisions of 11 O.S.1978, Sec. 51-112, Lodge 193 is hereby serving written notice of a request for collective bargaining on wages, rates of pay and any other matters which may require appropriation of moneys by the municipality. In addition, Lodge 193 would hereby demand to bargain over all terms and conditions of employment for those bargaining unit employees employed by your city. (Charging Party Exhibit 2).

8. The City Manager testified that he was aware that the purpose of this notice was to allow the parties to negotiate on wages prior to the submission of the budget in July of each year (Tr. 121-23).

9. On April 3, 1987, the Union submitted its initial contract proposal including, inter alia, a request for negotiations over wages [Charging Party's Exhibit No. 3]. No contract existed between the parties prior to negotiations for the fiscal year 1987-88 and no wage increase had been given since July 1, 1987 (Tr. 91, 136).

10. In April, 1987, due to a smaller increase in revenue over previous years, the City Manager, Doug Henley, began considering budgetary options for the upcoming year. Apparently, the option most seriously considered by the City was to freeze salaries of employees (Tr. 74, 110).

11. Although the City began considering a wage freeze in April, 1987, the Union was not notified of this possibility (Tr. 74). The Union was not given notice of the

wage freeze prior to the announcement to employees in July, 1987.

12. The Union and the City began to negotiate over terms and conditions of employment. One of the areas of discussion was the Union's interest in wages. Specifically, on April 16, 1987, while Respondent was considering a wage freeze, the Union and Respondent conducted their first bargaining session (Tr. 20).

13. Throughout the negotiations and up until July 7, 1988, no member of the Union had any notice of any changes to the existing wage structure.

14. A negotiation session was held between the parties on June 25, 1987. In that session, the attorney for management specifically informed the Union that it was his intent to negotiate wages (Tr. 23-24).

15. On June 24, 1987, the City Manager transmitted a budget recommendation to the City Council which recommended the freezing of salaries. That is, as reflected by Respondent's Exhibit 4, Henley specifically wrote:

I do recommend at this time that all salaries continue at their current level as of July 1, 1987 until the city council has a chance to review the finance committee's recommendations. The council must keep in mind that it was extremely generous last year with salary and benefit increases for all employees. The council may want to consider a cost of living adjustment in January, depending on our revenue situation and possible capital improvement projects. The City Manager's recommendation to freeze salaries was based in part on the City's revenue situation and possible need for capital improvements (Tr. 101-02).

16. As of June 24, 1987, the Union had not been given any notice of any wage freeze (Tr. 24).

17. On July 7, 1987, the Chief of Police issued a "Command Line" notice to employees which provided:

PAY FREEZE: Contrary to a recent newspaper report that our police budget for FY 88 will be reduced by 2.5 percent, the good news is that our budget for the new year will be substantially the same as last year, tight, no pay cuts or personnel layoffs which had been feared. However, the bad news is that for the foreseeable future all department pay rates are frozen at the current levels. This means there will be no merit or longevity pay increases as well as no general raise for the department.

In addition, this "Command Line" directed employees that its contents would not be discussed or distributed outside the department [Charging Party Exhibit No. 6]. As the Chief of Police testified, this was not intended as a notice to the Union of changes in terms and conditions of employment (Tr. 59).

18. Upon hearing from the officers of the "wage freeze" the Union's business agent confronted the Chief of Police about the change. The Chief of Police indicated that the change was already implemented and that there was nothing which could be done (Tr. 25). Chief Stoddard testified that he did not even learn of the wage freeze until July 6, 1987 (Tr. 56), and that when confronted by the Union's business agent about the change, he had no authority to negotiate (Tr. 58). Chief Stoddard testified that at that time there was nothing he could do in terms of negotiating the change (Tr. 58).

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of their disputes pursuant to 11 O.S. § 51-104(6).

2. In an administrative proceeding before the PERB, the Charging Party has the burden of persuasion by a preponderance of the evidence as to the factual issues raised by its ULP charges. Rule III Q, Rules of the PERB. See also, Prince Manufacturing Company v. United States, 437 F.Supp. 1041 (D.C. 1(1) 1977). In this case, the Charging Party has met this burden.

3. Respondent committed an unfair labor practice by making unilateral changes in the longevity pay component of wages (mandatory topics of bargaining) without first bargaining through impasse with the Union. 11 O.S. §§ 102-5), 51-102(6a)(5). See also, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964), NLRB v. Katz, 369 U.S. 736, 82 S. Ct. 1107, 8 L.Ed.2d 230 (1962).

OPINION

The Board is confronted with a variation on an earlier case (Fraternal Order of Police Lodge No. 93 vs. City of Tulsa, PERB No. 126 (1987)) in which the Board held that unilateral changes in mandatory topics of bargaining constituted an unfair labor practice. In City of Tulsa, supra, the city unilaterally withheld merit pay increases,

after the expiration of a prior collective agreement and prior to impasse. The Board adopted the federal rule, and that followed in a majority of public sector jurisdictions, that the parties may not alter the employment status quo concerning the employer-employee relationship, including longevity pay increases, without first bargaining to impasse.

In this case there was no expired or pre-existing collective bargaining agreement as in City of Tulsa, supra. Rather, the Union and City were engaged in negotiations for the first collective bargaining agreement after certification. During these negotiations, the City unilaterally froze automatic pay increases which had been received by police officers for several years.

Under the provisions of the Fire and Police Arbitration Act, 11 O.S. §§ 51-101, et. seq. (FPAA), collective bargaining is defined, in part, as conferring "in good faith with respect to wages, hours and other conditions of employment, § 51-102(5). Further, § 51-102(6a)(5) defines the refusal to bargain collectively as an unfair labor practice.

Respondent points out in their Brief that the Oklahoma Supreme Court has expressed its willingness to utilize federal case law in deciding cases under Oklahoma's collective bargaining statutes. See, Maule v. Independent School District No. 9, 714 P.2d 198, 201 (Okla. 1985) (construing the teacher's bargaining statute, 70 O.S. §§ 509.1 et seq.); Stone v. Johnson, 690 P.2d 459, 462 (Okla. 1984) (construing

the FPAA). Respondent asserts, correctly, that under Section 8 of the National Labor Relations Act (which is similar, in substance to § 5-102 of the FPAA), an employer violates its duty to bargain in good faith when it institutes changes in wages, hours or other terms and conditions without consulting the Union. See, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

The Board is in accord with this view. However, the Board disagrees with Respondent that the absence of a prior contract or dire economic conditions relieves the City of the duty to bargain under the FPAA.

The obligation to bargain imposed by statute is not eliminated due to the lack of prior agreement. The mere absence of a previous collective bargaining agreement does not suspend the duty to bargain in good faith nor does it entitle a city to make unilateral changes in mandatory topics of bargaining such as wages. See, NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947). The City may assert that continuing with its automatic pay raises might also, under this theory, unilaterally alter wages during negotiations prior to impasse. However, such actions merely amount to a continuation of past practices which existed prior to certification and, if not granted due to anti-union motivation, does not constitute a

ULP. See, NLRB v. Hendel Manufacturing Company, Inc., 523 F.2d 133 (2nd Cir. 1975).

Similarly, adverse economic conditions whether real or imagined, do not excuse conduct which is unlawful under the FPAA; nor do they relieve a city of its obligations to bargain in good faith. [The proper forum for arguing its financial condition is impasse arbitration. (See § 51-109)]. Lack of funds may dictate a city's negotiating position but in no way suspends its obligation to bargain in good faith. Negotiation over wages, hours and terms and conditions of employment may cover a myriad of topics and approaches to reach an agreement. For example, a union confronted with a grim economic picture may make wage concessions in return for concessions by the city on other issues. The possible agreements are endless but may only be achieved, if at all, through bargaining. Like most comparable collective bargaining statutes, the FPAA does not compel the parties to make concessions or enter into agreements, § 51-102(5). However, the parties are compelled to bargain in good faith, which the Respondent has failed to do in this case.

Therefore, the Board finds that the Respondent City of Nichols Hills committed an unfair labor practice by unilaterally changing wages without bargaining through impasse in violation of the FPAA. As a result, the Board finds that a Cease and Desist Order should be issued forthwith.

CEASE AND DESIST ORDER

The City of Nichols Hills is hereby ordered, pursuant to 11 O.S. § 51-104b(c) and consonant with the Findings of Fact, Conclusions of Law and Opinion entered herein to cease and desist from changing, unilaterally, terms and conditions of employment including wages.

Dated this 26 day of August, 1988.

James J. Costa

CHAIRMAN

Acting

dp.DA.NicholsH.FOP