

**BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD  
STATE OF OKLAHOMA**

<b>INTERNATIONAL ASSOCIATION OF</b>	)	
<b>FIREFIGHTERS, LOCAL 2479,</b>	)	
<b>Complainant,</b>	)	
v.	)	<b>PERB Case No. 00377</b>
	)	
<b>CITY OF PONCA CITY,</b>	)	
<b>Respondent.</b>	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER**

On the 16<sup>th</sup> day of November, 2001, this administrative complaint was presented for oral argument before the Oklahoma Public Employees Relations Board ("Board"). The Complainant, International Association of Firefighters, Local 2479 ("Union"), appeared through its attorney of record, James R. Moore. Respondent, City of Ponca City ("City"), appeared through its attorney of record, Charles S. Plumb. The parties agreed to waive testimony at a prior hearing on June 6, 2001, and requested that the Board render its decision based upon the written briefs submitted by both parties on Motions for Summary Judgment. The Board, having received the briefs and exhibits of the parties, considered oral argument and reviewed the proposed findings of fact and conclusions of law submitted by the parties, now issues this Final Order.

**Determination of Proposed Findings of Fact**

The Board is required by 75 O.S. 1991, § 312 to rule individually on Findings of Fact submitted by the parties. The submissions of the parties are treated as follows:

1. Complainant's proposed findings of fact 1, 2, 3, 4, 5,8, 9, 11 and 12 are adopted by the Board. Complainant's proposed findings of fact 6, 7, and 10 are rejected by the board as unnecessary to the determination of this complaint. Complainant's proposed finding of fact 13 is rejected by the Board.

2. Respondent's proposed findings of fact 1, 2, 4, 5, and 6 are adopted by the Board. Respondent's proposed finding of fact 7 is adopted in part as modified herein and rejected in part as unnecessary to the determination of this complaint. Respondent's proposed findings of fact 3, 8, 9, and 10 are rejected as unnecessary to the determination of this complaint.

### Findings of Fact

1. The City and Union began negotiating a new 2000-01 Collective Bargaining Agreement ("CBA") in March 2000.
2. On April 28, 2000, the Union invoked the process for interest arbitration pursuant to the Fire and Police Arbitration Act (FPAA), 11 O.S. 1991, § 51-106.
3. The parties continued to negotiate and by July 2000, the only issue unresolved was wages.
4. In July, 2000, the City offered a three-year contract for a five percent wage increase for 2000-01, a three percent wage increase for 2001-02, and a three percent wage increase for 2002-03.
5. In response to the offer by the City, the Union countered with a proposed three-year contract with five percent wage increases in each of the three contract years.
6. On July 20, 2000, the City rejected the Union's counteroffer and proposed, instead, a one-year contract with a wage increase of five percent for 2000-01.
7. The City included in the offer made on July 20, 2000, notification to Union that this was the City's final last best offer. The City also stated that any subsequent offer by the City should the parties proceed to arbitration, would reflect a lower wage increase proposal adjusted to compensate for the added expense of arbitration.
8. On or about August 30, 2000, the parties exchanged last best offers for interest arbitration

scheduled to begin September 7, 2000.

9. The City's last best offer included a wage increase proposal which was less than the five percent increase proposed on July 20, 2000. The difference between the City's two offers is approximate to the cost of arbitration.
10. The interest arbitration hearing commenced on September 7, 2000, and closed on November 30, 2000, resulting in selection of the Union's last best offer of a ten percent wage increase for the 2000-01 contract between the parties.
11. During the October 19 arbitration hearing, the City testified that its last best offer of a wage increase was less than the original offer of five percent based on the time, expense and uncertainty of arbitration and the results of a wage comparison survey conducted by City.
12. The Union denied that City offered any reason for reduction of its wage increase proposal other than the costs of arbitration.
13. The City exercised its right to submit the wage issue to the voters of Ponca City in a special election pursuant to 11 O.S. Supp. 2000, § 51-108(B). This resulted in the voters' acceptance of the City's reduced wage offer instead of the Union's last best offer for a wage increase.

#### **Conclusions of Law**

1. This matter is governed by provisions of the FPAA, 11 O.S. 1991 and Supp. 2000, § 51-101, *et seq.*, and the board has jurisdiction to rule on this unfair labor practice charge.
2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 1991 and Supp. 2000, § 308, *et seq.*
3. It is appropriate to consider federal labor law in the construction of the FPAA. *Stone v.*

*Johnson*, 690 P.2d 459, 462 (Okla. 1984).

4. The Board is empowered to prevent any person, including corporate authorities, from engaging in any unfair labor practice. 11 O.S. 1991, § 51-104b(A).
5. The Union, in asserting a violation of 11 O.S. 1991, § 51-102(6), has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 11 O.S. 1991, § 51-104b(C) and OAC 585:1-7-16.
6. An "Unfair labor practice" includes any action by the City refusing to bargain collectively or discuss grievances in good faith with the designated bargaining agent with respect to any issue coming within the purview of the FPAA. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(5).
7. The FPAA requires municipalities to meet at reasonable times and confer in good faith with union representatives upon a request for collective bargaining by the union. 11 O.S. 1991, § 51-105.
8. In the event that the city and union are unable, within thirty (30) days from and including the date of the first meeting, to reach an agreement on a contract either party may request that all unresolved issues be submitted to arbitration. 11 O.S. 1991, § 51-106.
9. At least seven (7) days before the date of the arbitration hearing, the city and union shall submit to each other and to the arbitration board members a written arbitration statement listing all contract terms which the parties have resolved and all contract issues which are unresolved. Such arbitration statement shall include a final offer on each unresolved issue, which shall be known as the last best offer of each party. 11 O.S. 1991 and Supp. 2000, § 51-108(A)(2).
10. Within seven (7) days after the conclusion of the hearing, a majority of the arbitration board

members shall select one of the two last best offers as the contract of the parties. 11 O.S. 1991 and Supp. 2000, § 51-108(A)(4).

11. As a part of the collective bargaining process, both the City and Union have a mutual obligation to meet and confer with respect to wages. 11 O.S. 1991, § 51-102(5).
12. The fees and necessary expenses of the arbitrator selected by the union and the arbitrator selected by the city shall be borne by the union and the city respectively. The reasonable fees and necessary expenses of the third arbitrator shall be borne equally by the parties. 11 O.S. 1991, § 51-110.

#### Discussion

The allegation of an unfair labor practice brought by the Union in this complaint is founded upon the alleged failure of the City to negotiate in good faith with the Union. The Union argues that the City's July 20, 2000 offer was made in bad faith because it included a condition that the proposed wage increase would be reduced to reflect the estimated expense of arbitration to the City if the Union did not accept the offer. The Union characterizes this notice as an attempt by the City to "bargain" the issue of the statutory right to proceed to interest arbitration, thus creating an "illegal" subject of bargaining. The Union argues that the City's intent to recoup the expenses of arbitration is a violation of the statutory provision stipulating that the parties will bear the fees and costs of the arbitrators pursuant to 11 O.S. 1991, § 51-110.

The FPAA, § 51-110, does not provide that the parties will share all the expenses of arbitration equally. It states only that each of the parties will bear the fees and necessary expenses of the arbitrators chosen respectively by the parties and that they will share equally the fees and

expenses of the third arbitrator. The Act does not apply to other costs of arbitration, i.e., attorney fees, transcription costs, etc. The City did not rebut the assumption inherent in the Union's charge that the City's reduction would include the City's share of statutory fees and expenses.

The City admits that the added expense of arbitration was the motive for including the notice with the original offer and that it was ultimately a partial motive, in addition to a wage comparison survey, for the reduction of the wage increase in the last best offer [Cite from the record]. The City argues that the purpose of the notice of its intention to, in effect, have the Union pay the entire cost of arbitration, was a good faith effort to "encourage" agreement between the parties and not to "thwart" the bargaining process.

The Union did not present evidence that the City specifically requested agreement to forego arbitration or that City refused to pay its share of the statutory fees for the arbitration. While the ostensible subject of bargaining remained the issue of wages, the City's offer was, in fact, conditioned upon the waiver by Union of its right to pursue arbitration, thus altering the statutory scheme which requires that the party's share the arbitrators' fees and expenses.

The Union argues that the City's introduction of a wage decrease by the amount of the City's cost of arbitration constitutes an illegal "subject" of bargaining. There is no dispute as to the right of the parties to lower or reduce the last best offer submitted to the arbitration panel. As the dissenting opinion notes, parties may engage in regressive bargaining and this fact alone is not an indicia of bad faith. The issue presented to this Board, however, is whether the threat, and ultimately the submission of a reduced last best offer *based on the added expense of arbitration* represented a bad faith attempt to interfere with the collective bargaining process and the Union's pursuit of its statutory right to invoke interest arbitration on the issue of wages.

Interest arbitration constitutes a part of the formation of the collective bargaining agreement when the parties request that a dispute concerning the terms of the contract be submitted to the arbitration panel. *City of Bethany v. Public Employees Relations Bd.*, 904 P.2d 604 (Okla. 1995).

The Oklahoma Legislature amended 11 O.S. 1991, § 51-108 in 1994 to mandate binding interest arbitration. This right to binding mandatory interest arbitration is included in the bargaining process and subject to the obligation, imposed upon both parties, to bargain in good faith. *Fraternal Order of Police, Lodge 165 v. City of Choctaw*, 933 P.2d 261, 265-67 (Okla. 1996).

In *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 610 (Okla. 1995), the Oklahoma Supreme Court noted that assertion of positions at the bargaining table which would, if accepted, require the other side to agree to terms contrary to those mandated by statute constitute a violation of the duty to bargain in good faith. In the instant case, the Union would have been required to cede the statutory right to interest arbitration to accept the City's offer. This outcome is an unjustifiable distortion of the statutory scheme established by the Legislature. The specter of interest arbitration was intended to encourage *both* parties to reach a voluntary agreement, or face the risk that their respective offers would be rejected as "unreasonable" by the arbitrators. The right to interest arbitration cannot lawfully become a subject of negotiation between the parties. It was created by the Legislature, and only the Legislature may take it away. Neither party may, in the dissent's words, "put pressure" on the other to bargain away this right.

The possibility of interest arbitration further encourages both parties to try their best to come to an agreement. When this fails, interest arbitration is the mechanism designed by the Legislature to break the impasse and select the most reasonable of the Last Best Offers. That was done in this case. To allow the City to introduce the right to invoke interest arbitration as a subject of the

collective bargaining negotiations is to distort the statutory scheme, introduce an illegal subject matter into the bargaining process and amounts to bad faith bargaining. See also *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), where the Court held that an employer may not bargain with a union to waive a statutory right to distribute literature on company property.

The City relies on *458-3M, GCIU v. NLRB*, 206 F.3d 22 (D.C. Cir. 2000), wherein the court upheld a finding by the NLRB dismissing the union's charge of an unfair labor practice by the employer based upon withdrawal of an offer of improved contract terms conditioned on the union's ratification of a new work schedule proposed by the employer. The NLRB concluded, and the court agreed, that the employer's threat to withdraw its offer unless the union agreed to the proposed work schedule was an effort to secure ratification of the agreement rather than an attempt to obstruct meaningful bargaining. 206 F.3d 32. In that case, the concession sought by the employer was not alleged to be an illegal subject of bargaining.

In this case the issue is whether the cost of arbitration may be used by either party as a bargaining chip in the negotiation of a contract. Introduction of the issue of the expense of arbitration as a factor in bargaining, including the sharing of fees and expenses of the arbitrators, which is controlled by statute, went beyond a mere bargaining tactic designed as an inducement to the Union to accept the more favorable proposal as opposed to assuming the risk of imposition of a lesser wage increase as a result of a request for arbitration. It forced the Union to weigh the risk of a less favorable offer against a statutory right, thereby crossing the line between 'hardball bargaining' and an unfair labor practice.

The Union, in asserting a violation of 11 O.S. 1991, § 51-102(6), has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 11 O.S. 1991, § 51-

104b(C) and OAC 585:1-7-16. In the instant case, the Union has presented evidence of bad faith on the part of the City by virtue of its proposal to the Union during the bargaining that, if the dispute were submitted to arbitration, the City's last best final offer would be reduced to reflect the costs of arbitration, which would offset the fees and expenses statutorily imposed on the City against the offer of a wage increase to the Union. As the dissent notes from *Bethany*, if a party asserts a position at the collective bargaining table which would, if accepted, require the other side to agree to terms contrary to those mandated by statute, the party has violated its duty to bargain in good faith and an unfair labor practice has occurred.

*Telescope Casual Furniture*, 159 LRRM 1332 cited by the dissent is factually distinguishable from the Ponca City case. *Telescope* does hold that regressive bargaining is not per se unlawful - however this conclusion was based upon a finding that the provisions contained in the alternative position had been fully discussed and understood by the parties *before* the impasse occurred, thus the alternative had been reasonably comprehended during negotiations and was lawful. See also *Taft Broadcasting* 163 NLRB 474 at 478 [64 LRRM 1386] (1967). These are not the facts before us. The City's alternative position was presented only after the impasse had occurred and, was not reasonably comprehended within those offers made before the impasse. Unlike the facts of *Telescope*, the City's ultimatum was neither discussed nor fully understood during the course of bargaining. *Telescope* is further distinguishable from the case before us because the ALJ specifically points out that the case involves no allegation by the Union of bad faith bargaining against the Respondent. In the case before us, we are dealing with an allegation of bad faith bargaining leveled against the City.

The dissent states that we have isolated a single element for scrutiny. We would agree with

this. The only issue for our scrutiny is whether the City may condition its offer on the Union's right to invoke interest arbitration contrary to the legislative scheme established in the FPAA. The answer is no. Introducing a statutory right into the bargaining process, and conditioning an offer on whether the party chooses to invoke the benefit of the statutory right is a violation of the obligation to bargain in good faith.

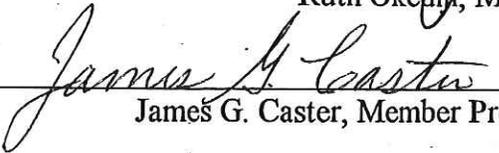
**ORDER**

IT IS THEREFORE THE ORDER of the Public Employees Relations Board that the unfair labor practice allegation of the Union is **UPHELD**. The City of Ponca City is hereby ordered, pursuant to 11 O.S. 1991, §51-104b(C), and consonant with the Findings of Fact, Conclusions of Law, and Opinion entered herein, to **CEASE** and **DESIST** from introduction of the costs of arbitration as a subject of bargaining in the negotiation of a collective bargaining agreement between the parties.

DATED: Aug. 22, 2002

By:

  
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Ruth Okeiji, Member

  
\_\_\_\_\_  
James G. Caster, Member Pro Tem

Chair Craig W. Hoster, dissenting, issues the following Opinion:

Chair Craig W. Hoster, dissenting

I respectfully dissent from the Board's pronouncement which establishes a new *per se* violation unknown in previous Oklahoma law and unsupported by NLRB precedent. I dissent because I am unwilling to take this leap with the majority in a situation where there is no indicia of bad faith bargaining on behalf of the City of Ponca City except possibly Ponca City's statement during negotiations that its statutory<sup>1/</sup> last best offer ("LBO") would probably be lower to compensate for the added expense of interest arbitration.

The parties began negotiating a new collective bargaining agreement in March 2000. In April 2000, Local 2479 invoked its statutory right for interest arbitration. The parties continued the bargaining process and by July 2000 the only outstanding issue was wages. By letter of July 20, 2000, Ponca City advised Local 2479 that the "City's [LBO], should we proceed to arbitration, will most likely be a wage increase proposal adjusted to compensate for the added expense of arbitration." The parties exchanged LBOs on August 30, 2000. After the exchange of LBOs, Ponca City remained willing to bargain in good faith outside the parameters of the LBOs and consider other prior offers.<sup>2/</sup>

The parties are obligated to bargain in good faith to reach agreement during the entire process. *FOP Local 265 v. City of Choctaw*, 1996 OK 78, ¶ 10, 933 P.2d 261, 265. I find no support in the record establishing bad faith bargaining by either party.

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<sup>1/</sup> 11 O.S. 2001, §51-108(A)(2).

<sup>2/</sup> Fralix Affidavit, ¶¶ 5 & 9.

The majority finds an unfair labor practice despite the absence of bad faith; indeed, where there is even a possibility of subjective good faith. The majority points to only one instance of purported bad faith bargaining: Ponca City's statement during negotiations that its LBO "will most likely" be lower to compensate for the additional expense of interest arbitration. Absence of any other indicia of bad faith places this decision in a *per se* context. I take a more tolerant view of Ponca City's negotiations, so long as they are not motivated by union animus. Reference should be made to the totality of negotiations to find good or bad faith.

I find the reasoning in two NLRB decisions persuasive. In *Telescope Casual Furniture, Inc.*, 159 LRRM 1332, 326 NLRB 588 (1998), the respondent announced that if the union did not agree to its final offer, the respondent would implement an alternative proposal with less favorable terms. The parties reached impasse over the respondent's final offer and respondent then stated that the alternative proposal was the offer on the table. The union filed an unfair labor practice charge. The NLRB noted that regressive bargaining is not unlawful *per se* unless it is for the purpose of frustrating the possibility of agreement and found that respondent's alternative proposal was introduced to press the union to come to an agreement.

*Oklahoma Fixture Company*, 165 LRRM 1122, 1125, 331 NLRB 145 (2000), instructs that the NLRB examines proposals only for the purpose of evaluating whether they were "clearly designated to frustrate agreement on a collective-bargaining contract." The NLRB looks at the process as a whole and does not isolate a single element of the process for scrutiny.

In the case before us, the majority fails to consider the bargaining process as a whole but instead, isolates a single element for scrutiny. The decision and the concurring and dissenting opinions in *Telescope Casual Furniture* and the decision and dissenting opinion in *Oklahoma*

*Fixture* consider issues similar to the ones facing the Board today. I would follow the articulated holding of the NLRB in both cases and avoid the temptation to make new law.

Ponca City contends its statement that its LBO would be lower to account for the additional expense of arbitration was for the purpose of putting pressure on Local 2479 to reach agreement. Are the reasons asserted by Ponca City so illogical or unreasonable as to warrant an inference of bad faith? *Cf.*, *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000). What incentive will either party have to reach agreement and avoid arbitration if the other party's LBO can be no worse than the final offer at the table? The majority agrees that the LBO may be more onerous than the final offer at the bargaining table and presumably would not have found an unfair labor practice if Ponca City had only not stated a reason that it would be submitting a reduced LBO.

The majority cites two cases to support its newly-crafted *per se* violation, *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) and *City of Bethany v. Public Employees Relations Board*, 1995 OK 99, 904 P.2d 604.

In *Magnavox*, a union filed an unfair labor practice charge challenging Magnavox's rule prohibiting employees from distributing literature on the employer's property on the grounds that the rule interfered with the employees' § 7 rights "to form, join, or assist labor organizations" or to refrain from such activities. The Supreme Court held that the rule violated the §7 rights of the employees. I find no support for PERB's newly-formulated *per se* violation in *Magnavox*.

In *Bethany*, the Oklahoma Supreme Court held that the duty to bargain in good faith is violated when an entity covered by the FPAA insists upon contract terms which would be illegal if incorporated in the collective bargaining agreement. 904 P.2d at 611. "A party may not insist at the negotiating table upon terms which would modify statutory requirements for CBAs." *Id.* If a

party asserts a position at the collective bargaining table which would, if accepted, require the other side to agree to terms contrary to those mandated by statute, the party has violated its duty to bargain in good faith and an unfair labor practice has occurred. *Id.* That, however, was not the situation in the case before the Board today. The agreement Ponca City urged did not violate the provisions of the FPAA. Under the statutory scheme, the parties are encouraged to reach agreement and avoid the attendant cost and delay of interest arbitration. Here, Ponca City advised Local 2479 that the LBO would be lower than the proposal then on the table to encourage agreement, not frustrate it.

Ponca City did not suggest that the CBA be changed to eliminate the statutory right of either party to seek interest arbitration. Implicit, of course, in any mutual agreement on a new CBA, is the understanding that neither party will proceed to interest arbitration. Agreement forecloses this option. Certainly neither party anticipates that the other will seek interest arbitration on issues just agreed to by the parties. Acceptance of Ponca City's offer, of necessity, means that Local 2479 will not proceed to interest arbitration. This is true even though the union clearly had such right absence acceptance of the offer. Ponca City did not insist, or even suggest, that the CBA prohibit interest arbitration, a right either party has under the FPAA in the event they cannot reach agreement. Consequently, the instant case does not violate the teaching of *Bethany*.

In determining whether a party has violated its statutory duty to bargain in good faith, PERB should examine the "totality of the party's conduct, both at and away from the bargaining table." *Oklahoma Fixture Company*, 165 LRRM at 1125. It must be determined from the context of the party's total conduct whether the party is lawfully engaging in hard bargaining to achieve a contract it considers desirable or is unlawfully "endeavoring to frustrate the possibility of arriving at any agreement." *Id.* This is the standard I would apply.

In this case, Ponca City advised that its LBO may be less favorable to Local 2479 monetarily because of the added expense of interest arbitration. Local 2479 had complained in a previous year that Ponca City should have advised Local 2479 that its LBO would be lower.<sup>3/</sup> Ponca City complied with Local 2479's request.

I find it significant that Ponca City was willing to continue bargaining after submitting its LBO and conceivably would have been willing to implement any of the offers it made at the bargaining table.<sup>4/</sup>

The majority finds a *per se* violation at the time Ponca City injected the cost of arbitration into the bargaining process. This statement by Ponca City is, at worst, an indicia of bad faith. It is not, however, a *per se* violation of a party's obligation to bargain in good faith.

The duty to bargain in good faith permeates and extends through the entire process even after the LBOs are exchanged. Ponca City contends that the primary reason its LBO differs from its last offer at the table is the study it conducted of comparable pay for comparable positions in comparable cities in Oklahoma. A comparison of Ponca City's LBO and its last offer tends to substantiate the City's contention.<sup>5/</sup> The majority agrees that a party may change its LBO -- and I would add -- provided it is not for the purpose of frustrating the possibility of agreement.

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<sup>3/</sup> Fralix Affidavit, ¶ 7.

<sup>4/</sup> Fralix Affidavit, ¶¶ 5 & 9.

<sup>5/</sup> Ponca City's final offer at the bargaining table was a 5% across-the-board wage increase. Fralix Affidavit, ¶ 4. Its LBO contained wage increases varying from a 2.6% increase for firefighters to an 8% increase for assistant chiefs. Fralix Affidavit, ¶ 5. The monetary difference between Ponca City's LBO and its final offer at the table was less than the expenses it incurred in the interest arbitration process. Fralix Affidavit, ¶ 11.

The Board's finding of an unfair labor practice is based upon the Board's unwarranted establishment of a *per se* violation previously unknown in the law of labor relations. Application of the facts to the *Telescope Casual Furniture/Oklahoma Fixture* standard, leads me to the conclusion that Ponca City did not commit an unfair labor practice. I must, therefore, dissent.



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Craig W. Hoster, Chair