

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

CITY OF ARDMORE, Oklahoma,)	
)	
Complainant,)	
)	
vs.)	PERB No. 00379
)	
FRATERNAL ORDER OF POLICE,)	
LODGE 108,)	
)	
Respondent.)	

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

NOW on this 18th day of July, 2001, there comes on before the Oklahoma Public Employees Relations Board (the "Board") the above-styled and numbered administrative action. The complainant, City of Ardmore ("City"), appears through its attorney of record, Margaret McMorrow-Love. Respondent, Lodge No. 108, Fraternal Order of Police ("Union") is represented by and through its attorney of record, James R. Moore. The parties agreed to waive testimony and requested the Board to render its decision based upon the written briefs and undisputed facts as stated. The Board, having received the briefs and exhibits of the parties and otherwise being fully apprized of the facts and matters alleged, makes the following determination regarding findings of fact and conclusions of law and issues its Final Order.

Findings of Fact

1. For several years, the City and the Union have entered into collective bargaining agreements pursuant to the terms of the Fire and Police Arbitration Act, 11 O.S. 1991 and Supp. 2000, §§51-101 et seq. ("FPAA").

2. The City and the Union (“Parties”) entered into a collective bargaining agreement (“CBA”) covering the period from July 1, 2000 through June 30, 2002, which was executed by the Parties on or about June 5, 2000.
3. On October 5, 2000, the Union filed a grievance with Chief Tony Garrett which raised two issues, i.e., violation of Article 22, §22.1 of the CBA which requires a fair and impartial procedure in promotions and alleged omission of items from the CBA regarding the promotion procedure.
4. Chief Tony Garrett denied the requests made by the Union in the grievance by letter dated October 12, 2000.
5. The City Manager received notice of the grievance upon receipt of the denial of the grievance from the Chief of Police. *Brief of City of Ardmore in Opposition to Motion to Defer to Arbitration*, page 15.
6. The City Manager did not respond to the grievance.
7. Subsequent to denial of the grievance by Chief Tony Garrett, the Union requested a list of arbitrators from the Federal Mediation and Conciliation Service (“FMCS”).
8. The City participated in selection of the arbitrator by letter December 28, 2000. *Response to City’s Motion for Judgment and Respondent’s Cross Motion for Judgment, Ex. “D”*.
9. On December 28, 2000, the City filed an Amended Unfair Labor Practice Charge against the Union alleging a violation of the FPAA by the Union in alleged refusal to discuss the grievance in good faith with the City and attempting to by-pass the grievance procedures contained in the CBA with reference to issues regarding promotions.

10. An arbitration hearing was conducted on January 30, 2001, and an award was issued on April 19, 2001.
11. At the hearing, the City objected to arbitration of the second issue raised in the grievance, i.e., the alleged omission of items from the CBA regarding the promotion procedure.
12. The arbitrator issued his decision sustaining the grievances as to both of the issues, ordering the promotion of John Randolph and reformation by inclusion of the omitted terms as amendments to the CBA.
13. The Union filed a Motion to Defer to Arbitration before this Board on February 28, 2001, which was denied on April 30, 2001.

Conclusions of Law

1. This matter is governed by the provisions of the FPAA, 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. The Board is empowered to prevent any person, including collective bargaining agents, from engaging in any unfair labor practice. 11 O.S. 1991, §51-104b(A).
4. "Unfair labor practice" includes, but is not limited to, refusal by the bargaining agent to bargain collectively or discuss grievances in good faith with the proper corporate authorities with respect to any issue coming within the purview of this article. 11 O.S. 1991, §51-102(6b)(3).
5. The City, 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. OAC 585:1-7-16.

6. It is appropriate to consider federal labor law in the construction of the FPAA. *Stone v. Johnson*, 690 P.2d 459, 462 (Okla. 1984).
7. The Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. *See, Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 271 (1964).
8. A grievance arbitrator cannot add terms to the collective bargaining agreement and can only interpret what is contained within the four corners of the agreement. *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 609, fn. 12 (Okla. 1995); *City of Midwest City v. Jarrell*, 2001 OK CIV APP 125, ____ P.2d ____.
9. The arbitrator exceeded his authority under the FPAA and the terms of the CBA by attempting to reform the CBA.

OPINION

The evidence reflects that the Parties negotiated the current CBA for the period July 1, 2000 through June 30, 2002, and executed the agreement, which was reduced to writing by the City, on or about June 5, 2000. During the course of the negotiation, there was bargaining as to proposed amendments to the prior collective bargaining agreement regarding promotion procedures.

The Union filed a grievance with the Chief of Police on October 5, 2000, which included two (2) issues: (1) failure to promote Officer John Randolph to the rank of Corporal, and (2) reference to two (2) items regarding the promotion process which were discussed and purportedly agreed to by the Parties during the negotiations, but were omitted from the CBA.

The grievance was denied by the Chief of Police by letter dated October 12, 2000, and forwarded to the City Manager. The Union presented testimony at the arbitration hearing to show

that a courtesy copy of the grievance had been delivered by the Union to the City Manager's secretary when it was submitted to the Chief of Police. The City denied receipt of the grievance until it was forwarded by the Chief of Police upon denial. It was stipulated that the Union did not submit the grievance to the City Manager after denial by the Chief of Police.

The Union then requested a list of arbitrators from the FMCS and the City participated in selection of the arbitrator on or before December 28, 2000. The City filed the instant charges of unfair labor practices on December 28, 2000.

The arbitration hearing was held on January 30, 2001, and an award was issued on April 19, 2001. At the hearing, the City objected to arbitration of the second issue raised in the grievance, i.e., the alleged omission of items from the CBA regarding the promotion procedure. The arbitrator issued his decision sustaining the grievances as to both of the issues, ordering the promotion of John Randolph and reformation by inclusion of the omitted terms as amendments to the CBA.

The City requests an order upholding its unfair labor practice charge, based upon the Union's failure to submit the grievance to the City Manager prior to initiation of the arbitration process, and that the Board issue a cease and desist order to preclude any attempt by the Union to circumvent the negotiating process in the future in those instances where it seeks amendments to a collective bargaining agreement.

Discussion

The City has failed to present evidence of an unfair labor practice by the Union. While the facts regarding initial delivery of the grievance to the City Manager by the Union are in dispute, it is undisputed that the grievance was forwarded to the City Manager by the Chief of Police. The relevant section of the CBA provides that the Chief of Police shall submit his answer within ten (10)

days of his receipt, which was accomplished in this case. The next step in the process is stated as follows:

Failing the resolution to the mutual satisfaction of *the parties* within ten (10) calendar days from the receipt of the written grievance described above, the grievance *will be sent to the City Manager* for adjustment.

Article VIII, §8.1(c) (emphasis added).

This language does not specify that the Union is solely responsible for submission of the grievance to the City Manager. It does, however, make reference to “the parties,” leaving ambiguity as to whether either of the parties or both of the parties are to forward the grievance for adjustment.

Moreover, the evidence was undisputed that the City Manager did not submit his answer to the grievance within the required ten (10) days after his receipt from the Chief of Police as provided in Article VIII, §8.1(d). The Union argues that upon this failure by the City Manager to follow the grievance procedures, they proceeded to the next step, i.e., a request of a panel of arbitrators. Article VIII, §8.1(d)(1). It is also undisputed that the City participated in selection of an arbitrator and did not raise the issue of the arbitrability of reformation of the written CBA until the hearing on January 30, 2001.

“Unfair labor practice” includes, but it not limited to, refusal by the bargaining agent to bargain collectively or discuss grievances in good faith with the proper corporate authorities with respect to any issue coming within the purview of this article. 11 O.S. 1991, §51-102(6b)(3).

The City, 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. OAC 585:1-7-16. In view of the lack of clarity in the language of the CBA as to submission of the grievance to the City Manager and the failure on his part to respond to the grievance upon receipt from the Chief of Police,

the City has failed to present evidence of a refusal by the Union to bargain collectively or discuss its grievances in good faith.

As to the second issue raised in the grievance, i.e., the omission of two (2) items discussed during the negotiations but omitted from the contract, this Board recognizes the general rule that the right to contest the arbitrability of a specific issue is not normally waived merely by failing to raise the issue of arbitrability until the arbitration hearing. Elkouri and Elkouri, *How Arbitration Works*, p. 311 (5th Edition, 1997). This Board denied the Union's Motion to Defer to the decision of the arbitrator in this grievance on the well-established grounds that it is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 271 (1964). The arbitrator then issued his decision sustaining the grievances as to both of the issues, ordering the promotion of John Randolph and reformation by inclusion of the omitted terms as amendments to the CBA.

Upon review of the arbitrator's decision, this Board finds that the arbitrator exceeded his authority under the FPAA and under the CBA in his opinion and award by ordering the City to reform the CBA to include the two (2) items purportedly agreed to by the parties during negotiations but omitted from the CBA.

An arbitrator is confined to interpretation and application of the agreement; an arbitrator is not free to dispense his own brand of workplace justice. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). When the arbitrator's award manifests an infidelity to his or her obligation, courts – and this Board – have no choice but to refuse to enforce the award. *Id.*; *City of Yukon v. Fire Fighters Local 2055*, 792 P.2d 1176, 1180 (Okla. 1990).

Whether the FPAA and the CBA create a duty for the parties to arbitrate a particular grievance is an issue which may be determined by this Board. *Cf., AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986); *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 614, fn.33 (Okla. 1995).

The Oklahoma Supreme Court in *City of Bethany* painstakingly explained the distinction between grievance arbitration and interest arbitration under the statutory scheme of the FPAA. In this case, the second issue addressed by the grievance arbitrator, reformation of the CBA, was properly an item for interest arbitration. In addition to the FPAA, the arbitrator's authority is limited by the CBA. Section 8.5 of the CBA prohibits the arbitrator from adding to the terms of the agreement and from modifying the agreement. The Oklahoma Supreme Court has concluded that a "grievance arbitrator cannot add terms to the contract; the arbitrator can only interpret what is contained within the four corners of the agreement." *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 609, fn. 12 (Okla. 1995); *City of Midwest City v. Jarrell*, 2001 OK CIV APP 125, ____ P.2d ____ (holding that an arbitrator exceeded his authority by adding a variation to the collective bargaining agreement). Here, the arbitrator obviously went beyond the four corners of the agreement.

In accordance with the refusal of the Board to defer to arbitration in this case, and based upon the arbitrator's disregard of statute and contract in his award, this Board advises the parties to cease and desist from any attempt to enforce the items included in the "reformation" of the CBA by the arbitrator.

ORDER

IT IS THEREFORE THE ORDER of the Public Employees Relations Board that the unfair labor practice allegation by the City charging the Union with an unfair labor practice is hereby DISMISSED. The Union is, however, ordered to CEASE AND DESIST from any attempt to enforce the following modifications of the CBA ordered by the arbitrator: (1) that the FOP representative be present when the promotion scores are tabulated, and (2) that the Chief of Police have no prior knowledge of the point distribution prior to the interview.



Craig W. Hoster, Chair

Date: October 30, 2001