

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

LOCAL 2085, INTERNATIONAL )  
ASSOCIATION OF FIREFIGHTERS, )  
AFL-CIO/CLC, )  
Complainant, )  
v. ) No. 00130  
CITY OF BETHANY, OKLAHOMA, )  
Respondent. )

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND OPINION

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This matter comes on for decision before the Public Employees Relations Board ("PERB" or "the Board") on the charging party's unfair labor practice ("ULP") charges. The Board has received the stipulations of the parties, briefs and documentary evidence.

Based upon the foregoing, the Board has reached certain findings of fact and conclusions of law as set out hereinbelow. Because this is an issue of statewide concern the PERB has included a discussion of the relevant issues and rationale for its views.

FINDINGS OF FACT

The parties hereto have stipulated to certain facts which the PERB incorporates into this decision as follows:

1. IAFF and Bethany have a collective bargaining agreement.

2. Bethany City Council on June 18, 1985, implemented a 28-day, 212 hour work period for firefighters by Ordinance No. 1333.

3. That on July 3, 1985, and August 13, 1985, IAFF filed grievances.

4. That said grievances were submitted to final and binding arbitration before Joe Levy, the mutually selected FMCS arbitrator. That an arbitration award was issued on April 8, 1986.

5. That on May 8, 1986, IAFF filed a grievance and the Board takes notice that said grievance was filed after the compliance date of the 1985 amendments to the Fair Labor Standards Act. (29 U.S.C. §§ 201, et seq.).

6. That on or about June 6, 1986, the City of Bethany refused to enter into a joint request for arbitration of the grievance filed on May 8, 1986.

7. That on June 18, 1986, Bethany filed a Petition in District Court of Oklahoma County, No. CJ-86-5764, seeking a declaratory judgment and requesting the Court to determine the obligation and rights of the parties, and to determine whether Bethany was required to arbitrate the issues presented by the May 8, 1986 grievance.

8. That on November 5, 1986, Judge Leamon Freeman ruled that the issues raised in the May 8, 1986 grievance

have already been arbitrated and are not subject to further arbitration. This decision is currently on appeal before the Oklahoma Supreme Court.

9. That the Unfair Labor Practice charge filed by IAFF concern Bethany's refusal to enter into a joint request for arbitration of the May 8, 1986 grievance.

#### CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and the subject matter of this dispute. 11 O.S. Supp. 1987, § 51-104(b) of the Fire and Police Arbitration Act (FPAA).

2. Work period and overtime issues are mandatory subjects of collective bargaining pursuant to 11 O.S. § 51-102(5). See also NCRB v. Boss Manufacturing Company, 118 F.2d 187 (7th Cir. 1941).

3. The PERB is unable to grant relief to the charging party based upon the doctrine of estoppel by judgment. Bras v. First National Bank & Trust Company of Sand Springs, 735 P.2d 329 (Okla. 1985).

#### DISCUSSION

The PERB previously has held that changes in public employees work schedules are mandatory topics of bargaining. The Board found that Section 207 (k) was merely permissive as to a 27-day work period and does not require the City to set a particular work period or excuse the City from duties imposed by Oklahoma statutes. The Board found that Section 207(k) did not relieve City from its obligation to bargain

with the Union as required by 11 O.S. 51-102(5). (See PERB No. 00125 citing NLRB v. Boss Manufacturing Company, 118 F.2d 187 (7th Cir. 1941) and Alley, Duvall and Korneich, 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). Although the actions of administrative agencies are not controlled by principles of stare decisis, the PERB has not abandoned the view that work schedules are mandatory subjects of collective bargaining.

In its brief, the Respondent asserts that the decision of the Oklahoma County District Court (City of Bethany v. Local #2085, International Association of Firefighters, Case No. CJ-86-5764 constitutes a bar to this action by reason of res judicata or estoppel by judgment.

The PERB is reluctant, in general, to bar parties from appearing before the Board based upon the doctrines of res judicata or estoppel by judgment. In order to bar an action based upon res judicata the moving party must show that five elements are present requiring invocation of the doctrine: (1) that the judgment entered by the district court is a final judgment; (2) identity in the things sued for or subject matter of the suit; (3) identity of the cause of action; (4) identity of the parties; (5) identity of the capacity in the person for or against whom the claim is made. See Epperson v. Halliburton, 434 P.2d 877; Fleming Bldg. Co.,

Inc. v. Northeastern Oklahoma Bldg. & Construction Trades Council, 532 F.2d 162 (10th Cir. 1976).

Estoppel by judgment is applicable when, in the second suit, the parties are the same but the cause of action is different. The parties are estopped only concerning those matters common to both suits. Bras v. First National Bank & Trust Company of Sand Springs, 735 P.2d 329 (Okla. 1985).

In this case, there appears to be no dispute that the complainants are seeking redress for violations of statutory rights and not contractual rights. The Board is confident that the statutory rights asserted herein are here asserted for the first time based upon the oft-stated principle that the jurisdiction of the district courts is not properly invoked until proceedings are completed in the administrative agency in which the Legislature has intended to create primary jurisdiction. See, e.g., Martin v. Harrah Independent School District, 543 P.2d 1370, 1372-74 (Okla. 1975); Hughes v. City of Woodward, 457 P.2d 787, 789-90 (Okla. 1969). Compare, 11 O.S. Supp. 1987, § 51-104(b).

Therefore, the charging parties are not barred on the strength of res judicata but the doctrine of estoppel by judgment presents a more vexing problem.

In PERB consolidated cases 150, 152, the Board held that previous orders of the district court precluded the Unions' access to grievance or impasse arbitration, the primary

statutory procedures for resolving labor disputes (§§ 51-11 and 51-106 through 51-110, respectively) as follows:

Because the utilization of these statutory arbitration procedures are part and parcel of the duty to bargain and discuss grievances in good faith (§ 51-102(6a)(5)), PERB is unable to fashion a meaningful and effective cease and desist order, and therefore should decline to do so.

In this case, based upon the Oklahoma Supreme Court's pronouncements in City of Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977) and Taylor v. Johnson, 618 P.2d 896 (Okla. 1985) the complaining party asserts that the assumption of declaratory judgment jurisdiction by the district court is in error. The PERB however, does not sit as an appellate court of the district courts of this state. The validity of district court's assumption of jurisdiction must be decided by the Supreme Court and not by this Board. Until such time, the Board must consider the district court decision to be valid in all respects. The Board therefore, is faced with a district court decision stating in part:

. . . that the issues raised in the May 8, 1986, grievance had been previously arbitrated and the award entered in final and binding, and the issues raised in the May 8, 1986 grievance are not subject to further arbitration.

To enter a cease and desist order based upon a violation of the statutory obligation to discuss grievances in good faith, the PERB would necessarily have to base its order on a finding that the issues presented by the two grievances

were not the same and that the issues presented in the May 8, 1986 grievance had not been arbitrated. Such an order, whether based upon statutory or contractual obligations to arbitrate grievances, would be in direct conflict with the findings of the district court. That issue has been clearly addressed by the district court and the PERB is precluded at this time from reaching a contrary decision.

Therefore, the Board being unable to grant the charging parties with any meaningful relief will decline to issue a cease and desist order. The Board however retains jurisdiction of this case pending the decision of the Oklahoma Supreme Court, at which time the parties may supplement the record and request further action by the Board.

  
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CHAIRMAN

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