

IN THE MATTER OF THE ARBITRATION BEFORE
 ARBITRATORS STEVEN A. ZIMMERMAN, AMBRE C. GOOCH & JIM KEESEE

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 2067,)	
)	
Bargaining Agent,)	
)	
v.)	FMCS No. 100609-57330-8
)	
CITY OF NORMAN, Oklahoma, A municipal corporation,)	
)	
Employer.)	

POST HEARING BRIEF OF IAFF, LOCAL 2067¹

The parties have each submitted last best offers for a contract for FY 2010-11, which spans the period from July 1, 2010 through June 30, 2011. By law, the offers must include a “final offer on each unresolved issue”. **11 O.S. § 51-108(A)(2)**. The Arbitration Board “. . . may not modify, add to or delete from the last best offer of either party.” **11 O.S. § 51-108(A)(4)**. The Arbitrators are to render their decision “upon the basis of a prompt, peaceful and just settlement of all submitted disputes. . .” **11 O.S. § 51-109**. The five factors to be given weight by the Arbitrators in making their selection of an offer are listed in Section 51-109.

The decision of the Arbitration Board will be final with one exception. If the last best offer of the firefighters is selected, management has the option of submitting the same two offers to a vote of the citizens of Norman. If the last best offer of management is selected, the firefighters are bound by the decision. **11 O.S. §51-108**.

I. GENERAL STANDARDS – FPAA INTEREST ARBITRATION

The Oklahoma Constitution contains a debt limitation provision that requires all public entities to limit contracts to one fiscal year at a time. **Okla. Const. Art. 10 Section 26**. The

¹ All arbitral and PERB authority cited in this Brief is attached

reason for this is to make sure the budget balances each year. While the law does not require a city to maintain any reserve or fund balance, it may not operate at a deficit or borrow money unless the citizens approve it, such as in a bond election. Because of that limitation, the parties here are required to collectively bargain each year in order to reach a new agreement.

This year, the IAFF final proposal essentially asked that the FY 2009-10 contract terms be extended for another year without any increase in pay or benefits. The offer was reasonable and based on the understanding that the City was coming off a down economic year. At the time of the last best offer, the City was completing its sixth consecutive month of sales tax increases that had averaged 5.67%. October, 2010 saw the largest amount of sales tax revenue in the City's hundred plus year history. Even the City Manager admitted that six consecutive months of sales tax growth was a positive sign. (Tr. Lewis 356.)

Regardless of how reasonable the IAFF offer is, or regardless of how well the economy in Norman is recovering, there is no way for the Union to engage in a test of economic strength to enforce its offer. Strikes and work slowdowns are a violation of the law because of the potential danger to the public safety. However, because of this legal disadvantage, the Oklahoma Supreme Court has held that municipalities are held to the highest standards of good faith, or "absolute good faith" as the Court described it. *Stone v. Johnson*, 1984 OK 76, 690 P.2d 459. Unfortunately, this case contains instances where the City failed to meet that standard.

According to **Elkouri**,

Good faith standards are presumed in a last and best offer approach. If not, the incentive to reach agreement item by item, word by word, is lost and bargaining becomes a charade. The last best offer process should be the arbitrator's *final dressing* of the corpus of the parties' agreement, *not the creation* of skeleton and flesh.

Elkouri and Elkouri, HOW ARBITRATION WORKS, 5th Ed. 1997, p. 1144 (emphasis added). (See *City of Owasso and FOP, Lodge 149*, FMCS No. 94-25531 (Harr, 1994); *City of Edmond and IAFF, Local 2359*, FMCS No. 98-11777 (Craig, 1998)).

In addition, those cited arbitrators, in FPAA interest arbitration cases, quoted Elkouri for the principle that, *"The function of the interest arbitrator is to find the agreement the parties would have made if they had been able to make an agreement."* *City of Edmond and IAFF*, (Craig, 1998); *City of Edmond and IAFF, Local 2359*, FMCS No. 99-09498-8 (Baroni, 1999). The point these arbitrators and Elkouri make is that the arbitrator should look for those areas where the parties' interests are similar and attempt to bridge that gap. If the parties have reached a similar agreement in the past, that inquiry is made much easier.

In another FPAA interest case, where the City sought to change management rights language the parties had long agreed to, the Arbitrator rejected the City offer and stated:

. . . Primarily, nothing suggests that Article 2 needs change to correct a past problem, to resolve a current dilemma or to avoid an anticipated, identifiable future situation. In short, present language has served the parties for years and nothing indicates it has become incapable of continuing to do so.

IAFF, Local 2067 and City of Norman, (Gordon, 2000), p. 7.

The FPAA also empowers the Oklahoma Public Employees Relations Board (PERB) to adjudicate unfair labor practice cases. 11 O.S. §51-104. In *IAFF, Local 2479 v. City of Ponca City*, PERB No. 377, the Board addressed interest arbitration under the FPAA.

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 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.

IAFF, Local 2479, PERB No. 377 (emphasis added).

If one party wants to depart from the agreement the parties have reached in prior years, the burden is on that party to justify the change. In *FOP Lodge 123 and Oklahoma City*, (Gordon 1998), the city's last best offer contained a provision to eliminate longevity pay for police officers. The Arbitrator held,

Presumably the Union originally obtained the existing language in exchange for some other goal. The parties have lived with it for years without notable difficulty. To nullify it now without any countervailing consideration and against the Union's wishes unnecessarily strips the Union of the benefits of a past bargain.

Reduction of prior benefits normally should not be approved by an interest arbitration board without substantial reason or unless the result is compelled by the attractiveness or repugnance of one of the two total packages. . .However, the procedure was initially fashioned by the parties, it is well established now and, on this record, there is no great urgency to tinker with it.

Interest arbitration should be a process to finish up the areas in which the parties have come close to agreement but have been unable to close the gap. That is the "final dressing" spoken of by the Elkouris. It should not be a free shot to try to take things from employees simply because they are unable to withhold their labor in response.

II. ISSUES AND DISCUSSION

While the IAFF offer was a status quo proposal, management proposed several significant cuts in compensation. First was a 4.61% across the board reduction in pay, effective November 1, 2010. Second was a freeze in the normal progression through the steps in the pay plan, and third was a provision allowing the Fire Chief to unilaterally cap the number of firefighters who could receive hazardous materials incentive pay. That provision also increased the pay for EMT certification and car seat techs. Because management was proposing to make changes, it had the burden of proving, through the five statutory factors, the necessity and reasonableness of making those changes.

A. Management offered no evidence that any other city in Oklahoma cut firefighter wages this year.

The most significant concession management seeks is a 4.61% reduction in firefighter pay. This would result in the reduction of pay of between \$2,800 per year and \$4,500 per year depending on rank. (Jt. Ex. 1, pay plans.) There is no provision to restore the pay cut at any time. Because a firefighter's pension is based on his rate of pay in the last 30 months of employment, this loss of pay translates into an additional pension loss between \$75,000 and \$80,000 per person. (Tr. York 411.) According to IAFF President Butch Crawford, 52 firefighters would presently be affected by the pension loss. (Tr. Crawford 479.) In the aggregate, management's offer could cause up to \$4.1 million in pension losses. This year alone, this concession and the step freezes would cost firefighters \$330,000. (Tr. 55.) The question for this Board is whether the evidence justifies such massive cuts.

By law, the relevant evidence consists of the five statutory factors found in Section 51-109 of the FPAA. The first three factors consist of comparisons with the private sector building trades, the local area where the jobs are comparable, and with other cities of comparable size and economic status both within and without the State. The fourth addresses the revenues available to the municipality and the interest and welfare of the public. The fifth is a comparison of the hazards and other elements of the job.

At the beginning of negotiations, the City negotiators proposed a deadline by which new proposals could be made. The Union agreed, then agreed again when management wanted to extend the deadline. The final deadline was March 25, 2010 (IAFF Ex. 2), and on that date management proposed a 0% wage change and a step freeze. Two months later it proposed a much worse offer, a 4.61 % reduction in wages. (IAFF Ex. 1.) Ironically, this proposal followed the first monthly increase in sales tax in several months. (Tr. Bates 96-97.) Over the next six

months, while the sales tax continued to grow to record numbers, management's proposal remained fixed. Only when it submitted its last best offer seven days before the arbitration hearing did it change and then only from a July 1 to a November 1 effective date.

While the FPAA calls for comparisons of wages and benefits, it does not dictate what the Board is to do with those comparisons. It allows the Board to assign whatever weight it deems appropriate. **11 O.S. § 51-109.** Normally, those comparisons are offered to justify wage increases. The past practice in Norman has been to place Norman in the top third or higher in the Factor 3 survey of similarly situated cities. (Tr. Crawford 460.) The reason for this is that Norman traditionally has operated with fewer employees per capita than most of the comparable cities. (Tr. Bates 115.) Now there is an additional reason. The citizens voted a special tax earmarked solely for the Fire and Police Departments. That funding relieves the General Fund from funding what would normally be additional costs of those two departments. The end result is that Norman is even more favorably disposed than the comparable cities.

This year the comparisons were more irrelevant than usual. There were no wage increases sought and the cuts that management wanted were not motivated at all by the firefighter's relative standing with comparable cities. (Tr. Bates 113-114.) Management proposed either furloughs or an equivalent 4.61% wage cut for all employees regardless of bargaining unit or comparable position. That proposal was based solely on its projections for the fiscal year which quickly proved wrong.

Given the fact that management's offer was based on the economy, and not comparative wages and benefits, the most relevant comparisons would be to other Oklahoma cities immersed in the same economy. Interestingly, management offered no such evidence, but the Union did. That evidence indicated that a wide range of Oklahoma cities were experiencing increases in

sales tax like Norman, and that NONE had proposed or agreed to a wage cut for firefighters. (IAFF Ex. 12.) IAFF Ex. 13 is a list of the eighteen largest cities in the State, with Norman being number three. A few of the contracts are still open, but the ones that were agreed showed that four received wage increases and eleven more did not take cuts. Usually that meant that the union agreed to no wage increase. Only three of the fire units in those 18 cities agreed to a step freeze. And actually, a step freeze is only an illusory payroll increase. In the long term, retirements of employees at the top step saves sufficient funds to pay the step increases at the lower steps. (Tr. Bates 106; York 405.)

Management did not even try to offer any Factor 1, 2, or 3 support for its proposal to cut wages and freeze steps. The reason is that such support simply does not exist in Oklahoma. And it is difficult to make a comparison to the economy of an out of State city because all of them rely on property taxes and not sales taxes for their revenues. Property taxes have been particularly vulnerable to the mortgage meltdown and the subsequent devaluing of real estate. (Tr. Lewis 357-358.)

This left management with the sole argument that firefighter wages should be cut because they were “above the average” of a group of cities they used for comparison. This argument fails before it even gets started partially for the reasons already outlined above. In addition, it fails because the average has never been the proper standard for comparison. As Butch Crawford testified, the parties have never agreed on a list of comparable Factor 3 cities, although they did agree on at least nine. (Tr. Crawford 458, 460.) Year after year, if management’s list showed Norman firefighters to be above the average it never meant they would not get an increase. The last two years are a perfect example. Mr. Bates brought the same comparisons into negotiations as he did to the arbitration hearing and in the end the City Council agreed to 4% wage increases.

(Tr. Bates 120.) (Management testified that firefighters got between 8% and 16% for those two years, but that was only when they combined the performance related step increases that some got with the COLA that was negotiated. (Tr. Crawford 448-449.)) The lesson from these facts is that even the City Council placed no value on management's list of cities. Why should this Arbitration Board now give it credence?

It is possible the Council placed no importance on the list of cities because the Mayor and others realized the list was merely a vehicle for argument. For example, when the Mayor and City Manager wanted to justify a raise for the Manager during the depths of the City's financial troubles, they cherry picked a group of cities guaranteed to pay better than Norman. (IAFF Ex. 3.) Even Mr. Bates admits, "...having different market groups for the different employee groups would seem unfair to those employees, and there would be no reason to do that..." (Tr. Bates 129.) It worked like a charm and in late 2009, it justified a wage and benefit increase for the Manager. (Tr. Bates 97.) That exercise, like the exception made for the Fire Chief and Deputy Chief to preserve their pensions from reductions (Tr. Bates 147; Hicks 193-194), is an example of how flexible management could be with its own. It offered no such quarter for the firefighters, however. Instead it proposed to balance the budget out of their pockets when it was not even necessary. The firefighters even offered alternatives that would be based on actual revenues and not defective projections, but management was not interested. (Tr. Bates 149-150.)

When the past practice of placing Norman in the top third of the survey was used, it showed firefighters 4.42% behind that standard. (IAFF Ex. 10.) In the past, Arbitration Boards have accepted a Factor 2 comparison with what is known as the "five metro cities". These are the five most comparable cities in the Oklahoma City metro area according to the former Fire Chief. (Tr. Crawford 463.) Placing Norman at number two according to its population would

require a 4.2% wage increase and just placing Norman at the five city average would require 1.52% more. (IAFF Ex. 10.) Those comparisons and those differences are based on the past practice of the parties and the acknowledgments of management. A 4.61% wage reduction would take the Fire Department further away from a proper comparison with other cities, not closer.

Management failed to support its wage cut and step offer with the statutory factors. No city was cutting firefighter wages, only three of the top 18 froze steps and overall, Norman firefighters were still behind the market in overall compensation. As will be seen, Factor 4 did not support management's offer either.

B. The City has additional available revenues from many sources and there is no justification to take compensation from firefighters.

Management's leading justification for the proposal was based on its projections of the economy this fiscal year. When the City Council adopted management's proposed budget in June, 2010, it contained some assumptions that were proven wrong within a very short time. The first assumption was that the sales tax, the primary source of City revenue, would not grow at all this fiscal year. In fact, the budget projection was even worse than that. Management projected \$33,250,000 in sales tax revenues for FY 2010-11 because that was the same number in its amended budget at the end of FY 2009-10. (IAFF Ex. 5.) However, after the budget was passed in June, 2010, the fiscal year ended with *actual* sales tax of \$33,661,000, some \$400,000 *more* than projected this fiscal year. (Tr. York 390; IAFF Ex. 6, p. 11.) This mistake was made because by May, 2010 the local economy had already broken into growth numbers and has not stopped since.

When the budget was prepared, management estimated it would have \$3,753,850 left over in fund balance from the prior year. (IAFF Ex. 5, line 1.) Instead, that number was \$1.7

million greater. (City Ex. 15, line 1.) A \$200,000 vacancy savings was also projected city wide, but the Finance Director estimated at the hearing it would actually be one million dollars, or \$800,000 more than in the budget. (Tr. Francisco 305-306; City Ex. 21.) And if the sales tax keeps on the same pace it has for the last four months, there will be another \$1.6 million in the budget that was unanticipated. (City Ex. 21.)

For good measure, the City will also receive a \$700,000 reimbursement this year from FEMA for money it expended last fiscal year in overtime and other storm related expenses. That is not contained in the budget either. (Tr. Crawford 495-496.) Gala Hicks, the HR Director, also revealed that the City does not intend to fill seven firefighter positions this year even though they show up in the budget as expenses. (Tr. Hicks 191.) That will shave almost \$330,000 off of current expenditures. (Tr. Fullingim 171.) Ms. Hicks also acknowledged there will be other savings in the Fire Department because the Fire Training Officer and Fire Inspector jobs will not be filled. (Tr. Hicks 190-191.) According to the pay plan, the Fire Training Officer starts at \$67,424 annually and the Fire Inspector at \$52,706. (Jt. Ex. 1.) Combined, that is another \$120,000 savings right in the Fire Department budget. Between that and the \$330,000 savings from the seven budgeted vacant firefighter positions, there is \$450,000 in the Fire Department budget alone that is available to otherwise fund the \$330,000 management wants to take from firefighter compensation. A simple shift from one column to the next and that issue is resolved.

While most of the financial focus was on the General Fund and its revenues and expenses, the City also has a Public Safety Sales Tax fund that funds positions within the Fire Department thus taking the financial burden from the General Fund. Ms. Hicks acknowledged that this year that fund will pay for three Captain positions. (Tr. Hicks 192; City Ex. 12.) The ordinance creating the fund also allows “excess” funds from that tax to be used for other

purposes. (City Ex. 7.) According to the long term budget projections, that fund will continue to grow every year until it reaches a surplus of 15 million dollars. (Tr. Bryant 219; City Ex. 6, p. 2.)

All of this additional revenue and the reduction of expenses amounts to many millions of dollars that were not anticipated, or included in the current budget. Even CPA Frank Crawford admitted that this unanticipated revenue is available revenue with which to fund the \$330,000 management said it needed during negotiations. (Tr. Crawford 278.) Mr. Crawford tried to minimize the strong financial condition of the City, but he was never able to rebut the actual audit, performed under GFOA standards, that showed a \$17 million (or 25%) fund balance at the end of FYE 2009. (Tr. York 378-379, 440.) Similarly, Mr. Crawford admitted that the Council could also transfer money from the Enterprise Funds to the General Fund if it wanted. (Tr. Crawford 264.) Those Funds had over \$80 million in reserves at the end of FYE 2009. (City Ex. 24.)

Why did management believe it needed the concessions from the firefighters in the first place? Early on in negotiations, before the six month sales tax run, management suggested it needed a status quo contract in order to balance the budget for the next fiscal year. Later, City negotiators told the Union that they needed the cuts just to make ends meet in the General Fund. Even though it had no agreement on the wage cuts, management included the cuts in the proposed budget and City Council passed it.

One of the oddities of this case is that management staked its case on budget problems but never put the budget in evidence in its case. Instead, it put a "revised" budget in evidence at City Ex. 15. On cross examination, the Finance Director admitted that the document was one he created and it had not been approved or passed by the Council, the only entity with the power to

pass a budget. (Tr. Francisco 326.) When the IAFF put a summary of the actual budget in evidence (IAFF Ex. 5) several things were clear.

First, the City Council passed a budget that had two areas of reserves in it: 1) \$424,386 as a projected fund balance at the end of the year (IAFF Ex. 5, line 78); and 2) \$1,286,557 in the “two percent reserve” for unforeseen expenses (IAFF Ex. 5, line 60). That budget assumed a 4.61% reduction in wages for an entire year and step freeze, as well as the other changes in firefighter incentives. Now it is evident there are millions of dollars in additional revenues and expense savings that can be added to that same budget. So, instead of using wage cuts to end up with that fund balance, it is apparent that the unexpected revenues and savings can perform that function. And perform it far better than those cuts could.

The total amount management wants to take from firefighter compensation is \$330,000. Since there are millions in additional revenues not accounted for in the budget, it is easy for this Board to find it is not necessary to take the money from the firefighters just so there is \$424,000 left in the budget at the end of the year. The Council will realize far more than that reserve without touching firefighter, or other employee, compensation. That has been conceded by the Finance Director.

Management was faced with the prospect of far more revenue in October than it projected back in April. It realized that the justification it had back then for cuts in compensation no longer existed at the time of the arbitration hearing. It slightly modified its offer based on that change, from a July 1 effective date to November 1. But there was no offer to restore the compensation by the end of the year. Knowing it could not deny the additional revenues or that it no longer needed the cuts to balance the budget, management took the opposite approach; it tried to load up on additional “projected expenses” that were not in the budget. This was its

effort to soak up the new revenues so it could still argue it had to cut employee compensation to balance the budget.

In order to try to use up the new revenues, the Finance Director presented the Board his “estimates” of additional expenses and other changes that were not in the budget. In City Ex. 21, Mr. Francisco acknowledges the prospects of \$4.1 million more in revenues. (This acknowledgment did not include many of the other sources of revenue outlined above.) He then skillfully deducts new expense estimates until the balance sheet is left with a \$127,545 deficit. However, none of the verbal estimates were corroborated. He basically stated he believed there would be a million dollar increase to the insurance budget, and a half million dollar decrease in fine and investment revenue. That was it. No proof, no spread sheets, no monthly financial statements from the Insurance Fund, nothing. The Council has not agreed with his estimates or amended the budget based on them, and no one from the Council testified that they even agreed with them.

Mr. Francisco said that some of the new revenue would have to be spent on insurance increases. The insurance plan year is from January through December. Francisco stated that there was \$750,000 in additional insurance costs that were not included in the budget this year. (Tr. Francisco 336.) That statement was puzzling because the insurance year was half over when the budget was created. If there truly was a shortfall in the insurance fund during the year it should have been included in the budget. He offered City Ex. 23 to justify the additional claim statement and the possible increase in plan costs for next year. However, that exhibit makes two things clear. One, it did not take into consideration \$821,000 in reimbursements that is coming for large claims. (Tr. Crawford 452; City Ex. 23.) Second, the exhibit says it will “accompany several exhibits that display paid claim data for the previous 18 months.” Those exhibits were

deleted from City Ex. 23, yet Francisco wanted the Board to take his word for what they contained. If management wanted the Board to seriously consider its claim that the City will need an additional million dollars for insurance this fiscal year it could have at least shown it the documents that came from the Plan administrator. Failure to do so when the hearing was held in the very City offices that had that information makes the claim very doubtful.

Finally, even if Mr. Francisco's statements are provable, his extra cost estimates only spent \$1.5 million of the additional revenues that were not counted in the budget. When one adds the above listed additional revenues plus the expense savings it amounts to over \$6.1 million. If there were no wage cuts or wage freezes city wide that would add \$2.8 million back to the budget, leaving a surplus of \$3.3 million at the end of the year. Take out his estimated \$1.5 million and there is a fund balance of \$1.8 million at year end. Considering that the Council was satisfied to end the year with \$424,000 in General fund balance, the employees can get their wages restored AND the Council can have a greater fund balance than planned.

From every perspective, the City will end up with more fund balance than budgeted without any cuts in wages or steps for any employees. When that focus is narrowed to the \$330,000 at issue in this case the answer is even more obvious. Factor 4 clearly supports the IAFF offer. It is not necessary to take money from firefighter compensation just to further pad the fund balance.

C. A limit on Hazardous Materials Incentive Pay is not justified.

One part of the City offer would increase incentive pay for certain EMT licenses and limit it for the Haz Mat certification. It was unclear why or how management could justify increasing Fire Department costs for EMT pay when it was claiming at the same time it had to cut pay. It was also unclear why last month the Chief required 15 more firefighters to get the

certification when at the same time he was negotiating a cap because he supposedly already had too many. He also did not explain why he would never inform the IAFF what the number was even though his proposal for a cap was on the table for six months.

The primary problem with the cap is that it is designed to disadvantage the more senior firefighters. If the Department already has too many certifications according to the Chief, and at the same time he is requiring rookies to get it, there will never be a time that the number will allow senior firefighters to get the certification and thus the incentive pay. There is no problem with continuing the current system that was started by the past Chief, who believed all the firefighters should be certified. (Tr. Crawford 482.)

D. Management's Last Best Offer was a regressive offer and violates the letter and spirit of the FPAA.

One of the FPAA standards is that the Board, “. . .render their decision on the basis of a prompt, peaceful and just settlement of all submitted disputes. . .”. **FPAA, Section 51-109**. The FPAA provides a “strong policy of requiring absolute good faith in bargaining . . .to counter balance the absence of the right to strike and the absence of the availability of binding arbitration”. *Stone v. Johnson*, 1984 OK 76, 690 P.2d 459, 463. Arbitration is binding on the Union but not on management which can re-submit the same issues to a vote of the people. **FPAA, Section 51-108(B)**.

The Oklahoma Public Employees Relations Board and the Appellate Courts have held that regressive offers violate the standard of good faith bargaining. *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB No. 421 (2005); *City of Norman v. Fraternal Order of Police, Lodge 122*, COCA No. 105,599 (10/06/09) (*unpublished*); *IAFF, Local 2479 v. City of Ponca City*, PERB No. 377 (2001); *City of Lawton v. AFSCME, Local 3894*, PERB No. 2009-PPC-014. The City of Norman is well aware of this standard as a result of an Oklahoma Court

of Civil Appeals decision last year. In that case, the PERB and Court found Norman guilty of an unfair labor practice for, among other things, making a lower offer in arbitration than it had at the table. The Court found the City had no financial justification for lowering the offer and that it was essentially punishing the Union for declining the earlier offer. *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB No. 421 (2005); *City of Norman v. Fraternal Order of Police, Lodge 122*, COCA No. 105,599 (10/06/09) (*unpublished*).

Less than a year later, the situation has repeated itself. This year, City made a “no change” wage offer on the last day proposals could be made. (IAFF Exs. 1 and 2.) Later, *after the economy improved*, management made a far worse wage offer and stuck with it for five months as the sales tax improved each month. The explanation given at the table was that management really wanted furloughs that would amount to the same 4.61% but for unexplained reasons never negotiated them. The Ground Rules require written proposals by the cut-off date and a furlough proposal was never made. (Tr. Bates 103.) The CBA requires that furloughs be agreed by the parties. (Jt. Ex. 1, CBA, Art. 2(3)(f).) Instead, management proposed a wage cut with the hope that the Union would concede to furloughs. The entire scheme was ill conceived and contrary to law.

There is no doubt the last best offer is regressive. In fact, it is incorrect to call it a last best offer since it was worse than the first offer in March. Interestingly, management never tried to justify worsening the offer. In *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB No. 421 (2005) and *City of Norman v. Fraternal Order of Police, Lodge 122*, COCA No. 105,599 (10/06/09), the City argued that its regressive offer was not illegal because it experienced a change of financial conditions that caused a lack of available revenues after the first offer was made. *Norman*, COCA Opinion, p. 12. The Court reviewed the arbitration

decision and quoted the arbitrator as finding, “City has the burden in an *ability to pay* type defense of showing that revenues were demanded in other areas in the overall ‘interest and welfare’ of the public that did not permit the allocation of revenues to meet the firefighter or police unit demands.” *Norman, COCA Opinion, p. 15*. In that case, the arbitrator, the PERB and the Court found the city did have the available revenue to fund the wage increase and that there had been no change of circumstances to justify a regressive offer.

In this case, management did not even try to justify its regressive offer. To do so would have been futile given all the additional revenue it now acknowledges. There was a change of conditions after the original zero wage offer in March, but it was positive not negative. At best, management could only argue it made the regressive offer so it could pad its reserves even more. But that hardly qualifies as a change of condition. The Council was already satisfied with the fund balance it passed in the budget.

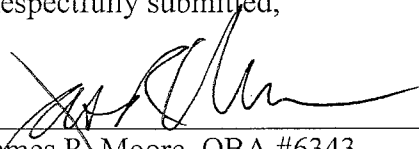
This Board does not sit to adjudicate unfair labor practices, but selection of a regressive offer as the contract of the parties would not be a “just and peaceful settlement” of the issues. **FPAA, Sec. 51-109**. Application of Factor 4, revenues available to the municipality, proves that fact. City has far more available revenues than it did when it made the zero offer. The interest and welfare of the public does not dictate that those revenues go into reserves while firefighter compensation is cut.

IV. CONCLUSION

Applying the facts of this case to the FPAA standards, it is clear that the IAFF offer should be selected by the Board. Management offered no comparative evidence on Factors 2 and 3 regarding the most important issues in this case, wage cuts and step freezes. The IAFF evidence on those two Factors clearly supports the IAFF offer. Under Factor 4, even

management conceded it had far more available revenues than it ever disclosed during bargaining. That available revenue was far in excess of what is needed to balance the budget, without cutting any employee compensation or steps, let alone the \$330,000 amount at issue in this case. The Board should select the last best offer of the IAFF as the contract of the parties for FY 2010-2011.

Respectfully submitted,



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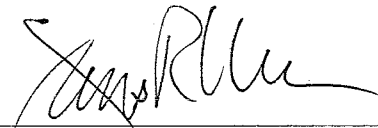
I, James R. Moore, hereby certify that on the 4th day of November, 2010, a true and correct copy of the above and foregoing document was emailed and mailed to:

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