

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

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**Case No. 109447**

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CITY OF NORMAN, OKLAHOMA, a municipal corporation,

Plaintiff/Appellant,

vs.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 2067,

Defendant/Appellee.

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Appeal from District Court of Cleveland County

Case No. CV-2011-48-L

The Honorable Tom A. Lucas

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**ANSWER BRIEF OF APPELLEE**

**INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 2067**

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municipal corporation,	§	
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Plaintiff/Appellant,	§	
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vs.	§	No. 109447
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INTERNATIONAL ASSOCIATION OF	§	
FIREFIGHTERS, LOCAL 2067,	§	
	§	
Defendant/Appellee.	§	

**APPELLEE’S ANSWER BRIEF**

**COMES NOW** Appellee International Association of Firefighters, Local 2067 (IAFF), by and through its undersigned counsel, and submits the following Answer Brief.

**INTRODUCTION**

This case involves a dispute over the wording of a ballot for an election that was never held. The issue is now theoretical because the City of Norman (City) never scheduled the election and no ballot was ever submitted to the Election Board. No election can ever be held on the contested ballot because it addresses financial issues in a contract during Fiscal Year 2010-11. A municipality may not retroactively execute or modify a contract after the fiscal year has ended. The City made no effort to obtain review of the ballot language by this Court before the fiscal year ended.

**FACTUAL AND PROCEDURAL HISTORY**

**1. The Beginning of Interest Arbitration**

The Fire and Police Arbitration Act, “FPAA”, 11 O.S. § 51-101 *et seq.*, authorizes collective bargaining between firefighters and their municipal employer over “wages, hours and terms and conditions of employment.” 11 O.S. § 51-101(A). Because of the debt

limitation provisions of Article 10, Section 26 of the Oklahoma Constitution, bargaining may only result in one year contracts over financial matters. *City of Del City v. FOP Lodge 114*, 1993 OK 169, 869 P.2d 309. An agreement may not lawfully span more than one fiscal year. *Id.* at ¶37.

During annual contract bargaining, if the parties reach impasse, the firefighters or police officers are prohibited from striking to enforce their position at the table. 11 O.S. § 51-101(A). In its place, the Legislature created a system to resolve such impasses without any interruption in public safety services. That system is referred to as “interest arbitration”. The procedure for it is found in Sections 51-106 through 51-109 of the FPAA. This Court has previously upheld the constitutionality of this interest arbitration procedure. *FOP Lodge 165 v. City of Choctaw*, 1996 OK 78, 933 P.2d 261.

The purpose of the procedure is to provide a hearing to resolve those issues that have kept the parties from completing an employment contract for the fiscal year. Thus, the statute directs that “any and all **unresolved issues** shall be submitted to arbitration, upon request of either party.” 11 O.S. § 51-106 (bold added).

In this case, the City and IAFF were unable to reach a full agreement on a new contract for fiscal year 2011, *i.e.*, the period from July 1, 2010, through June 30, 2011. They could not agree on three issues: a wage reduction, incentive pay and performance step increases. As a result, the parties used the statutory procedure and submitted to arbitration a “final offer on each **unresolved issue**”. 11 O.S. § 51-108(A)(2) (bold added). Those final offers are collected into a single “last best offer” and the arbitration board must select one or the other without modification. 11 O.S. § 51-108(A)(4). The process is designed to

encourage good faith bargaining. *FOP Lodge 122 v. City of Norman*, PERB Case No. 00421 (2005).<sup>1</sup>

The City offered a 4.61% reduction in firefighters' wages, while the firefighters offered to maintain the pay plan with no increase or decrease. (IAFF MSJ, Ex. 2) As for incentive pay, the City offered a new provision to allow the Fire Chief to unilaterally cap the number of firefighters who could receive hazardous materials incentive pay. (*Id.*) The firefighters proposed no change to incentive pay. (*Id.*) Last, the City offered a freeze in the normal progression through the performance steps in the firefighters' pay plan, whereas the firefighters proposed no change to the performance pay plan. (*Id.*) In summary, IAFF proposed that there be no changes on the three issues from the previous contract the parties had agreed to for fiscal year 2010.

## **2. The Arbitration Hearing and Decision**

The FPAA delegates to an arbitration board the jurisdiction to conduct an evidentiary hearing on the parties' final offers on the unresolved issues. The statute sets forth the standards to be applied by the board in determining which party's offer to select. **11 O.S. § 51-109**. The City and IAFF each submitted detailed financial evidence during the arbitration regarding the costs of each offer. (IAFF MSJ, Ex. 2) The cost of all wages and benefits for the Fire Department for the prior year was over \$12 million. (IAFF MSJ, Ex. 3) The parties stipulated on the record during arbitration that the cost difference between the two offers for fiscal year 2011 was \$330,000. (IAFF Resp. to City MSJ, Ex. B, pp. 54-55) The Board weighed the evidence before it and selected IAFF's final offer on November 11, 2010. (IAFF MSJ, Ex. 2)

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<sup>1</sup> [http://www.ok.gov/DCS/documents/PERB\\_00421.pdf](http://www.ok.gov/DCS/documents/PERB_00421.pdf)

### 3. City Management's Response to the Arbitration Award

The arbitration board's decision is final and binding unless city management opts for the "appeal" provided by the FPAA. **11 O.S. § 51-108(B)**. That appeal is only available to the city. If the board accepts the city's last best offer there is no appeal available to the employees. *Id.* The appeal provided to the city by the FPAA is a resubmission of the same two offers on the unresolved issues to a vote of the citizens of the affected municipality. The statute directs that a city "may submit **the offers which the parties submitted to the arbitration board** to the voters of the municipality [...]" **11 O.S. § 51-108(B)** (bold added).

As illustrated above, the only offers that can be submitted to a board are the parties' "final offer on each **unresolved issue.**" **11 O.S. § 51-108(A)(2)** (bold added). If the citizens vote for the city's last best offer then it "shall become the agreement of the parties" for that year. **11 O.S. § 51-108(C)**. Whether the citizens pick the city offer, the firefighters' offer or there is no appeal at all, there is an agreement for the fiscal year. And, the agreement is effective on the first day of the fiscal year regardless of when the process is completed. **11 O.S. § 51-108(E)**. The statutory procedure guarantees there will be an agreement in place and there will be no work stoppages by public safety employees. *FOP Lodge 165 v. City of Choctaw*, 1996 OK 78, ¶¶21, 23, 933 P.2d 261.

Here, the City exercised its right to appeal the Board's decision. On November 20, 2010, the City Manager filed a Request for Special Election as the first step in the appeal. **11 O.S. § 51-108(B)**. (IAFF MTD, Terhune Affidavit<sup>2</sup>) Ten days later on November 30, 2010, the City Council approved Resolution No. R-1011-69 which stated in part, "The Mayor shall be authorized to deliver to the Election Board of Norman [sic] County, Oklahoma this

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<sup>2</sup>"IAFF MTD" refers to Appellee's Motion to Dismiss filed on May 31, 2011, with this Court (#109447).

Resolution and a subsequently drafted ballot title for purposes of calling the special election on the last best offers of the City and the IAFF.” (*Id.* at Ex. A, Section 1) Section 6 of the Resolution provided for a certified copy of the Resolution to “be filed with the Secretary of the Election Board, Norman [sic] County, Oklahoma, on or before March 10, 2010 [sic]”. (*Id.* at Section 6)

On March 8, 2011, the Council changed the proposed date for the election and modified the Resolution to notify the Cleveland County Election Board of an election on the two offers “. . . no later than April 15, 2011, of a June 14, 2011, City wide election . . .” (IAFF MTD, Terhune Affidavit, Ex. B) However, the Resolution was never delivered to the Election Board as required by Title 26, Section 13-102 of the Oklahoma Statutes and the terms of the Resolution itself, and the election was never called. (IAFF MTD, Synar Affidavit)

#### **4. The Parties’ Dispute Over Ballot Language**

The FPAA requires the parties to agree on ballot language for the election. However, the statute directs that if no agreement is reached “each party shall present a proposed ballot to the arbitration board.” **11 O.S. § 51-108(C)**. The statute further instructs that the ballot shall state:

- (1) “the total dollar amount of the **offer** from the corporate authority”;
- (2) “the total dollar amount of the **offer** from the bargaining agent”; and
- (3) “the percentage of increase or decrease both **offers** have over or under the last contract of the two parties.”

**11 O.S. § 51-108(C)** (bold added). The term ‘offer’ refers back to the parties’ “final offer on each unresolved issue.” **11 O.S. § 51-108(A)(2)**. No other ‘offer’ is designated by the

statute or required to be submitted to the voters by the parties because by definition, all other issues are resolved. **11 O.S. § 51-108(B)**.

Here, the City and IAFF were unable to reach an agreement on ballot language. As a result, each party submitted a proposed ballot to the Board on December 27, 2010. (Petition,

¶12) The City's ballot language read in part:

The total dollar amount of the City's offer, including wages and benefits, is \$12,248,323.74, which is an increase of 3.20 percent from the agreement for Fiscal Year beginning July 1, 2009 and ending June 30, 2010.

The total dollar amount of the Union's offer, including wages and benefits, is \$12,614,995.11, which is an increase of 6.29 percent from the agreement for Fiscal Year beginning July 1, 2009 and ending June 30, 2010.

(IAFF MSJ, Ex. 3) IAFF submitted the following ballot language:

The total dollar amount of the City's offer on the unresolved issues, is a reduction of \$330,000 in the cost of the last contract, amounting to a decrease of 2.78 percent.

The total dollar amount of the IAFF "no change" offer on the unresolved issues is zero. The IAFF's "no change" offer on the unresolved issues causes no increase or decrease in the cost of the last contract.

(IAFF MSJ, Ex. 4) Even though it was undisputed that the IAFF offer caused no change from the previous contract for fiscal year 2010, the City proposed a ballot that stated the IAFF offer cost **6.29% more** than the 2010 contract. (IAFF MSJ, Ex. 3)

##### **5. The Board's Selection of IAFF's Ballot Language**

The FPAA delegates to the arbitration board that heard the evidence the exclusive jurisdiction to consider and select the ballot language proposed by the parties. The statute directs that "[t]he board shall consider the proposed ballots and shall select one or the other

[...].” **11 O.S. § 51-108(C)**. The board’s selection is final. The statute does not address any judicial review. *Id.*

Here, the City and IAFF each submitted a proposed ballot to the Board. The ballots contained marked differences in the total cost of the parties’ offers. This was unusual, as the parties had stipulated on the record during the arbitration hearing that the monetary difference between their final offers on the unresolved issues was \$330,000. (IAFF Resp. to City MSJ, Ex. B, pp. 54-55) The stipulated cost difference was caused solely by the City’s offers to reduce compensation in the three areas. However, the City’s proposed ballot stated that IAFF’s offer would increase contract costs by **6.29% or \$746,915.59**. (IAFF MSJ, Ex. 3)

The parties submitted briefs to the Board in support of their ballot language. (IAFF MSJ, Exs. 5 & 6) The City attached to its brief an Affidavit of Anthony Francisco, the Director of Finance for the City of Norman, in addition to various spreadsheets compiled by Mr. Francisco and his department that showed the increased contract cost calculations. (IAFF MSJ, Exs. 1 & 6) None of this evidence had been offered at the arbitration hearing and was in fact contrary to the stipulation. (IAFF MSJ, Ex. 7) The Board found that the City’s calculations were misleading and inaccurate and consequently not appropriate for the ballot according to Title 11, Section 51-108(C) of the FPAA. The Board selected IAFF’s ballot language on January 3, 2011, long before the fiscal year ended. (*Id.*)

**6. The City’s Request for Declaratory and Equitable Relief**

On January 19, 2011, the City filed a Petition in Cleveland County District Court for Declaratory and Equitable Relief. (Petition) The City requested the District Court to insert its language in the ballot that had been rejected by the Board. IAFF filed a Motion to

Dismiss on February 11, 2011, contending the District Court was without jurisdiction to hear the matter. (IAFF Dist. Ct. MTD) The City filed a Motion for Summary Judgment on February 15, 2011.<sup>3</sup> (City MSJ)

On April 11, 2011, the District Court granted IAFF's Motion to Dismiss and denied City's Motion for Summary Judgment. (Order) The effect was that the ballot selected by the Board was the one that would be used in the election. The City did not seek an extraordinary writ or other emergency relief. Instead it filed this appeal.

#### **7. The City's Appeal of the District Court's Decision**

The City Council never notified the Cleveland County Election Board of a citywide election as required by Title 26, Section 13-102 of the Oklahoma Statutes. (IAFF MTD, Synar Affidavit) That statute requires a municipality to submit a resolution with certain enumerated information to the county election board at least 60 days prior to the date of the election. Even though the City's time for filing the resolution had expired, it filed a Petition in Error with this Court on May 9, 2011. By that time, the City would not have been able to give 60 days' notice of an election before the end of the fiscal year.

The sole issue in this appeal is whether the District Court erred in determining the language that should appear on the ballot for the election. Since there was never a Resolution calling for an election filed with the Election Board, the subject of the ballot language is moot and merely theoretical. And, because the fiscal year has long passed, an election on a FY 2010-11 contract can never be held. *Infra*. Therefore, on May 31, 2011, IAFF filed a Motion to Dismiss because the appeal over the ballot language is moot. (IAFF MTD) This Court deferred consideration of IAFF's Motion to Dismiss to the decisional stage of the appeal. (06/17/2011 Order) Accordingly, IAFF re-urges its Motion to Dismiss.

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<sup>3</sup> IAFF also filed a Motion for Summary Judgment on April 7, 2011. (IAFF MSJ)

The City now maintains that it could not call for the election because the District Court would not agree with its ballot language. Since the ballot was misleading and inaccurate, it should not have been submitted for a vote. If the City truly wanted an election before its 60 day window closed, it had a remedy before this Court in the form of a writ. It never sought such relief. Instead, the City maintained it was the District Court's fault that it could not call an election.

### **ARGUMENT AND AUTHORITIES**

#### **I. RESPONSE TO THE CITY'S PROPOSITION I: THE ARBITRATION BOARD'S SELECTION OF BALLOT LANGUAGE IS FINAL. THE BOARD'S DECISION IS NOT SUBJECT TO JUDICIAL REVIEW.**

The City argues the District Court was obliged to review the Arbitration Board's January 3, 2011 Decision Regarding Ballot Selection to insure it complied with the law. The City first cites *City of Anadarko v. FOP*, 1997 OK 14, 934 P.2d 328, in support of its argument. (City Brief in Chief, p. 11) However, in *City of Anadarko*, the Court acknowledged the review of an arbitration award under the FPAA is strictly limited. *City of Anadarko*, 1997 OK 14, ¶7. The Court held:

[T]he Fire and Police Arbitration Act has no express statutory authority for review of a collective bargaining agreement reached through Section 51-108 procedures, [but] this Court has repeatedly reviewed the statutory collective bargaining process for constitutional compliance.

*Id.* Here, the Board's selection of IAFF's proposed ballot was not unconstitutional. The disputed portions of the ballot only have to do with stipulations and mathematical calculations. Those calculations do not impede upon the City's constitutional rights, nor has the City suggested they do.

The City cites *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 2007 OK 50, 164 P.3d 1063. However, *Sooner Builders* involved the Oklahoma Uniform Arbitration Act, “OUAA”, 12 O.S. § 1851 *et seq.*, rather than the FPAA. Although the OUAA authorizes district courts to vacate or modify an arbitrator's award on specific grounds, such as where the arbitrator exceeded the arbitration power, it does not apply to the present matter. The OUAA expressly states that it does not apply to collective bargaining agreements. 12 O.S. § 1855(D).

The City cites *Elkouri & Elkouri, How Arbitration Works 32-5* (6<sup>th</sup> Ed., ABA 2003), in support of the non-statutory manifest disregard of the law standard. However, Oklahoma has not adopted the manifest disregard of the law basis for vacating an arbitration award. In *Sooner Builders* the Court stated:

Several states have recognized the "manifest disregard of the law" basis for vacatur of an arbitrator's award, while other states have rejected it. We need not adopt or reject the non-statutory "manifest disregard of the law" basis for vacating the arbitrator's denial of prevailing party attorney fees and expenses because there is a statutory basis.

*Sooner Builders & Invs., Inc.*, 2007 OK 50, ¶¶27-28.

The City cites the Tenth Circuit case *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10<sup>th</sup> Cir. 2001). However, *Bowen* involved the Federal Arbitration Act, “FAA”, 9 U.S.C. § 1 *et seq.*, rather than the FPAA. The FAA “applies to a written arbitration clause in a contract evidencing a transaction involving commerce.” *Bowen* at 254 F.3d at 931-32. It does not apply to the present matter.

The City cites *Midwest City v. Jarrell*, 2001 OK CIV APP 125, 33 P.3d 962. However, *Midwest City* involved an issue of arbitrability in grievance arbitration. In *Midwest City*, the arbitrator acknowledged that the contract did not provide for arbitration but

found the parties had submitted to arbitration based on their conduct. The court vacated that award because it was in excess of the arbitrator's contractual authority.

The City last cites *Oklahoma City v. IAFF*, 2011 OK 29, 264 P.3d 678. However, *Oklahoma City* is distinguishable from the case at bar. In *Oklahoma City*, the arbitration board failed to perform its statutory duty to hold a hearing and weigh the parties' offers according to the statutory standards. The board struck the city's offer solely based on its finding that the city committed an unfair labor practice. The Court found the authority to make that finding was statutorily entrusted to the Public Employees Relations Board, not the arbitration board. Because that authority had been solely granted to another entity, the Court found that the board did not have the statutory authority to select a last best offer based on that finding. *Id.* at ¶15.

The Court also found the board in *Oklahoma City* violated Title 11, Section 51-108(A)(4) of the FPAA by modifying the city's last best offer which it was prohibited from doing by statute. Section 51-108(A)(4) limits the criteria used by an arbitration board in selecting a last best offer to five criteria listed in Section 51-109. *See 11 O.S. 51-108(A)(4)*.

Here, the City has not claimed that the Board exercised authority outside of its subject matter jurisdiction. The City merely claims the Board should have agreed with it, not the firefighters, and it argues over the Board's mathematical calculations, even though they match the City's stipulations. Unlike the board in *Oklahoma City*, this Board accepted and reviewed the proposed ballot language of both parties according Section 51-108(A)(4). It acknowledged in its Award that "[t]he language in Section 51-108(A)(4) is clear and unambiguous in stating the criteria to be used by the Arbitration Board to select a last best offer." (IAFF MSJ, Ex. 2, p. 3) This Board also followed the factors set forth in Section 51-

109. In its Award, the Board recognized that “its selection of a last best offer is limited to use only the criteria spelled out in paragraphs 1 through 5 of Section 51-109 of Title 11.” (*Id.* at p. 2) The Board considered each of the five factors and selected the last best offer from the IAFF. In fact, it noted that “[t]he interest and welfare of the public and revenues available to the City were given greater weight than the other factors.” (*Id.* at p. 7)

It cannot be disputed that the Board considered the ballots proposed by the City and IAFF. The Board noted in its Decision Regarding Ballot Selection that:

Looking at the City’s ballot, a voter could ask; how does a reduction and freeze in wages add a cost to the City and be such a large increase over the previous contract? The ballot does not answer these questions and therefore could mislead and be deceptive to a person about to cast a vote on the issues and cost of the issues between the parties.

The Union’s proposed ballot does not mislead or deceive a resident about the cost increase to the City for FY 2011. No increase in compensation is understood by most residents (voters) to mean no additional cost to the City was proposed by the firefighters. No change to the step pay plan would mean increases agreed to in the past by the City would remain unchanged and not increase the cost for FY 2011. The same for no change in the incentive plan. The Union’s proposed ballot is not misleading or deceptive to the residents of the City.

(*Id.*) The Board also considered the parties’ briefs in support of their ballot language. (IAFF MSJ, Exs. 5 & 6) It decided that “[t]he last best offer presented by each Party at the arbitration hearing should be the statements of the unresolved issues on the ballot for consideration for presentation to the residents of the municipality.” (IAFF MSJ, Ex. 7) Accordingly, the Board chose IAFF’s ballot language, which included the City’s last best offer on the unresolved contract issues. (*Id.* at Exs. 4 & 7)

Appellant City confuses “exceeding jurisdiction” with an adverse finding on the evidence. Merely because the Board, or the District Court, did not agree with the City on its

ballot language does not mean they exceeded their authority or subject matter jurisdiction. By law, the Board had the legal obligation to resolve the issue of the ballot language, and it did. **11 O.S. § 51-108(C)**. It did so based on the evidence that was submitted during the hearing - evidence that the City stipulated to. The District Court rightfully did not disturb that decision. The Board and the District Court properly rejected the City's argument on its misleading and inaccurate ballot language.

**II. THE CITY HAS CITED NO AUTHORITY TO SUPERCEDE THE MANDATE OF THE FPAA THAT THE DECISION OF THE ARBITRATION BOARD IS FINAL.**

The proposal and selection of ballot language in interest arbitration is governed by Section 51-108(C) of the FPAA. Section 51-108(C) reads:

Within twenty (20) days of the date of the decision to call for the election, the municipal authorities and the bargaining agent shall agree on a ballot. If no agreement is reached within that time, each party shall present a proposed ballot to the arbitration board. The parties shall present their ballot to the board no later than seven (7) days after the aforementioned twenty-day period. **The board shall consider** the proposed ballots **and shall select** one or the other within seven (7) days of the date of receipt of the parties' proposed ballots.

**11 O.S. § 51-108(C)** (bold added). The plain language demonstrates the Legislature's unmistakable directive to vest an arbitration board with exclusive jurisdiction to consider and select ballot language; it is not within the province of a district court to do so. Moreover, it is clear that the Legislature intended a board's selection to be final. No measure for judicial review is provided for in Section 51-108. A court cannot add language to the FPAA to allow review of the language selected by a board. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1, 2003 OK 98, ¶19, 82 P.3d 587* ("It is not the function of the courts to add new provisions which the legislature chose to withhold.")

The reason for the procedure is rooted in the constitutional requirement that municipal contracts may only be one year in duration and that the city council must create a new budget each year. **OK Const., Article 10, Sect. 26.** As the rest of the FPAA makes clear, there are time limitations in every step of the process designed to allow the parties to have a final decision on every issue, including ballot language, in time to have an election during the fiscal year. It is axiomatic that if such an issue was within judicial branch jurisdiction, it could not be resolved by the end of the fiscal year, given the potential for appeals.

Here, the City and IAFF could not agree on a ballot and invoked the jurisdiction of the Board to complete the process. Both parties submitted proposed ballots to the Board and claimed that the language used by the other did not conform to Section 51-108 of the FPAA. In fact, each party submitted a brief to the Board regarding the issue. (IAFF MSJ, Exs. 5 & 6) The Board weighed the evidence and arguments of the parties, interpreted Section 51-108 and selected IAFF's proposed ballot language. (IAFF MSJ, Ex. 7) As illustrated above, the Board's decision is final and could not be reviewed by the District Court. Its decision has the same force and effect as a judgment from a court of competent jurisdiction for claim preclusive purposes. *See Cities Serv. Co. v. Gulf Oil Corp., 1999 OK 14, ¶13, 980 P.2d 116.* The District Court could not review the factual or legal findings of the Board. *See City of Yukon v. International Ass'n, Local 2055, 1990 OK 48, ¶8, 792 P.2d 1176.*

The Board issued its decision on the ballot language on January 3, 2011. Six months remained in the fiscal year within which to hold an election if the City really desired one. At that point, City management knew that State court litigation and appeals would take it past the time for an election, yet it intentionally chose that path. Had it truly wanted a judicial

review of the Board’s decision in time to call for an election it could have requested this Court review the matter on an extraordinary writ. Instead, it chose the path of certain delay knowing the fiscal year would be long closed before decision on the ballot language. It made no effort to preserve its right to hold an election in a timely manner and should not be heard to complain about that in this appeal.

### **III. RESPONSE TO THE CITY’S PROPOSITION II: THE FPAA REQUIRES A BALLOT TO DISCLOSE INFORMATION RELATING TO THE PARTIES’ FINAL OFFERS ON UNRESOLVED CONTRACT ISSUES**

#### **A. The FPAA Requires a Ballot to Address Only Unresolved Contract Issues**

The FPAA directs that “any and all **unresolved issues** shall be submitted to arbitration, upon request of either party.” **11 O.S. § 51-106** (bold added). Here, the City and IAFF could not agree on the three issues for the fiscal year 2011 contract: a wage reduction, incentive pay and performance step increases. As a result, both the City and IAFF submitted to arbitration a “**final offer on each unresolved issue**”. **11 O.S. § 51-108(A)(2)** (bold added). The Board selected IAFF’s final offer and the City exercised its right to appeal by submitting the issue to the Norman voters. (Petition, ¶9) The FPAA directs that a city “may submit **the offers which the parties submitted to the arbitration board** to the voters of the municipality [...]” **11 O.S. § 51-108(B)** (bold and underlining added).

When the City and IAFF were unable to reach an agreement on ballot language, each party submitted a proposed ballot to the Board. (Petition, ¶12) The FPAA instructs that the ballot shall state:

- (1) “the total dollar amount of the **offer** from the corporate authority”;
- (2) “the total dollar amount of the **offer** from the bargaining agent”; and

- (3) “the percentage of increase or decrease both **offers** have over or under the last contract of the two parties.”

**11 O.S. § 51-108(C)** (bold added). The term ‘offer’ refers back to the parties’ “final offer on each unresolved issue.” **11 O.S. § 51-108(A)(2)**. No other ‘offer’ is designated by the statute or authorized to be submitted to the voters because by definition, all other issues were “resolved”. **11 O.S. § 51-108(B)**.

The FPAA requires the ballot to state the difference “**of the offers**” of both the city and the bargaining agent over/under the last contract. **11 O.S. § 51-108(D)**. The City’s final offer on the three unresolved issues were a 4.61% reduction in firefighters’ wages, a new provision to allow the Fire Chief to unilaterally cap the number of firefighters who could receive hazardous incentive pay, and a freeze in the normal progression through the steps in the firefighters’ pay plan. (IAFF MSJ, Ex. 2) The IAFF’s offer actually resulted in no increased contract cost and could not since the contract did not change. (*Id.*) The City’s offer resulted in a decrease in compensation of \$330,000 from the previous contract for fiscal year 2010. (IAFF Resp. to City MSJ, Ex. B, pp. 54-55) That amount was stipulated to by the parties at the arbitration hearing. (*Id.*) Hence, the IAFF selected ballot language which read:

The total dollar amount of the City’s offer on the unresolved issues, is a reduction of \$330,000 in the cost of the last contract, amounting to a decrease of 2.78 percent.

The total dollar amount of the IAFF “no change” offer on the unresolved issues is zero. The IAFF’s “no change” offer on the unresolved issues causes no increase or decrease in the cost of the last contract.

(IAFF MSJ, Ex. 4)

**B. The FPAA's Purpose and Objective Requires a Ballot to Disclose the Total Dollar Amount and Comparative Information Regarding the Parties' Final Offers on Unresolved Contract Issues.**

The FPAA directs that “any and all **unresolved issues** shall be submitted to arbitration, upon request of either party.” 11 O.S. § 51-106 (bold added). The purpose and objective of the statute is quite clear. Interest arbitration pertains to the resolution of unresolved issues. *See State ex rel. Department of Public Safety v. 1985 GMC Pickup, 1995 OK 75, ¶7, 898 P.2d 1280* (“The governing principle in statutory construction is legislative intent. [...] If the language is plain and clearly expresses legislative will, such language will be followed without further inquiry.”)

The purpose and objective of the FPAA is consistent with Oklahoma election law. In *Arthur v. City of Stillwater, 1980 OK 64, 611 P.2d 637*, the Court held that the question on a ballot submitted to popular vote by the electorate must be in a form to permit the voter to reach an informed decision whether to approve or disapprove the measure. *Arthur v. City of Stillwater, 1980 OK 64, ¶14*. The Court further stated:

Generally, the requirement concerning submission of ballot propositions is that the question not be deceptive or misleading, and that it be free from uncertainty and ambiguity. The test is whether the voters are afforded an opportunity fairly to express their will, and whether the question is sufficiently definite to apprise the voters with substantial accuracy as to what they are asked to approve.

*Id.*

Here, the City's ballot showed an increase of 3.20% when the parties had already stipulated during the arbitration hearing that the City's final offer on the three unresolved issues caused a reduction of \$330,000 in compensation from the previous fiscal year 2010. (IAFF MSJ, Ex. 3 & Ex. 1, pp. 11-12) The City's ballot also indicated that IAFF's offer

would increase contract costs from the previous fiscal year 2010 by 6.29% or \$746,915.59.

(*Id.*) These figures were misleading given the fact that IAFF proposed no changes in any of the three unresolved contract issues. In fact, the Board said:

Looking at the City's ballot, a voter could ask; how does a reduction and freeze in wages add a cost to the City and be such a large increase over the previous contract? The ballot does not answer these questions and therefore could mislead and be deceptive to a person about to cast a vote on the issues and cost of the issues between the parties.

The Union's proposed ballot does not mislead or deceive a resident about the cost increase to the City for FY 2011. No increase in compensation is understood by most residents (voters) to mean no additional cost to the City was proposed by the firefighters. No change to the step pay plan would mean increases agreed to in the past by the City would remain unchanged and not increase the cost for FY 2011. The same for no change in the incentive plan. The Union's proposed ballot is not misleading or deceptive to the residents of the City.

(IAFF MSJ, Ex. 7)

The City had tried to use inflation and increases in personnel to artificially inflate the number and to create a deceptive picture of the final offers that the Board decided.<sup>4</sup> After the City filed its Petition in Cleveland County District Court for Declaratory and Equitable Relief, IAFF deposed Anthony Francisco, the Director of Finance for the City of Norman. Mr. Francisco testified that of the \$746,915.59 purported increase, \$667,527.80 would have occurred regardless of the arbitration award. (IAFF MSJ, Ex. 1, pp. 45-47) He could only identify \$79,387.79 in step increases that occurred because of the award and that amount had been built into the pay plan from the previous fiscal year 2010. (*Id.*) In essence, he admitted under oath that the dollar amounts and percentage increases the City wanted to insert in the

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<sup>4</sup> The City later admitted that the increased figures included medical insurance inflation, longevity increases, positions that were not filled during fiscal year 2010 but budgeted for fiscal year 2011, and step increases. (IAFF Resp. to City MSJ, Ex. C)

ballot language had nothing to do with which last best offer was selected by the Board. Nor were they related to the three unresolved issues submitted to the Board. The real financial impact of the Board's decision would be concealed by the City's proposed ballot language. The City's ballot language was the definition of misleading and deceptive as described by the Court in *Arthur v. City of Stillwater, supra*.

Although Appellee IAFF maintains this appeal should be moot, it is still not clear why the City has continued to argue that the voters would need to be informed about medical inflation or increases in number of personnel when those subjects were never in dispute, unless the intent is to confuse. Including those increases would be contrary to the clear statutory intent of the FPAA, which is to inform the voters of the impact of the final offers from a dollar and percentage standpoint compared to the fiscal year 2010 contract.

**C. The City's Ballot Language was not "Faithful to the Letter and Logic of the FPAA".**

The defect in the City's proposed ballot, as identified by the Board, is the same defect the City presented to the District Court: it did not match the evidence and the stipulated facts. It did not inform the voters that its final offers reduced the firefighters' compensation nor did it inform the voters that the IAFF offer was a status quo contract from the previous fiscal year. The IAFF ballot does both of those things. Because the IAFF ballot was accurate and did not mislead the voters as the City ballot did, it was chosen by the Board.

It appears that City management was only willing to go to a vote of the people if it could submit a misleading ballot that would give it a better chance to win. Without that advantage it lost the desire for an election.

**D. The Arbitration Board's Selection of IAFF's Final Offer on the Unresolved Contract Issues Became a Part of the Negotiated Fiscal Year 2011 Collective Bargaining Agreement by Operation of Law.**

The City raises a new issue in this appeal that it did not raise in its Petition in Error. It argues that the offer selected by the Board cannot be the contract of the parties for FY 2010-11 because the City “timely rejected the Arbitration Board’s decision and requested an election for May 10, 2011”. (City Brief in Chief, p. 16.) The appeal centers on procedural and substantive assignments of error raised regarding the ballot, not whether there was an employment agreement in FY 2010-11. Yet, that is the subject of the City’s last proposition. The Court’s examination is limited to the issues raised in the City’s Petition in Error. *Oklahoma Turnpike Authority v. Little*, 1993 OK 116, ¶10, 860 P.2d 226. Errors not assigned will not be reviewed. *Harris v. State*, 1966 OK 253, ¶9, 434 P.2d 477. However, even if the Court entertains the issue, it should find that the FPAA makes the Board decision on the three issues final in this case.

An employment contract is reached one of three ways in interest arbitration under the FPAA. First, by express agreement; second, the parties’ final offers on unresolved contract issues are selected by the arbitration board; or third, by voters of a municipality during a special election. 11 O.S. §§ 51-108(B), (C). Section 51-108(B) of the FPAA directs, **“If a request for an election is not filed in a timely manner, the board’s selection decision shall be final [...].”** 11 O.S. § 51-108(B) (bold and underlining added).

The City claims it did that by “rejecting” the Board’s decision and “requesting an election”. It reasons that was sufficient to neutralize the Board’s decision, presumably forever since the fiscal year has expired. However, neither of its statements is accurate. First, nothing in the FPAA addresses “rejecting” the decision. That action has no legal

effect. Second, it is undisputed from these facts that the City never requested an election. Even if it could somehow suspend the Board's decision by merely requesting an election, it did not do it.

The FPAA directs, "The election shall be governed by the state laws on special municipal elections." **11 O.S. § 51-108(C)**. Title 11, Section 16-112 of the Oklahoma Statutes sets out the first step by which a municipality calls a special election:

When the municipal governing body shall deem it advisable, it may, by resolution or ordinance, authorize the mayor to call a special election for the purpose of submitting to the registered voters of the municipality the question of issuing municipal bonds, of granting any franchise, or for any other purpose authorized by law. (Underlining added)

Title 26, Section 13-102 contains the next step:

A. Not fewer than fifteen (15) days before the filing period for any regular municipal election, or in the event of a special election, not fewer than sixty (60) days before such election, the governing board of any municipality shall submit a resolution to the secretary of the county election board conducting such election. Such resolution shall contain the following facts: (Underlining added)

On November 30, 2010, the City began the first part of the election process when the City Council approved Resolution No. R-1011-69 which authorized the Mayor to call a special election. (IAFF MTD, Terhune Affidavit, Ex. A) The Resolution provided for the issues to be submitted to Norman voters in a May 10, 2011 election. (*Id.*) Resolution No. R-1011-69 read in part:

Section 1. The Mayor shall be authorized to deliver to the Election Board of Norman [sic] County, Oklahoma this Resolution and a subsequently drafted ballot title [...].

Section 2. The special election shall be held on May 10, 2011, between the hours of 7:00 A.M. and 7:00 P.M. and shall be non-partisan.

(*Id.*)

Even though the election was set more than five months from the Council's Resolution, the Mayor never called for the election or delivered the Resolution to the Election Board. Three months later, on March 8, 2011, the City Council voted to modify the Resolution to notify the Election Board no later than April 15, 2011, of a June 14, 2011 citywide election. (IAFF MTD, Terhune Affidavit, Ex. B) However, the City never provided that Resolution to the Election Board and it never asked the Election Board to set an election date. (IAFF MTD, Terhune and Synar Affidavits) Despite those undisputed facts, the City argues here that it successfully nullified the Board's decision by "requesting an election".

Because the City never properly appealed the Board's decision on the offers by submitting them to the voters, the Board's decision is final. **11 O.S. §§ 51-108(B), (C)**. The arguments the City makes about Article 10, Section 20 of the Oklahoma Constitution are academic since the City never exercised its option to submit the two offers to a vote of the people in the seven months it had to do so after November 30, 2010.

The City argues it should be excused from compliance with the provisions of the FPAA and State election law since it disagrees with the ballot language. It states erroneously that it only had two choices: submit the Board's ballot to the people or file suit in District Court. (City Brief in Chief, pp. 17-18.) According to the City, "[it] chose the only legal remedy available and filed the action upon which this appeal is based." (*Id.* at p. 18) This argument is without merit. The City could have brought an original action for a writ of mandamus as many others have done when an election issue is time sensitive. *See Gray v. State ex rel. State Election Bd.*, 1998 OK 85, 962 P.2d 1 (candidate brought original action

for a writ of mandamus against State Election Board to prohibit the removal of her name from the ballot for the office of district judge); *See also McCarthy v. Slater*, 1976 OK 100, 553 P.2d 489; *Swindall v. State Election Board*, 1934 OK 259, 32 P.2d 691; *Shelton v. McMillan*, 1914 OK 448, 143 P. 196.

The Council passed the election Resolution on November 30, 2010. The Board selected IAFF's ballot language on January 3, 2011. (IAFF MSJ, Ex. 7) The end of the City's fiscal year for 2011 was June 30, 2011. (Petition, ¶7) The City clearly had ample time to seek a writ; however, it chose not to because it appears it never intended to have an election.

**IV. ALL ISSUES REGARDING THE BALLOT LANGUAGE ARE MOOT. AN ELECTION CANNOT BE HELD TO RETROACTIVELY CREATE OR MODIFY A CONTRACT FOR A PRIOR FISCAL YEAR.**

IAFF re-urges its Motion to Dismiss filed with this Court on May 31, 2011, because the City's appeal over the ballot language is moot. The City has requested the following relief from this Court:

Norman seeks interpretation of § 51-108 and a reversal of the District Court's decision, so the City's voters will receive a ballot, consistent with the FPAA, and which accurately and fully discloses the total dollar amount of Norman and the IAFF's 2011 offers.

(Petition in Error, Ex. B "Statement of the Case", ¶4; *see also* City's Brief in Chief, "Conclusion", p. 19 ["This Court should reverse the District Court's decision and remand this matter with instructions that the election proceed using Norman's proposed ballot language."]) Yet, this relief cannot be granted.

According to the following authorities, after the fiscal year ends it is unlawful to create or modify a contract that would govern both fiscal and non-fiscal items for the

preceding fiscal year. If the voters were to choose the same offer chosen by the Board, nothing would change. However, if they reversed the Board and imposed new terms on the parties for the prior fiscal year it would be a nullity. In other words, there is no lawful reason to hold the election.

Oklahoma statute and common law hold that cities may not contract during the present fiscal year to pay an obligation for the previous fiscal year. In *In re Bliss*, 1929 OK 535, ¶51, 285 P. 73, this Court ruled a town's excise board "is without authority of law to make an appropriation for the purpose of paying warrants outstanding for a previous fiscal year." Similarly, in *Board of Education v. Challey*, 1931 OK 742, ¶12, 5 P.2d 747, this Court ruled that a "tax levied for the conduct of a school for a current fiscal year may not be used for the payment of an indebtedness incurred by the school district during a prior fiscal year." "It is well settled that funds received by a municipality in any one fiscal year cannot be used to pay indebtedness incurred in a previous fiscal year." *Board of Comm'rs v. Campbell*, 1941 OK 241, ¶10, 115 P.2d 256, citing *Gulf Pipe Line Co. v. County Treasurer of Tulsa County*, 1925 OK 439, 236 P. 896; *Coggeshall & Co. v. Smiley, Co. Treas.*, 1929 OK 526, 285 P. 48; *Protest of Chicago, R. I. & P. Ry. Co.*, 1931 OK 492, 2 P.2d 279.

The rule separating the obligations of fiscal years has been strictly enforced by this Court. See *City of Del City v. FOP, Lodge No. 114*, 1993 OK 169, 869 P.2d 309. The Oklahoma Statutes also reflect the prohibitions against retroactive contracts. Title 62, Section 310.4 of the Oklahoma Statutes allows a city to pay obligations incurred in a prior fiscal year for up to 90 days after the end of the fiscal year provided no new obligations pertaining to the prior fiscal year may be created after the fiscal year ends. That is what the City wants to do here. The fiscal year ended on June 30, 2011, but the City wants to create a

new contract well into fiscal year 2012. That action would violate not only the Constitution but State law as well.

As shown above, the City's time to submit an election resolution has expired. *See e.g., Edwards v. Welch, 1911 OK 257, 116 P. 791* (appeal held moot due to expiration of time for holding election). This Court acknowledged in *Wyatt-Doyle & Butler Eng'rs, Inc. v. City of Eufaula*:

[T]he teaching of the *Afton* case [ ] reveals that a contractual obligation made in one fiscal year cannot be subsequently validated in a succeeding fiscal year by the voters, and if it cannot be subsequently validated by the voters, it certainly could not be subsequently validated by a municipality.

*Wyatt-Doyle, 2000 OK 74, ¶12, 13 P.3d 474.*

The City is well aware it is too late to submit issues about the FY 2010-11 contract to a vote at this time. In fact, it is doubtful the City wants that result even if it were available. Instead, it already has what it wants, it has refused to comply with the Board's decision arguing that the creation of Resolution 1011-69, by itself, suspended the Board's decision. It now argues for an option found nowhere in the FPAA and contrary to its spirit, intent and express provisions. That option is that the City neither has to accept an arbitration decision nor submit it to a vote of the people as long as it passes a resolution that authorizes the Mayor to call for an election sometime. And, the election never has to be held. That interpretation leaves the parties with no contract for the fiscal year, a result that is repugnant to the entire balance of the statute.

The balance in the statute is that work stoppages and slowdowns are prohibited in exchange for a system of arbitration to resolve disputes.

In partial compensation for the denial of the traditional economic weapons of labor, the Firefighter's and Policemen's Arbitration

Law provides a method of arbitration for issues unresolved by negotiation.

***Stone v. Johnson*, 1984 OK 76, ¶16, 690 P.2d 459.**

If a contract is completed by an arbitration board or by a vote of the people it is retroactive to the first day of the fiscal year so there will never be a gap in coverage. **11 O.S. Section 51-108(E)**. The City's new theory on nullification means that some disputes never get resolved and that firefighters could go a year or more with no contract. Both interpretations are directly contrary to the intent of the FPAA for the past 30 years.

### **CONCLUSION**

IAFF re-urges its Motion to Dismiss filed with this Court on May 31, 2011, and respectfully requests this Court dismiss the City's Petition in Error as moot. In the alternative, IAFF respectfully requests that this Court affirm the District Court's decision granting IAFF's Motion to Dismiss and denying the City's Motion for Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_ day of January, 2012, a true and correct copy of the above and foregoing document was emailed and mailed to: Jeff Harley Bryant, Rick Knighton, City of Norman, P.O. Box 370, 201 West Gray, Norman, OK 73070, and Charles Plumb, McAfee Taft, 1717 S. Boulder Ave., Suite 900, Tulsa, OK 74119.

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Timothy J. Synar