

Principles of Waiver of Statutory Rights

In a recent Public Employees Relations Board (PERB) opinion involving the City of Lawton, it held that neither the parties' collective bargaining agreement nor union inaction after they were notified of a meeting to discuss the possible change, constituted a "clear and unmistakable" waiver of a statutory right. In this case, the statutory right was legislative action under the Fire and Police Arbitration Act at 11 O.S. Section 51-101 and following.

PERB applied its "clear and unmistakable standard" to whether the bargaining agent waived the employee's statutory right to bargain the retirement system. See the prior cases of *FOP, Lodge 93 v. City of Tulsa*, PERB Case No. 473 (2009) and *FOP and Lodge 125 v. City of Guymon*, PERB Case No. 329 (1996). The Opinion discussed two ways to waive a statutory right – waiver by contract and waiver by inaction.

Waiver by Contract. PERB held the contract did not allow the city, as a reserved management right, to unilaterally modify the system and does not constitute a waiver of the union's right to bargain over the issue. The Opinion stated that "labor law recognizes that a 'mere catchall phrase' in a management-rights clause . . . will fall short of being a clear and unmistakable relinquishment." *The Developing Labor Law*, Vol. 1, Ch. 13 at 1014-15 (5th ed. 2006). PERB noted that "conspicuously absent from the CBA is any direct mention of the retirement system."

Waiver by Inaction. Although acknowledging waiver by inaction is possible, PERB gave no analysis for its conclusion that the "clear and unmistakable standard" was not met when the union ignored Lawton's retirement system meeting. See *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996). In a footnote PERB states that a union's "acquiescence in an employer's unilateral conduct does not necessarily constitute a waiver of the right to bargain in the future over the same or similar employer conduct." *E.R. Stembner, Inc.* 313 NLRB 459 (1993).

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