

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

FRATERNAL ORDER OF POLICE,)	
LODGE 114,)	
)	
Complainant,)	
)	
vs.)	Case No. 370
)	
CITY OF DEL CITY,)	
)	
Respondent.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
OPINION, AND CEASE AND DESIST ORDER**

This matter comes before the Public Employees Relations Board (PERB or Board) upon the complaint of the Fraternal Order of Police, Lodge 114, (FOP) alleging the City of Del City (City) committed an unfair labor practice during the summer of 2000.

PERB met in public session on March 21, 2001, with a quorum of its members present, and conducted a hearing at which the FOP and City were represented by counsel, Loren Gibson and Jack B. Fried, respectively, and by party representatives, James Cummings and Phil Taylor, respectively. At the hearing, PERB heard testimony from six witnesses and received twenty-four exhibits. At the conclusion of the hearing, each party was allowed time to submit proposed findings of fact, proposed conclusions of law, and argument.

Thereafter, PERB met in public session on July 18, 2001, with all members present, and voted to enter executive session to discuss this matter pursuant to 25 O.S. Supp. 2000 § 307(B)(8). At the conclusion of the executive session, PERB returned to

public session and found, on a recorded vote of 2 to 0, that the City had engaged in an unfair labor practice.

When proposed findings of fact are submitted by a party, PERB is required to rule individually on the submitted proposed findings. 75 O.S 1991 § 312. Only the City has submitted proposed findings of fact and proposed conclusions of law. The submission of the City's proposed findings of fact is treated as follows:

- a. Proposed Finding of Fact nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15 and 17 are substantially adopted by the Board.
- b. Proposed Finding of Fact no. 3 is accepted in part and rejected in part.
- c. Proposed Finding of Fact nos. 11 and 12 are rejected as irrelevant.
- d. Proposed Finding of Fact no. 16 is rejected.

FINDINGS OF FACT

1. The City was at all relevant times a municipal corporation under the laws of the State of Oklahoma. Judicial notice.
2. The FOP is the collective bargaining agent for the City's police department personnel, excluding civilians, dispatchers, animal control officers, the deputy police chief, and the police chief. Union Exhibit 1, Paragraph 1.1.
3. During the relevant times, Robert Magni was a police detective for the City. *See* Union Exhibits 5, 6, and 7.
4. A bulletin board was maintained in the City's Detective Division for many years. Union Exhibit 4.
5. On April 26, 2000, a newspaper article concerning a contract impasse between another FOP lodge and another city was removed from the bulletin board and a

note was posted stating the board was not an FOP bulletin board. Union Exhibits 2, 3, and 4.

6. On or after April 26, 2000, Detective Magni notified FOP President James Cummings of the removal of the article, accused Lieutenant Jody Suit of ordering Sergeant Randy Harrison to remove the article, and sought resolution of the conflict of whether FOP material could be posted there. Union Exhibit 3.
7. The FOP/City collective bargaining agreement requires the City to provide the FOP "with appropriate space in a non-public area of the Police Department building for the maintenance of a bulletin board." Union Exhibit 1, Paragraph 16.6.
8. On May 3, 2000, the FOP, acting through President Cummings, communicated a "Step 1" grievance concerning the article's removal to Chief of Police Phil Taylor. "Step 1" is an informal grievance resolution procedure. Union Exhibit 4; Testimony of Deputy Chief Baranski, Hearing Transcript Lines 243 to 253; Union Exhibit 1, Paragraph 13.2.
9. On that same day, Sergeant Harrison and Lieutenant Suit sought a board of inquiry by the Police Department to clear their names of wrongdoing in connection with the removal of the article from the bulletin board. Testimony of Deputy Chief Baranski, Hearing Transcript Lines 247 to 255; Union Exhibits 5 and 6.
10. On May 25, 2000, the FOP, acting through its counsel, Loren Gibson, filed a "Step 2" grievance concerning the bulletin board with Chief Taylor. "Step 2"

begins a formal grievance procedure. Union Exhibit 4 and Union Exhibit 1, Paragraph 13.2.

11. On June 12, 2000, Chief Taylor ordered Detective Magni to appear before a Departmental Board of Inquiry and provide information on June 20, 2000. Union Exhibit 7.
12. The Departmental Board of Inquiry meeting was later changed to June 22, 2000. Testimony of Deputy Chief Baranski, Hearing Transcript Lines 260 to 263.
13. On June 22, 2000, the FOP filed a complaint alleging an unfair labor practice with PERB. Complaint in this case.
14. Detective Magni appeared at the June 22 Departmental Board of Inquiry meeting with counsel, who objected to the Board of Inquiry's investigation into the bulletin board matter because it was the subject of a grievance and an unfair labor practice complaint. Union Exhibit 9, page 1.
15. The June 22 Departmental Board of Inquiry meeting was recessed to a later date to allow the Department to contact its attorney regarding Detective Magni's counsel's objections. Union Exhibit 9, pages 3 to 4.
16. The Departmental Board of Inquiry reconvened on July 6, 2000. Union Exhibits 10 and 11; Testimony of Deputy Chief Baranski, Hearing Transcript Lines 306 to 315.
17. The July 6, 2000 Departmental Board of Inquiry meeting was conducted by Deputy Chief John Baranski who declined Detective Magni's union representative's request that the Department give the three-part cautionary warnings outlined in *Johnnie's Poultry*, 146 NLRB 770 (1964), and *Bill Scott*

- Oldsmobile*, 282 NLRB 1073 (1987). Testimony of Deputy Chief Baranski, Hearing Transcript Lines 374 to 375; Union Exhibit 11, Pages 1 to 3.
18. In addition, Deputy Chief Baranski informed the union representative that the representative would not be allowed to speak during the inquiry. Union Exhibit 11, Pages 1 to 2.
 19. Deputy Chief Baranski advised Detective Magni that he was ordered to answer the Departmental Board of Inquiry's questions, that the answers could not be used against him in a criminal prosecution, and that refusal to answer questions would place Detective Magni at risk of disciplinary action, including job termination. This was referred to as the "Garrity" warning under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Testimony of Deputy Chief Baranski, Hearing Transcript Lines 343 to 350; Union Exhibits 12 and 13; Union Exhibit 11, Page 2.
 20. Jerry Steely, Human Resources Director for the City, prepared the questions asked and other materials for the Departmental Board of Inquiry when Chief Taylor made the FOP grievance known to him and requested assistance in preparing a response to that grievance. Testimony of Director Steely, Hearing Transcript Lines 1288 to 1299 and 1325 to 1331.
 21. Director Steely attended the meetings of the Departmental Board of Inquiry as an observer. Testimony of Director Steely, Hearing Transcript Lines 1369 to 1370.
 22. The purpose of questions asked at the Departmental Board of Inquiry was to investigate the FOP grievance. Testimony of Director Steely, Hearing Transcript

Lines 1352 to 1358 and 1441 to 1446; *see also* Testimony of Deputy Chief Baranski, Hearing Transcript Lines 462 to 505.

23. Chief Taylor recommended to the City Manager that Detective Magni's employment with the Police Department be terminated in part as a result of the grievance investigation. Testimony of Chief Taylor, Hearing Transcript Lines 1803 to 1806.
24. The City Manager rejected the termination recommendation. Testimony of Chief Taylor, Hearing Transcript Lines 1809 to 1815.

CONCLUSIONS OF LAW

1. PERB has jurisdiction of this matter and over the parties. 11 O.S. 1991 § 51-104b.
2. The National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and cases decided thereunder are instructive in applying the Oklahoma Fire and Police Arbitration Act, 11 O.S. 1991 §§ 51-101 *et seq.*, under which PERB was created. *See, Stone v. Johnson*, 600 P.2d 459, 461 (Okla. 1984); *Fire Fighters Local 2551 v. City of Broken Arrow*, PERB Case No. 104 (1986).
3. An employer must allow an employee who is part of a bargaining unit to have meaningful union representation when that employee is questioned in an investigatory process that the employee reasonably believes may lead to discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975); *Fire Fighters Local 2551 v. City of Broken Arrow*, PERB Case No. 104 (1986).

4. Prohibiting an employee's union representative from assisting the employee during such an investigatory process by requiring the union representative to remain silent is an unfair labor practice. *Texaco, Inc.*, 251 NLRB 63 (1980).
5. A union member is protected against discipline for filing a grievance that contains an error. *Industrial Supply Co.*, 289 NLRB 636 (1988).
6. In a relationship between an employer and a member of a collective bargaining unit when the employer wishes to interview an employee about a grievance, the employer must (1) inform the employee about the scope, nature, and purpose of the questioning, (2) provide assurance that no reprisal will be taken against the employee, and (3) obtain the employee's permission to engage in the interview on a voluntary basis. *Johnnie's Poultry*, 146 NLRB 770 (1964); *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987).
7. Failing to give this three-part warning during a grievance investigation is an unfair labor practice. *Johnnie's Poultry*, 146 NLRB 770 (1964); *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987).

OPINION

The City's Human Resources Director, Jack Steely, a witness called by the City and author of questions put to the interviewees during the City's investigation, testified that a purpose for the questioning of Detective Robert Magni was to investigate the FOP grievance about the bulletin board. *See* Finding of Fact 22. This testimony was reiterated by another City witness, Deputy Chief John Baranski. *See* Finding of Fact 22. With this testimony, it is unnecessary to attempt to delve into the minds of the City's management to discern the purpose of Detective Magni's interview. The *Johnnie's*

Poultry/Bill Scott Oldsmobile warnings were necessary, but they were not given. *See* Finding of Fact 17. By itself, this failure constitutes an unfair labor practice.

It was reasonable for Detective Magni to believe he might be subject to discipline given the confrontational nature of the interview and Deputy Chief Baranski's statement that discipline could result. *See* Finding of Fact 19. The reasonableness of such a belief is seen in Police Chief Phil Taylor's subsequent recommendation that Detective Magni be terminated. *See* Finding of Fact 23.

While PERB is uncomfortable with an attorney representing the FOP also presenting himself as a witness in this case, the City did not object to the dual role. Regardless of PERB's comfort, the fact that the union representative was prohibited from speaking during the attempted City interrogation was proved by documentary evidence as well as by the attorney's testimony. *See* Finding of Fact 18. In addition, the City did not contest evidence that Deputy Chief John Baranski, who conducted the interview, directed the union representative to remain silent. This attempt to silence the union representative during an interview that the employee could reasonably believe might lead to discipline was an unfair labor practice.

The Public Employees Relations Board, therefore, finds by a vote of 2 to 0, with its third member recused, that the City of Del City engaged in an unfair labor practice against the Fraternal Order of Police, Lodge 114, for the reasons stated above.

CEASE AND DESIST ORDER

The City of Del City is hereby ordered, pursuant to 11 O.S. § 51-104b(c) and consonant with the Findings of Fact and Conclusions of Law entered herein, to cease and desist from denying members of the bargaining unit rights guaranteed them under the

Oklahoma Fire and Police Arbitration Act, including the right to be fully represented at disciplinary hearings and the right to receive the customary warnings commonly known as *Johnnie's Poultry* and *Bill Scott Oldsmobile*. This Order shall be posted prominently within the Del City Police Department for not less than thirty (30) days.



Craig W. Hoster, Chair

DATED this 28th day of December, 2001