

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

FRATERNAL ORDER OF POLICE,)	
LODGE 122,)	
)	
Complainant,)	
v.)	Case No. 00383
)	
CITY OF NORMAN, OKLAHOMA,)	
)	
Respondent.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

On the 12th day of March, 2002, this administrative complaint was presented for oral argument before the Oklahoma Public Employees Relations Board ("Board"). The Complainant, Fraternal Order of Police, Lodge 122, ("Union"), appeared through its attorney of record, James R. Moore, Respondent, City of Norman, Oklahoma ("City"), appeared through its attorneys of record, Tony G. Puckett and Jeffery H. Bryant.

The Board reviewed written briefs and heard oral argument from the parties on the Respondent's Motion to Disqualify Board Member Larry Gooch. Upon Mr. Gooch's refusal to voluntarily recuse, the Board considered and overruled the Motion to Disqualify, finding that Respondent failed to present sufficient grounds to support the claim that Mr. Gooch could not accord the parties a fair and impartial hearing.

The parties agreed to waive testimony and requested that the Board render its decision based upon the Respondent's Motion to Dismiss or, in the alternative, grant Summary Judgement. Having received the legal arguments and exhibits, the Board considered oral argument and reviewed the proposed statements of undisputed facts submitted by the parties and now issues this Final Order.

Stipulated Facts

The parties stipulated to the facts as stated in the written briefs submitted by the parties and agreed that there were no disputed facts for the purpose of a ruling on the Motion to Dismiss or Summary Judgment. The submissions of the parties, Complainant's 1-30, and Respondent's A-D, E in part, and F-G, are adopted by the Board for the purposes of the requirements of 75 O.S. 2001, § 312. Respondent's statements E and H are rejected by the Board as to the identity of the candidates remaining on the eligibility list.

Findings of Fact

1. The City and Union negotiated a collective bargaining agreement ("CBA") for the fiscal year, 2000-01.
2. Article 2, Section 1 of the CBA provides, "The FOP recognizes that the City has the exclusive right to operate and manage its affairs and direct its work force in all respects in accordance with its responsibilities, and the power or authority which the City has not officially abridged, delegated, or modified by this Agreement, is retained by the City."
3. The right to promote is retained by the City as provided in Article 2, Section 3.a of the CBA.
4. The City has "the right to determine policy, including the right to manage the affairs of the Police Department in all respects," as provided in Article 2, Section 3.f of the CBA.
5. Norman Police Department Policy No. 315, which was in place on the effective date of the CBA, provided, "The use of eligibility lists to avoid the unnecessary repetition of lengthy selection processes may be considered by the Chief of Police on a case by case basis. Such lists may be valid for no longer than one (1) year."

6. By memo dated August 16, 2000, the Chief of Police informed sergeants of the process for promotion to lieutenant.
7. The August memo provided the requirement for eligibility as, "Sergeants with 3 years time in grade as of October 1, 2000 and not on probation."
8. The August Memo stated, "An eligibility list will be maintained for 1 year in the event a Lieutenant vacancy occurs."
9. For this vacancy, there were four applicants for promotion to lieutenant and an eligibility list of three of the four applicants was created based on a scoring process established in Policy No. 315.
10. From the eligibility list for this promotion, the Chief of Police selected the applicant with the highest score for promotion to a vacant position of lieutenant.
11. Two of the unsuccessful candidates for promotion filed grievances, one of which complained of the failure to retain this eligibility list after the vacancy was filled.
12. The Chief of Police decided not to use the previous eligibility list or create a new eligibility list for promotion to a subsequent vacancy for the position of lieutenant, citing fairness in allowing all candidates "the opportunity to compete for the next vacancy."

Conclusions of Law

1. This matter is governed by provisions of the Fire and Police Arbitration Act (FPAA), 11 O.S. 2001, §§ 51-101, *et seq.*, and the Board has jurisdiction to rule on this unfair labor practice charge.
2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 2001, §§ 308, *et seq.*

3. It is appropriate to consider federal labor law in the construction of the FPAA. *Stone v. Johnson*, 690 P.2d 459, 462 (Okla. 1984).
4. The Board is empowered to prevent any person, including corporate authorities, from engaging in any unfair labor practice. 11 O.S. 2001, § 51-104b(A).
5. The Union, in asserting a violation of 11 O.S. 2001, §51-102(6), has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 11 O.S. 2001, § 51-104b(C) and OAC 585:1-77-16.
6. “Unfair labor practice” includes refusal by the City to bargain collectively with respect to any issue within the purview of the FPAA. 11 O.S. 2001, § 51-102.6a(5).
7. The Chief of Police may, in his discretion, use an eligibility list or not use an eligibility list for promotions and the Chief may exercise his discretion on a case by case basis.
8. The evidence does not establish an unfair labor practice.

Discussion

The unfair labor practice charge filed by the Union is founded upon the alleged unilateral change in the promotional process for police lieutenants. The specific act complained of is that the Chief of Police exercised his discretion pursuant to policy to fill a vacancy for the position of lieutenant subsequent to a memo which referred to a prior vacancy, dated August 16, 2000, in which he stated that “An eligibility list will be maintained for 1 year in the event a Lieutenant vacancy occurs.” Exhibit 3, Respondent’s Motion to Dismiss.

By grievance dated September 26, 2000, one of the three applicants not chosen to fill a vacancy for promotion to lieutenant, complained that no eligibility list was established after the first promotion was made. In response to this grievance, the Chief of Police admitted in a memo dated

October 3, 2000, that “The establishment of an eligibility list was not accomplished after the results of the first promotion process.” He explained this decision, “As a matter of fairness I believe all the candidates should have the opportunity to compete for the next vacancy.” Exhibit 7, Respondent’s Motion to Dismiss.

The decision not to establish an eligibility list after the first vacancy was filled is alleged to be a unilateral change in the procedure announced in the August 16, 2002 memo which stated that an eligibility list would be maintained for one year. Thus, when the second vacancy occurred, all qualified candidates were given the opportunity to apply rather than limiting candidates to those not chosen in the first selection process.

The Union does not dispute that the CBA granted the exclusive right to the City in Article 2, Section 1 of the CBA “to operate and manage its affairs and direct its work force in all respects in accordance with its responsibilities, and the power or authority which the City has not officially abridged, delegated, or modified by this Agreement, is retained by the City.” The parties to a labor contract are free to negotiate provisions which permit management to take unilateral action during the term of a CBA without re-negotiating over the exercise of such rights, as were granted to the City in this case. *Lodge No. 103, Fraternal Order of Police v. The City of Ponca City*, PERB Case No. 00349 (1997); *Fraternal Order of Police, Lodge 151 v. City of El Reno*, PERB Case No. 00353 (1998).

The Union does not dispute that the right to promote was retained expressly by the City in the CBA in Article 2, Section 3.a of the CBA. The Union does not dispute that the City has “the right to determine policy, including the right to manage the affairs of the Police Department in all respects,” as provided in Article 2, Section 3.f of the CBA. In negotiating these terms, the Union

agreed to give the City broad discretion in management, including in particular policy regarding promotion.

The issue raised by the Union focuses on interpretation of Norman Police Department Policy No. 315, which was in place on the effective date of the CBA. In this policy, the City provided, "The use of eligibility lists to avoid the unnecessary repetition of lengthy selection processes may be considered by the Chief of Police *on a case by case basis*. Such lists may be valid for no longer than one (1) year." (Emphasis added). The Union's charge is not that the City lacked authority to enforce this policy or that the City unilaterally changed Policy No. 315. It is that the Chief of Police did not utilize the eligibility list for the second vacancy based upon his determination that "fairness" was served by allowing all qualified candidates an opportunity to apply for any future vacancy rather than retaining the eligibility list established for the first vacancy, which would have limited the field to the two candidates who were not chosen to fill the first vacancy. The Chief confirmed that no eligibility list would be established for the second vacancy in a memo dated September 18, 2000. Exhibit 23, Complainant's Response. The effect of this decision resulted in the application and promotion of a candidate for the second vacancy who was not eligible for promotion during the selection process for the first vacancy.

The Union argues that this decision constitutes a unilateral change in the promotion procedure based upon the premise that the "list" of the candidates not chosen to fill the first vacancy became a part of the CBA as provided in Article 11, Section 2:

Work rules, regulations, policies and procedures of the department in effect on the effective date of this Agreement or issued after the effective date of this Agreement shall remain in full force and effect on employees in the bargaining unit, if not in conflict with any article or section of this Agreement.

There is no dispute by the City that Policy No. 315 was in effect on the date of the CBA. However, the Union interprets the option of the Chief of Police to consider the use of eligibility lists on a "case by case" basis as a one-time option which becomes binding in every promotion process for the duration of the agreement. The City interprets the phrase "case by case basis" in the policy to allow the Chief of Police to decide this issue in each promotion process to fill each vacancy.

In the case of the first promotion process, there was a list of four applicants who met the requirements for promotion to lieutenant. When the second vacancy occurred, his decision to forego the first eligibility list did not conflict with Policy No. 315 unless it prohibits the Chief of Police from making this decision in every case of vacancy and promotion procedure. If the policy is read to prohibit this decision in every case, the result would be that promotions could not be made if more vacancies occurred during the effective period of the CBA than there were eligible candidates at the time of the first vacancy. This result would obtain even if there were eligible candidates interested in promotion on the date of later vacancies. Policy No. 315 does not dictate when the decision to establish an eligibility list is to be made. It does provide that eligibility lists, if they are to be utilized on a case by case basis, may be valid for no longer than one (1) year. The first vacancy was filled within the one-year period as provided by this limitation.

Based upon the evidence presented, the Board finds that a plain reading of Policy No. 315 is dispositive of the issue presented. When a vacancy occurs, the list of applicants who meet the requirements to fill the vacancy may be valid for consideration in filling "that vacancy" for no more than one year. If no selection is made within a year, the list would no longer be valid to fill that vacancy. This option may be exercised at the time of occurrence of future vacancies on a case by case basis for each promotion; provided the eligibility list used is valid under Policy No. 315. In

the instant case, the Chief of Police chose not to utilize the eligibility list in his consideration of promotion to fill the second vacancy. The Chief of Police may, in his discretion, use a list or not use a list on a "case by case" basis. His stated reason was fairness in providing an opportunity to all applicants who met the requirements for promotion. This is in accord with the stated purpose in Policy No. 315 to provide a fair and impartial system for promotion of personnel. Section II(A).

Based upon the foregoing, the Board finds that the Union has failed to present evidence of a unilateral change of Policy No. 315 or the promotion procedure and further failed to show that the City had a duty to bargain the issue of retention of eligibility lists. The Union thereby failed to meet the burden of proving the allegations of unfair labor practice by a preponderance of the evidence.

ORDER

IT IS THEREFORE THE ORDER of the Public Employees Relations Board that the unfair labor practice allegation of the Union is dismissed.



Craig W. Hoster, Chair

Dated this 23 day of August, 2002