

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

FRATERNAL ORDER OF POLICE,)	
LODGE 108,)	
Complainant,)	
V.)	PERB Case No. 00393
THE CITY OF ARDMORE, OKLAHOMA,)	
Respondent.)	

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

On the 6th day of November, 2002, this administrative complaint was presented for oral argument before the Oklahoma Public Employees Relations Board ("Board"). The Complainant, Fraternal Order of Police, Lodge No. 108 ("Union"), appeared through its attorney of record, Douglas D. Vernier. Respondent, City of Ardmore, Oklahoma ("City"), appeared through its attorney of record, Margaret McMorro-Love. The parties agreed to waive testimony and requested that the Board render its decision based upon the written briefs submitted by both parties. The Board, having received the briefs and exhibits of the parties, considered oral argument, and reviewed the proposed findings of fact and conclusions of law submitted by the parties, issues this Final Order.

Determination of Proposed Findings of Fact

The Board is required by 75 O.S. 2001, § 312 to rule individually on Findings of Fact submitted by the parties. The submissions of the parties are treated as follows:

1. Complainant's proposed findings of fact 1-13 are substantially adopted by the Board. Complainant's proposed finding of fact 14 is rejected by the Board as it states a conclusion of law.
2. Respondent's proposed findings of fact 1-9 and proposed supplemental facts 1-10 are substantially adopted by the Board.

Findings of Fact

1. The City of Ardmore is a municipal corporation which has adopted a council-manager form of government.
2. The Fraternal Order of Police, Lodge 108, is the duly recognized and exclusive bargaining agent for members of the City of Ardmore Police Department.
3. The City of Ardmore and the Fraternal Order of Police entered into a Collective Bargaining Agreement (CBA) for FY

2000-2002 which expired by operation of law on June 30, 2002.

4. Article XXII of the CBA addresses the promotion procedures for various positions within the police department including the rank of Lieutenant.

5. Article XXII provides that the "purpose of this promotional procedure is to provide for a fair and impartial plan that will ensure that only the most qualified individuals are selected for promotion."

6. Article XXII provides for a schedule of points to be allocated in the promotion process for each portion of the process including a written test, oral board, interview with the Chief, education and training.

7. Candidates are placed on a promotion list, in descending order, with the candidate with the highest overall score first on the list.

8. Officers are selected for promotion starting with the candidate listed first and then on down.

9. In § 84.1 of its "Personnel Policies and Procedures: Privacy of Personnel Records," the City has provided that "[t]he confidential information contained in an employee's personnel file will not be revealed to outside sources except as required by law, or with the consent of the employee."

10. The City of Ardmore conducted a promotion process for the position of Lieutenant in January of 2002. Jerry Pearce was the successful candidate chosen for promotion.

11. Lodge 108 requested that the City provide documentation relating to the promotion process to the Union.

12. The City responded by letter dated January 25, 2002, stating that the documentation requested was available to the individuals who had participated in the promotion process; and that the documentation had been provided to several of those individuals upon their request to the City. The City had no objection to the individuals sharing that documentation with the Union.

13. In that letter, the City further advised that the Chief could find no provision in the CBA which provided for release of the requested information to the Union, and invited the Union to provide the City with a cite to the CBA or contract law to support its request for release of the information directly to the Union.

14. By grievance dated January 29, 2002, the Union alleged that the promotion process violated the CBA and again requested the documentation.

15. By letter dated February 6, 2002, the Chief informed the Union that the grievance was denied and offered to meet to discuss any facts in support of the allegations by the Union. The City denied the request for documentation citing PERB Order No. 00379, dated October 30, 2001 which ordered the Union to cease and desist from efforts to enforce a portion of an

arbitration award reforming the CBA to allow the Union to review tests scores and allocation of points in the promotion process. The City also relied upon an order of the District Court of Carter County vacating the arbitration award which mandated reform of the CBA to allow the Union access to the documentation requested in that case. The City in the same letter did agree to provide the documentation requested by the Union to the individuals included in the promotion process, or to the Union directly if the individuals provided the City with a written authorization to release the information to the Union. Citing a duty to protect the individual officers' right of privacy, the City denied the Union's request absent such written authorization.

16. On April 3, 2002, the Union filed the instant charge alleging violations of 11 O.S. 2001, §§ 51-102(6a)(1)(2)(3)(5) and 11 O.S. 2001, § 51-101A. The Union alleges that the City's denial of release of promotion documents, which allegedly contain necessary and relevant information to allow the Union to perform its responsibilities as bargaining agent, constitutes an unfair labor practice.

Conclusions of Law

1. This matter is governed by provisions of the 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 585:1-7-16.
6. "Unfair labor practice" includes any action by the City dominating or interfering with the formation, existence or administration of any employee organization or bargaining agent. 11 O.S. 2001, § 51-102(6a)(2).
7. The employer has an obligation to provide information that is needed by a bargaining agent for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 462 (1967).
8. An employer may deny a union relevant information when the production of such information is unduly burdensome

or the employer's interest in confidentiality outweighs the union's interest in disclosure. *Facet Enterprise, Inc. v. NLRB*, 907 F.2d 963 (10th Cir. 1990).

9. The Oklahoma Open Records Act allows a municipality to keep confidential personnel records, "[w]hich relate to internal personnel investigations including examination and selection material for . . . promotion. . . ." 51 O.S. 2001, § 24A.7 (A)(1).

10. In determining whether an employer must comply with the union's request for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

ORDER

Based upon the evidence and arguments presented by the parties, the Board finds that the interest of the Union in performing its duties to members outweighs the interests of the City in regard to the confidentiality of testing and protection of employee privacy in this cause, and that the documentation requested for the processing of the Union's grievance is necessary for the Union to perform its legitimate contractual obligations under the CBA. The City's reliance on the privacy interest in testing materials as established in *NLRB v. Acme Industrial Co.* is misplaced, and the facts are distinguishable from the instant cause. In *NLRB v. Acme*, the test materials in question were developed with substantial financial investment by the employer. Protecting these materials was important to safeguard this economic investment. Further, the tests in question were psychiatric in nature, and such tests have typically enjoyed greater protection on privacy grounds than non-medical testing material.

The Oklahoma Open Records Act permits an employer to keep certain records confidential. The City has chosen to keep these records confidential "except as required by law." Finding of Fact 9. Such law includes the contractual obligations of the CBA, which both the Union and the City have a responsibility to monitor and implement. Thus, to the extent that the Union requires this information to fulfill its legal obligations, the City's refusal is at least inconsistent with its own policy as stated in § 84.1 of its "Personnel Policies and Procedures: Privacy of Personnel Records."

Finally, it is certainly plausible to impose conditions on the Union regarding the release of the information so that the confidentiality of the material remains intact. Neither confidentiality nor privacy requires absolute secrecy. IT IS THEREFORE THE ORDER of the Public Employees Relations Board that the unfair labor practice allegation of the Union is UPHELD. The City of Ardmore is hereby ordered, pursuant to 11 O.S. 2001, § 51-104b(C), and consonant with the Findings

of Fact, Conclusions of Law, and Opinion entered herein, to CEASE and DESIST from denial of the Union's request for production of documents relating to the promotion process in regard to the instant grievance, such production to be limited to processing of the instant grievance.

Original signed by *Craig W. Hoster*, Chair

Dated this 21st day of January, 2003