

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

**FILED**

JUN 21 2012

Public Employees Relations  
Board

FRATERNAL ORDER OF POLICE,     )  
LODGE 122,                             )

  Complainant,     )

v.   )

PERB No. 2011-ULPC-503

CITY OF NORMAN, OKLAHOMA,     )

  Respondent.     )

**ORDER GRANTING UNION’S MOTION TO STRIKE AND DISMISS  
AND DENYING CITY’S MOTION TO CLARIFY AND/OR VACATE**

This matter came on for hearing before the Public Employees Relations Board (the “Board”) meeting in a Regular Meeting on the 17<sup>th</sup> day of May, 2012, at 10:00 a.m., in the Will Rogers Building, First Floor-Rooms 102/104, 2401 North Lincoln Boulevard, Oklahoma City, Oklahoma, on the following written motions: (1) Respondent’s Motion to Clarify and/or Vacate Order and Supporting Brief (the “Motion to Clarify”) filed by the City of Norman, Oklahoma (the “Respondent” or “City”), on April 11, 2012; and (2) Complainant’s Motion to Strike and Dismiss entitled “FOP’s Motion to Strike and Dismiss City’s Motion to Clarify and/or Vacate” and Supporting Brief (the “Motion to Strike”) filed by the Fraternal Order of Police, Lodge 122 (the “Complainant” or “Union”), on April 30, 2012.

The Complainant herein appeared by and through its attorney Jarrod A. Leaman, James R. Moore & Associates, P.C., Oklahoma City, Oklahoma. The Respondent appeared by and through its attorney Todd A. Court, McAfee & Taft, P.C., Oklahoma City, Oklahoma. No proposed findings of fact were submitted to the Board by either party to these proceedings.

The Respondent alleges in its Motion to Clarify that a need for clarification arises from the Board’s original ruling granting Summary Judgment in favor of the Complainant filed herein

on March 8, 2012 (the "Order Granting Summary Judgment"). More specifically, the Respondent requests a clarification of the Board's ruling in its order Granting Summary Judgment on how the ruling affects its future polygraph interviews. The Respondent claims that the Board's Order Granting Summary Judgment was not sufficiently clear in whether the City is permitted to exclude a union representative from a polygraph examination, including the pre-test portion of the polygraph examination, so long as the "Relevant Questions" to be asked during the in-test portion of the polygraph examination are disclosed to the union representative and the employee to be so examined prior to conducting the polygraph examination.

The alleged violation(s) in the original matter were filed by the Complainant on March 14, 2011, and alleged that on September 14, 2010, the Respondent conducted an investigatory interview that included a compelled polygraph examination of a certain Norman Police Officer. Allegedly, at the request of said officer, a Union Representative accompanied said Officer to the investigatory interview and the Respondent would not allow the Union Representative to represent said officer during the pre-polygraph interview in violation of Section(s) 51-102(6a)(1) and 51-102(6a)(5) of Oklahoma's Fire and Police Arbitration law, 11 O.S.2011, § 51-101 through 11 O.S.2011, § 51-113 et seq. (sometimes referred to herein as the "FPAA").

The Board, having reviewed the written motions filed herein, having heard the arguments of counsel and otherwise being fully apprised of this matter, makes the following findings of fact:

#### **FINDINGS OF FACT**

It is the finding of the Board by preponderance of the testimony taken and of the evidence as follows:

1. The findings of fact of the Board stated in the Order Granting Summary Judgment filed

herein on March 8, 2012, are hereby restated in full and incorporated by reference herein.

2. The Respondent admits that it failed to file or chose not to file any application or request for rehearing, reopening or reconsideration of the Order Granting Summary Judgment within ten (10) days of the date of the Order Granting Summary Judgment.
3. On April 11, 2012, the same day that the Respondent filed its Motion to Clarify in this matter, the Respondent filed an appeal of the Board's Order Granting Summary Judgment in the District Court of Cleveland County Oklahoma, Case No. CV-2012-396-W.

### **CONCLUSIONS OF LAW**

The Board concludes as a matter of law as follows:

1. This matter is governed by the provisions of the Fire and Police Arbitration law, 11 O.S.2011, §51-101 et seq. and the Board has jurisdiction over the parties hereto pursuant to 11 O.S.2011, §51-104b.
2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.2011, § 308a et seq. and the Board's rules at OAC 585: 2-1-1 et seq. and the meeting was convened and conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S.2011, § 301 et seq.
3. The burden of proof in this matter is a preponderance of the testimony taken pursuant to 11 O.S.2011, §51-104b (C) and a preponderance of the evidence pursuant to OAC 585: 2-7-12.
4. The Order Granting Summary Judgment is a "final agency order" in an "individual proceeding" as such terms are each defined, respectively, in 75 O.S.2011, § 250.3.

5. The conclusions of law of the Board stated in the Order Granting Summary Judgment filed herein on March 8, 2012, are hereby restated in full and incorporated by reference herein.
6. The Board is empowered to prevent any person, including bargaining agents and corporate authorities, from engaging in any unfair labor practice. 11 O.S.2011, §51-104b (A).
7. The Complainant, in asserting a violation of 11 O.S.2011, §51-101 et seq., has the burden of proving the allegations of unfair labor practice by a preponderance of the testimony taken and of the evidence. 11 O.S.2011, §51-104b (C) and OAC 585: 2-7-12.
8. Under OAC 585: 2-7-3, the Board recognizes all motions permitted under the Oklahoma Pleading Code, 12 O.S.2011, §2001 et seq., including, but not limited to, motions to strike and motions to dismiss. OAC 585: 2-7-3.
9. Failure of a party to comply with statutes, rules or orders of the Board may result in the Board dismissing a charge, striking a pleading, issuing a preclusion order, staying an action, entering a default judgment or taking other appropriate action. OAC 585: 2-3-7.
10. Under 75 O.S.2011, §317, any party aggrieved by a final agency order in an individual proceeding may file an application for a rehearing, reopening or reconsideration with the Board within ten (10) days of the date of entry of such final agency order. 75 O.S.2011, § 317.
11. Any party aggrieved by any final agency order in an individual proceeding may file for judicial review of such final agency order under 75 O.S.2011, § 318.
12. After the issuance of any order granting summary judgment as a final agency order under 75 O.S.2011, §312 and the passage of a ten (10) day period thereafter in which a party

hereto aggrieved by such order granting summary judgment may apply or request a rehearing, reopening or reconsideration of such order granting summary judgment under 75 O.S.2011, §317, the Board no longer has jurisdiction over the subject matter of the charge(s) upon which summary judgment was granted pursuant to 11 O.S.2011, §51-104b.

#### OPINION

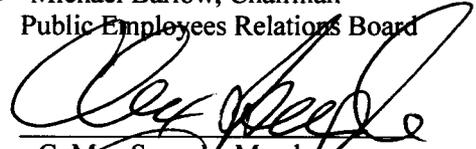
It is the finding of the Board as follows:

The Union's Motion to Strike is hereby GRANTED because the Board no longer has jurisdiction over the subject matter of the charge(s) in this individual proceeding upon which it previously granted summary judgment as a final agency order through its Order Granting Summary Judgment. The Respondent herein chose to not apply for or request or failed to apply for or request a rehearing, reopening or reconsideration of the Order Granting Summary Judgment within the ten (10) day period in which a party aggrieved by a final agency order in an individual proceeding may, under 75 O.S.2011, §317, apply for or request a rehearing, reopening or reconsideration. The Respondent filed an appeal of the Board's Order Granting Summary Judgment in the District Court of Cleveland County, Oklahoma, on the same day it filed its Motion to Clarify herein. Based upon such filing of the appeal by the Respondent in the District Court of Cleveland County, Oklahoma, the Board no longer has jurisdiction to hear the Motion to Clarify. Accordingly, the Respondent's Motion to Clarify should be and hereby is DENIED and the Complainant's Motion to Strike should be and hereby is GRANTED.

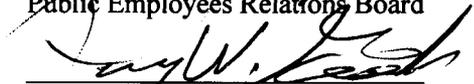
Dated this 21 day of JUNE, 2012.



Michael Barlow, Chairman  
Public Employees Relations Board



C. Max Speegle, Member  
Public Employees Relations Board



Larry W. Gooch, Member  
Public Employees Relations Board