FILED
AUG 08 2013
Public Employees Relations Board

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

CITY OF STILLWATER,	)	
	)	
Petitioner,	)	
	)	
v.	)	PERB No. 2012-UC-12442FF
	)	
IAFF LOCAL 2095,	)	
	)	
Respondent.	)	

ORDER GRANTING UNION'S COUNTER MOTION FOR SUMMARY JUDGMENT AS TO CITY'S PETITION FOR UNIT CLARIFICATION

This matter on unit clarification came on for hearing before the Public Employees Relations Board (the "Board") meeting in a Regular Meeting on the 9th day of May, 2013, at 9:31 a.m., with a quorum present consisting of four (4) members, in the Oklahoma Department of Agriculture, Food and Forestry, Agriculture Building, First Floor Board Room, 2800 N. Lincoln Boulevard, Oklahoma City, Oklahoma, on the following written motions: (1) "Motion for Summary Judgment, Brief in Support" filed herein by the City of Stillwater (the "Petitioner") on December 7, 2012 (the "City's Motion"); and (2) "Respondent's Response to Complainant's Motion for Summary Judgment and Counter Motion for Summary Judgment" filed herein by the International Association of Fire Fighters, Local 2095 (the "Respondent") on March 15, 2013 (the "Respondent's Motion").

The Petitioner appeared by and through its Deputy City Attorney, Larry V. Simmons. The Respondent appeared by and through its Attorney, James R. Moore, James R. Moore & Associates, P.C., Oklahoma City, Oklahoma. As part of the City's Motion, the Petitioner submitted proposed conclusions of law and what the Petitioner labeled as a "Statement of Undisputed Facts" but no proposed findings of fact within the meaning of 75 O.S.2011,

§312(A)(2). The Respondent did not submit any proposed findings of fact or proposed conclusions of law as a part of the Respondent's Motion or otherwise.

On December 7, 2012, the Petitioner filed a one page form document with the Board entitled "Petition for Unit Clarification Under the FPAA" to which was attached a document entitled "Petition for Unit Clarification" (collectively hereinafter referred to as the "Petition"). The Petition stated that the name of the bargaining unit involved is the "IAFF Local 2095", that description of the bargaining unit was "Firefighters", that the bargaining unit was certified by the Board on October 9, 1980, and that the number of employees in the bargaining unit was "Disputed". Further, the Petitioner, through its Petition, requested that the Board determine that "...the bargaining unit consists of the permanent paid members of the Petitioner's fire department excluding the Chief of the fire department and his designated administrative assistant the Assistant Chief". As noted previously, the Petitioner filed the City's Motion on December 7, 2012, simultaneously with its filing of the Petition.

The Respondent through its Attorney James R. Moore, filed an Entry of Appearance herein on December 21, 2012, reserving an additional twenty days in which to answer or otherwise respond. On January 10, 2013, the Respondent filed a document herein entitled "Answer to Petition for Unit Clarification" denying that the Board has jurisdiction to entertain an issue regarding the composition of this bargaining unit, denying that there is any change in the bargaining unit composition or the positions covered by the applicable collective bargaining unit since certification, asserting that the parties (the Respondent and the Petitioner) have long been in agreement over the positions covered by the collective bargaining agreement and have expressed that agreement in those collective bargaining agreements, denying that there is any legal prohibition against the composition of the current bargaining unit and of those positions

covered by the collective bargaining agreement, and requesting that the Petition be denied. As noted previously, the Respondent filed the Respondent's Motion herein on March 15, 2013. Attached to the Respondent's Motion was an exhibit (marked as Exhibit A), that was a copy of the certification by the Board dated October 9, 1980, that the Respondent was the collective bargaining representative of the unit composed of the permanent paid Fire Fighters of Stillwater, Oklahoma; excluding only the Fire Chief and one designated Administrative Assistant.

The Board, having reviewed the City's Motion and brief filed herein, the Respondent's Motion and brief filed herein, having heard the arguments of counsel, having engaged in questioning of counsel and otherwise being fully apprised of the City's Motion and Respondent's Motion, expressly adopts certain facts (alleged by the Petitioner to be undisputed) stated in the City's Motion under the subtitle "Statement of Undisputed Facts" numbers one (1) through and including eight (8) as hereinafter restated and renumbered, to which stated facts the Respondent through its Respondent's Motion, expressed its agreement under the subtitle "Response to Complainant's Factual Statement", as well as incorporating certain additional facts provided by the Respondent in its Respondent's Motion under both the subtitle "Respondent's Additional Undisputed Facts" and in its Exhibit A, and makes the following findings of fact:

FINDINGS OF FACT

It is the finding of the Board by a preponderance of the evidence that:

1. The Petitioner is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma as the City of Stillwater, Oklahoma. (Petitioner's Statement of Undisputed Facts No. 1).

2. The Respondent is, and was at all times material herein, the exclusive bargaining representative for certain employees of the Stillwater Fire Department, City of Stillwater,

Oklahoma (the "Department"). (Petitioner's Statement of Undisputed Facts No. 2).

3. In 1997, the Department attempted to remove one of the Assistant Chief positions from the bargaining unit. The justification for the attempted removal was to merge the Administrative Assistant position and the Assistant Chief position. The Respondent grieved the removal, and the case was heard by an arbitrator pursuant to the FPAA and the parties' CBA. The arbitrator, Barnett Goodstein, sustained the grievance on February 16, 1998, finding that the Petitioner could remove a fire fighter from the bargaining unit to fill the administrative assistant position but could not also remove the Assistant Chief position and job duties from the unit. (Respondent's Additional Undisputed Facts No. 5).

4. From 1986 to July 1, 2011, the Department functioned with two Assistant Chiefs, the Assistant Chief of Operations and the Assistant Chief of Administration. Effective July 1, 2011, the Respondent and the Petitioner bargained for and eliminated one of the Assistant Chief positions, and the duties of that position were assigned to several other bargaining unit members. The position was eliminated in order to create a new position of Public Safety Director, which is outside of the bargaining unit. That position is now held by Norman McNickle, who is the former Chief of the Stillwater Police Department. (Respondent's Additional Undisputed Facts No. 7).

5. Effective July 1, 2011, the parties agreed to retain one Assistant Chief in the bargaining unit. The parties again agreed to that on July 1, 2012 in the FY 2012-13 CBA. That agreement retained all of the provisions covering Assistant Chiefs that had been in prior agreements. It was just two months later that Chief Bradley attempted to remove the Assistant Chief from the unit. (Respondent's Additional Undisputed Facts No. 8).

6. By letter dated September 4, 2012, the Chief of the Stillwater Fire Department advised

the permanent paid members of the Department that he would designate the Assistant Chief (an open position to be filled) as his Administrative Assistant pursuant to 11 O.S. §51-102(1) and that the person selected would not be a member of the bargaining unit. (Petitioner's Statement of Undisputed Facts No. 3).

7. On September 4, 2012, the Fire Chief issued a notice of vacancy regarding the Assistant Chief position in which he described the process for filling the vacancy. Also on September 4, 2012, the Fire Chief issued a second notice stating that the new Assistant Chief would also be his administrative assistant and not be in the bargaining unit. The Chief's intent was to appoint a new Assistant Chief and then remove that person and the Assistant Chief position from the bargaining unit to become the administrative assistant. The administrative assistant would have no duties other than those of Assistant Chief. (Respondent's Additional Undisputed Facts No. 9).

8. On September 18, 2012, the President of IAFF Local 2095 filed an official grievance claiming the Chief's letter of September 4, 2012 violates the parties' collective bargaining agreement because it would remove the position of Assistant Chief from the bargaining unit. (Petitioner's Statement of Undisputed Facts No. 4).

9. The Petitioner responded to the official grievance in writing on September 28, 2012 stating "[t]he right of the Fire Chief to designate an Administrative Assistant from the ranks of those who would be included in the bargaining unit is found in the same statute defining the bargaining unit. This right is not a proper subject for negotiation, grievance or arbitration. Accordingly, the City [Petitioner] will not process this matter further." (Petitioner's Statement of Undisputed Facts No. 5).

10. On October 2, 2012, the Chief of the Stillwater Fire Department received an undated

letter signed by the Chief Steward for the Respondent on behalf of its Grievance Committee repeating the claim that the Fire Chief's letter of September 4, 2012 violates the parties' collective bargaining agreement because it would remove the position of Assistant Chief from the bargaining unit. The letter cited a 1997 Arbitrator's decision concluding that the designated Administrative Assistant cannot simultaneously perform the duties of Assistant Chief. (Petitioner's Statement of Undisputed Facts No. 6).

11. On October 9, 2012, the Chief of the Stillwater Fire Department responded in writing to the letter from the Grievance Committee. The Chief repeated the response previously provided to the President of the Respondent and concluded that no further action would be taken in response to the letter received October 2, 2012. (Petitioner's Statement of Undisputed Facts No. 7).

12. On December 3, 2012, the Stillwater City Attorney's Office was contacted by a law firm (James R. Moore & Associates) representing Respondent for the purpose of selecting an arbitrator to resolve this issue. (Petitioner's Statement of Undisputed Facts No. 8).

13. On October 9, 1980, the Respondent was certified by the Board as the collective bargaining representative of the unit composed of the permanent paid Fire Fighters of Stillwater, Oklahoma, excluding only the Fire Chief and one designated Administrative Assistant. (Respondent's Motion, Exhibit A).

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.Supp.2012 & 2011, §§ 51-101 et seq. (also known as the "FPAA"), and the Board has jurisdiction over the parties and the subject matter of and related to this petition for unit

clarification pursuant to 11 O.S.2011, §51-103.

2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.Supp.2012 & 2011, §§ 308a 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. Under the provisions of its Rules at OAC 585: 2-7-3, the Board recognizes all motions permitted under the Oklahoma Pleading Code, 11 O.S.Supp.2012 & 2011, § 2001 et seq., including, but not limited to, motions for summary judgment. OAC 585: 2-7-3.

4. "We hold that the Firefighters and Policeman's Arbitration Law [now the Fire and Police Arbitration Law, 11 O.S. §§ 51-101 et seq.], defines and determines the make-up of a collective bargaining unit and is not a proper subject for negotiation between the City and the bargaining agent for the firefighters". (citation omitted). *City of Bethany v. Public Employees Relations Bd. of State of Okl.*, 904 P. 2d 604, 611 (Okla. 1995). (*See also Oliver v. City of Tulsa*, 654 P. 2d 607, 612 (Okla. 1982)).

5. According to 11 O.S.2011, §51-102(1) in pertinent part, the term "fire fighters" is defined to mean "...the permanent paid members of any fire department...in any municipality within the State of Oklahoma but shall not include...the chief of the fire department and an administrative assistant". According to the Board's Rules at OAC 585:35-3-6(b) in pertinent part, "[t]he administrative assistant shall be...that person so designated by the chief of the fire department." 11 O.S.2011, §51-102(1).

6. "Oklahoma statute requires PERB to determine which employees are in a bargaining unit represented by an elected bargaining agent. 11 O.S.1991 § 51-103(B)." *City of Oklahoma City v. Public Employees Relations Board of the State of Oklahoma*, 942 P. 2d 244, 245-246

(Okla. Civ. App. 1997).

7. "In reaching a decision as to whether these actions of the City constitute a failure to bargain in good faith we may properly consider prior labor decisions involving parallel federal legislation. Section 8(d) of the National Labor Relations Act [29 U.S.C. §158(d)] states:

> 'to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession …'
>
> This mutual obligation imposed upon the employer and the representative of the employees under the National Labor Relations Act is the same obligation imposed upon the municipal employer and the representatives of the bargaining unit by section 51-102(5) of the Firefighters' and Policemen's Arbitration Law."

Stone v. Johnson, 690 P.2d 459, 462 (Okla. 1984).

8. "When an employer promotes an employee to a supervisory position and the new supervisor continues to perform former bargaining unit work, however, the work is removed from the bargaining unit. That is a change in the bargaining unit's terms and conditions of employment, giving rise to the employer's bargaining obligation under Section 8(d) of the Act [National Labor Relations Act, 29 U.S.C. §158(d)]. In those circumstances, the employer must bargain with the union in good faith and may unilaterally change the bargaining unit's work only after lawful impasse." *Hampton House*, 317 NLRB 1005, 1005 (1995), (*See also Mt. Sinai*

Hosp., 331 NLRB 895, 907 (2000), *enforced* 8 Fed.Appx. 111(2nd Cir. 2001)).

9. "...the reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work. (citations omitted). Clearly, that has occurred here. The Respondent both transferred unit work to existing managers and also hired new assistant managers to perform it. Therefore, the work transfer was a mandatory subject of bargaining." *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), *enforced* 317 F. 3d 300 (D.C. Cir. 2003), (*See also Hampton House*, 317 NLRB 1005, 1005 (1995)).

OPINION

The issue of unit clarification for the Fire Fighters of the Fire Department of the City of Stillwater, Oklahoma, was previously addressed by the Board on October 9, 1980, when the Board certified the International Association of Fire Fighters, Local 2095 as the collective bargaining representative of the unit composed of the permanent paid Fire Fighters of Stillwater, Oklahoma, excluding only the Fire Chief and one designated Administrative Assistant.

The Fire and Police Arbitration Law, 11 O.S.2011, §§ 51-101 et seq., provides only one situation or instance in which a municipal employer may petition for unit clarification. That one situation or instance is identified in 11 O.S.2011, §51-103 (B)(2) and arises where a municipal employer alleges that one or more labor organizations has presented to it a claim to be recognized as the exclusive employee representative in an appropriate unit. In both the Petition and the City's Motion, the Petitioner failed to show that the one situation or instance in which a municipal employer may petition for unit clarification occurred or existed in this matter.

Based upon the authorities and reasoning discussed above, the Respondent is entitled to judgment on its Counter Motion for Summary Judgment and the City's Motion for Summary Judgment on its petition for unit clarification must be denied.

Accordingly, the City's Motion filed herein by the Petitioner should be and hereby is DENIED. The Respondent's Motion filed herein by the Respondent should be and hereby is GRANTED.

Dated this 6 day of August, 2013.

Robert McCampbell, Chairman
Public Employees Relations Board

Jessica Perry, Member
Public Employees Relations Board

Sue Wycoff, Member
Public Employees Relations Board

Greg Buckley, Member
Public Employees Relations Board