

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

FRATERNAL ORDER OF POLICE,)
LODGE 123,)
)
 Complainant,)
)
v.)
)
CITY OF OKLAHOMA CITY,)
OKLAHOMA,)
)
 Respondent.)
)
)

Public Employees Relations Board

FILED

AUG 21 2006

Case No. 00432

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

This matter came on for consideration by the Public Employees Relations Board (the "Board") on the 10th day of August, 2006, on the Unfair Labor Practice (ULP) Charge of Complainant Fraternal Order of Police, Lodge 123, (the "Union" or "FOP"). Board member Linda L. Samuel-Jaha recused herself. The case was submitted to and decided by the Board without oral argument on Respondent's Motion for Summary Adjudication and FOP's Response thereto and on briefs submitted by both parties on Stipulated Facts. The FOP was represented by James P. Moore and the City of Oklahoma City (the "City") was represented by Richard E. Mahoney.

FINDINGS OF FACT

1. Officer Jeff Sellers is a member of the bargaining unit represented by FOP Lodge 123. Stipulated Fact 1.
2. Officer Sellers was investigated by the Office of Professional Standards of the Oklahoma City Police Department on the allegations of a prostitute that he had sex with her while on duty. Stipulated Fact 2.

3. Officer Sellers had union representation each time he was interviewed by investigators from the office of professional standards, and Officer Sellers denied having sex on duty. Stipulated Fact 3.

4. Officer Sellers was informed by the City that he was going to be given a polygraph examination on April 18, 2005, regarding the allegations. The examination was required by the Police Department. Stipulated Fact 4.

5. The Oklahoma City Police Department had departmental procedures in place, regarding the use of polygraph examinations, at all times relevant to this charge. Stipulated Fact 5.

6. Officer Sellers informed the polygraph examiner and the investigators from the Police Department that he wanted to have a union representative appear with him during any questioning by the polygraph examiner. The polygraph examiner met with Sellers prior to the polygraph examination to develop the questions that would be asked in the polygraph examination. Sellers' union representative was not allowed to be present in the pre-examination meeting. Stipulated Fact 6.

7. Sellers and his union representative were permitted to read the questions that were asked in the polygraph examination prior to the polygraph examination. Stipulated Fact 7.

8. The interview prior to the polygraph and the polygraph examination itself were conducted by Cecil Frymire, an employee of the Oklahoma City Police Department. In the interview prior to the polygraph, Frymire repeated previously asked questions of Sellers about the allegations of Sellers having sex on duty. Stipulated Fact 8.

9. The Oklahoma Polygraph Examiners Act, 59 Okla. Stat. 2001 § 1451 *et seq.*, governs the conduct of a polygraph examiner in Oklahoma. Stipulated Fact 9.

10. Frymire did not permit the union representative to be present in the room where the polygraph was conducted or when the pre-polygraph questions were asked. Sellers objected to the exclusion of his union representative during the interview and polygraph but was required to continue with the questioning without a representative. Stipulated Fact 10.

11. The questions asked of Sellers in the pre-polygraph interview and during the polygraph examination by Frymire covered the same subjects addressed by the investigators from the office of professional standards and addressed the same allegations against Sellers. Stipulated Fact 11.

12. Officer Sellers was informed by the City that he was going to be given a second polygraph examination on May 3, 2005. Stipulated Fact 12.

13. Stipulations 5-11 apply to the polygraph examination of May 3, 2005. Stipulated Fact 13.

14. During the May 3, 2005, polygraph exam, Frymire suspected Sellers may have been using countermeasures to alter the test by altering his breathing. Frymire had not asked Sellers a question about countermeasures in the pre-polygraph interview nor had he told him it would be asked during the polygraph. Frymire added the question about counter measurers after it was reviewed with Sellers. Stipulated Fact 14.

15. Only the polygraph examiner and Sellers were present during the polygraph examinations and pre-polygraph interviews. Stipulated Fact 15.

16. The Oklahoma City Police Department's Polygraph Examiner is to give an opinion on truthfulness or deception on the part of the person being examined based on his examination and pursuant to Police Department procedures. The polygraph examiner found

Sellers was deceptive in the April 18, 2005 examination, and the May 3, 2005 examination was inconclusive. Stipulated Fact 16.

17. Post-polygraph interviews or follow-ups are conducted by the office of professional standards, at which the employee can request union representation. The polygraph examiner does not perform post-test interviews, and did not perform any post-test interviews of Sellers. Stipulated Fact 17.

18. Officer Sellers was discharged by the City for having sex with a prostitute while on duty, being untruthful to the members of the Public Integrity Office, and refusing to cooperate in the polygraph examination of May 3, 2005. Stipulated Fact 18.

19. The City's polygraph examiner has changed locations and now allows employees to have an employee representative in the room when the polygraph questions are established and when the polygraph examination is given, if the employee requests the presence of a representative. Stipulated Fact 19.

CONCLUSIONS OF LAW

1. This matter is governed by the provisions of the Fire and Police Arbitration Act ("FPAA"), 11 O.S. 2001 and Supp. 2005, §§ 51-101, *et seq.*, and the Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S. 2001, § 51-104b.

2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 2001, §§ 308a, *et seq.*

3. Federal law may be considered 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(6a)(1), 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. The denial of an employee's request for the presence of her union representative at an investigatory interview that the employee reasonably believed might result in disciplinary action is a violation by the employer of § 51-102(6a)(1) of the FPAA because it interferes with, restrains, and coerces the individual right of the employee, "to engage in . . . concerted activities for . . . mutual aid or protection . . ." and that constitutes an unfair labor practice. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *Fire Fighters Local 2551 v. City of Broken Arrow*, PERB Case No. 104 (1986).

7. Pre-polygraph interviews are *Weingarten* investigatory interviews. *Consol. Casino Corp.*, 266 NLRB 988, 1009-1010, 266 NLRB No. 172, 1983 WL 25035, 113 L.R.R.M. (BNA) 1081 (N.L.R.B., Jun 13, 1983).

8. The polygraph exam itself is not a *Weingarten* investigatory interview if the questions have been pre-approved and only pre-approved questions are asked during the exam. The tape recording of the polygraph exam assures that only pre-approved questions are asked. As a result, the examinee is not entitled to union representation during the actual polygraph exam.

9. During the pre-polygraph interview the employee reasonably believed the investigatory interview might result in disciplinary action against him and, despite his request, was not permitted to have a union representative present as required by *Weingarten*. Therefore, pursuant to 11 O.S. 2001, § 51-104b, the Board finds that upon the preponderance of the evidence presented, the City has engaged in an unfair labor practice.

10. Because the City now allows union representation at the pre-polygraph interview, a cease and desist order is not warranted.

11. The grievance issue before the arbitrator is a different issue than that presented here; therefore, the Board need not defer to the grievance arbitration.

OPINION

The reasoning and result in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) was adopted by this Board in *Fire Fighters Local 2551 v. City of Broken Arrow*, PERB Case No. 104 (1986), and *Weingarten* has been consistently applied ever since. See, e.g., *International Assoc. of Firefighters Local 1628 v. City of Shawnee*, PERB Case No. 220 (1990); *FOP Lodge 114 v. City of Del City*, PERB Case No. 370 (2001).

An employer violates § 51-102(6a)(1) of the FPAA when it denies an employee's request that a union representative be present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The City committed an unfair labor practice by denying Officer Sellers' right to have a union representative present at the pre-polygraph interview which he reasonably believed might result in disciplinary action against him. During the pre-polygraph interview, the employee was questioned and the questions that would be asked during the polygraph exam were crafted.

We next consider the aspects of the polygraph examination. All *Weingarten* requisites appear, at first blush, to also be satisfied in the context of the actual polygraph exam. A closer examination of *Weingarten*, however, leads the Board to the conclusion that *Weingarten* does not require the presence of a union representative during the polygraph exam.

The foundation of *Weingarten* is the right of employees to act in concert for "mutual aid and protection." *Weingarten*, 420 U.S. at 256-257. The exercise of this right, however, may not interfere with legitimate employer prerogatives. *Id.* at 258. No party has a legitimate interest in

the polygraph exam being compromised. A polygraph measures the subject's cardiovascular pattern, respiratory pattern and galvanic skin response pattern. The presence of a union representative may interfere with the measurements the examiner gathers and could affect the testing.

We conclude, therefore, that the administration of a polygraph examination does not involve *Weingarten* protections where, as in this case, the questions are developed and disclosed to the subject during the pre-polygraph interview and only those questions are asked during the actual polygraph exam.

Dated: August 21, 2006



Craig W. Hoster, Chair
Public Employees Relations Board