

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

INTERNATIONAL UNION OF POLICE)
ASSOCIATIONS, AFL-CIO, LOCAL 24,)
)
Complainant,)
)
v.)
)
THE CITY OF LAWTON, OKLAHOMA,)
)
Respondent.)

PERB No. 2011-ULPC-505

ORDER GRANTING CITY’S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the Public Employees Relations Board (the “Board”) meeting in a Regular Meeting on the 13th day of October, 2011, at 9:00 a.m., 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 motions: (1) Complainant’s Motion for Summary Judgment filed by the International Union of Police Associations, AFL-CIO, Local 24 (the “Complainant” or “Union”) on July 29, 2011; and, (2) City’s Motion for Summary Judgment with Supporting Brief filed by the City of Lawton, Oklahoma (the “Respondent” or “City”), on August 15, 2011. The Complainant appeared by and through its attorney Jarrod Leaman, James Moore & Associates, P.C., Oklahoma City, Oklahoma. The Respondent appeared by and through its Deputy City Attorney Timothy E. Wilson and Assistant City Attorney Kelea Fisher. No proposed findings of fact were submitted to the Board by either party to these proceedings.

The alleged violation in this matter was filed by the Complainant on May 18, 2011, and alleged that the Respondent through its City Manager, Larry Mitchell, appointed Ronald Smith, Sr. in 2005 to his current position of Chief of Police. Subsequently, City Manager Larry Mitchell

appointed Ronald Smith, Jr., the son of Chief of Police Ronald Smith, Sr., to the rank of Captain on December 13, 2010. In doing so, City Manager Larry Mitchell, allegedly, unilaterally changed the terms of the current Collective Bargaining Agreement for fiscal year 2010-2011 (the “CBA”) without bargaining by violating Section 14.5 of the CBA which expressly incorporates the provisions of Lawton City Code (the “City Code”) Section 17-2-11-232(A) that, among other things, provides that no person related within the third degree of affinity or consanguinity to a department director shall be appointed to any office, position or clerkship or other service of the City on a full-time basis, in violation of Section 51-102(6a)(5) of the Fire and Police Arbitration Act, 11 O.S. 51-101 through 11 O.S. 51-113 et seq. (the “FPAA”).

The Board, having reviewed the written motions filed herein and 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 a preponderance of the testimony taken and evidence that there is no substantial controversy as to the following facts or issues:

1. The City is a municipal corporation duly organized under the laws of the State of Oklahoma as a City with its own Charter (the “City Charter”). Respondent’s Undisputed Fact No. 1. (Amended).

2. The Union is the local bargaining agent for the City’s police officers. Respondent’s Undisputed Fact No. 2.

3. The City Charter was ratified at an election held on July 25, 1972. Any changes to the Charter must be submitted to the voters for approval and must be ratified by a majority of the qualified electors voting thereon. Respondent’s Undisputed Fact No. 3.

4. The City Charter has always included a nepotism provision. The original nepotism provision read as follows:

Section 8-7 Nepotism.

Neither the city manager, the mayor, the council, nor any other authority of the city government, may appoint or elect any person related to the mayor or any councilman, to the city manager, or to himself, or, in the case of a plural authority, to one of its members, by affinity or consanguinity within the third degree, to any office or position of profit in the city government; **but this shall not prohibit an officer or employee already in the service of the city from continuing and being promoted therein. [Emphasis added].**

Respondent's Undisputed Fact No. 4.

5. On March 21, 1995, the voters approved various amendments to the City Charter. One of those amendments involved minor modifications to the City Charter's nepotism provision. Specifically, the nepotism provision was renumbered to Section C-8-6 and modified slightly to state:

Neither the city manager, the mayor, the council, nor any department head of the city government, may appoint or elect any person related to the mayor or any councilmember, to the city manager, or to himself, or, in the case of a plural authority, to one of its members, by affinity or consanguinity within the third degree, to any office or position of profit in the city government; **but this shall not prohibit an employee already in the service of the city from continuing and being promoted therein. [Emphasis added].**

Respondent's Undisputed Fact No. 5. (Amended).

6. In addition to the City Charter Section C-8-6 on nepotism, there is a City Code Section also addressing nepotism. Paragraph “A” of City Code Section 17-2-11-232 states:

No person related within the third degree of affinity or consanguinity (marriage or blood) to the mayor, a member of the city council, city manager, assistant city manager or similar position or department directors shall be appointed to any office, position or clerkship or other service of the city, either on a full-time or part-time basis. No person related within the third degree of affinity or consanguinity to a division supervisor or an assistant department director may be appointed to or transferred into any office, position or clerkship or any other service of the city which is in the same department where the assistant department director is employed or the same division where the division supervisor is employed. For purposes of this subdivision, “major” positions within the police department and deputy fire chief positions shall be deemed to be assistant department directors.

Respondent’s Undisputed Fact No. 6. (Amended).

7. One way City Code Section 17-2-11-232 is different from City Charter Section C-8-6 is that Section 17-2-11-232 does not contain the language stating “**but this shall not prohibit an employee already in the service of the city from continuing and being promoted therein.**” [Emphasis added]. Respondent’s Undisputed Fact No. 7.

8. Additionally, City Code Section 17-1-1-107(6) titled “Duties of the city manager” provides in part that the city manager shall:

Have such powers, duties, and functions as the city Charter may prescribe, and such powers, duties, and functions consistent with the city Charter as the council may prescribe.

Respondent's Undisputed Fact No. 8.

9. The City and the Union entered into a collective bargaining agreement for fiscal year 2010-2011 pursuant to Oklahoma's Fire and Police Arbitration law, 11 Okla.Stat. §51-101 *et seq.* Respondent's Undisputed Fact No. 9 (Amended).

10. Section 14.5 of the CBA states:

Unless specifically modified herein the provisions of Chapter 17, Personnel Policy and Procedures of the Lawton City Code including a [sic] regulation or policies issued pursuant thereto as they may exist on the adoption of this Agreement or as they may hereafter be amended from time to time exclusively by the City Council of the City of Lawton are incorporated herein as if set out in full in this Agreement. **It is understood, however, that this Agreement by its specific term supersedes any and all provisions of Chapter 17 of the Lawton City Code that are or shall become in conflict with this Agreement.** [Emphasis added].

Respondent's Undisputed Fact No. 10.

11. Section 2.2 of the CBA states in part:

The City retains the rights in accordance with the Constitution and laws of the State of Oklahoma and the responsibilities and duties contained in the Charter of the City of Lawton and the ordinances and regulations promulgated thereunder.

No provision of this agreement shall supersede any provision of the City Charter. ... [Emphasis added].

Respondent's Undisputed Fact No. 11.

12. Likewise, Paragraph "C" of City Code Section 1-1-109 titled "Conflicting provisions" states:

Where any conflict exists between a chapter, article, division or section of this code or any chapter or section of the Charter, the latter shall prevail.

Respondent's Undisputed Fact No. 12.

13. Section 2.2(F) of the CBA also grants the City the right to promote and Section 2.3 retains to the City all rights not specifically abridged, delegated, granted or modified by the CBA. Respondent's Undisputed Fact No. 13.

14. Article 5 of the CBA contains a grievance arbitration procedure as required by 11 O.S. §51-111 to deal with disputes involving the interpretation or application of the CBA or the actions of any of the parties thereunder. Respondent's Undisputed Fact No. 14.

15. Ronnie Smith Sr. was hired by the City as a police officer on September 9, 1974. Ronnie Smith Jr., the son of Ronnie Smith Sr., was hired by the City as a police officer on September 8, 1997. Ronnie Smith Sr. was promoted by the city manager to chief of police on May 31, 2005. The chief of police is the department director for the Lawton Police Department. Ronnie Smith Jr. was promoted by the city manager to lieutenant on June 22, 2005. The Union did not file a grievance nor did the Union file an unfair labor practice complaint when Ronnie Smith Jr.

was promoted to lieutenant. Respondent's Undisputed Fact Nos. 15, 16, 17, 18, 19, and 20. (Amended).

16. Ronnie Smith Jr. was promoted by the city manager to captain on December 13, 2010. Notifications of the promotion occurred on December 8, 2010. No objection was raised by the Union at the time of notification or at the time of notification. The Union did not file a grievance over Ronnie Smith Jr.'s promotion to captain. The first objection the City received as to Ronnie Smith Jr.'s December 13, 2010 promotion to captain was a letter dated April 14, 2011 to the city manager, four months after the promotion. Respondent's Undisputed Fact Nos. 21, 22, and 23. (Amended).

17. The employment of Ronnie Smith Sr. and of his son Ronnie Smith Jr. is the only known instance of a police officer being employed by the Lawton Police Department at the time a relative of the officer is appointed police chief. Respondent's Undisputed Fact No. 24. (Amended).

18. CBA Sections 2.2, 2.3 and 14.5, Charter Sections C-8-6 and C-91, and Code Sections 1-109 and 17-1-1-107 were in full force and effect as written when Ronnie Smith Jr. was promoted to lieutenant in 2005 and again when he was promoted to captain in 2010. Paragraph (B) of Code Section 17-2-11-232 was amended in 2008, but the remainder of the Section remained unchanged. Respondent's Undisputed Fact No. 26.

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. §§ 51-101 et seq. and the Board has jurisdiction over the parties and the subject matter of this complaint pursuant to 11 O.S. §51-104b.

2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S. §§ 308a et seq. and the meeting was convened and conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S. §§ 301 et seq.

3. The burden of proof in this matter is a preponderance of the testimony taken pursuant to 11 O.S. §51-104b (C) and a preponderance of the evidence pursuant to OAC 585: 2-7-12.

4. The Board is empowered to prevent any person, including bargaining agents and corporate authorities, from engaging in any unfair labor practice. 11 O.S. §51-104b (A), 104b (C) and OAC 585: 2-7-12.

6. “Summary Judgment is appropriate only where it appears that there is no substantial controversy as to any material fact and that one party is entitled to judgment as a matter of law.” *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 23, ¶ 15, 913 P. 2d 1311, 1313.

7. “Arbitration is favored by this Board and by the Oklahoma courts as a method to resolve labor disputes. See Garner v. City of Tulsa, 651 P. 2d 1325 (Okla. 1982); Voss v. City of Oklahoma City, 618 P. 2d 925 (Okla. 1980); City of Midwest City v. Harris, 561 P.2d (Okla. 1977).” *IAFF Local No. 1969 v. City of Miami*, PERB No. 00153.

8. “In Broken Arrow the Board stated:

Deferral as to the arbitrator’s determination of contractual issues is consistent with, and fosters, the statutory policies supporting grievance arbitration. See §§ 51-102(6a)(5) and 51-111. Deferral is especially important where it encourages the parties to utilize speedy, mutually agreed procedures for resolving disputes

between the parties. See, Hayford and Wood, “Deferral to Grievance Arbitration in Unfair Labor Practice Matters: The Public Sector Treatment,” 32 Labor L.J. 679, 680-681 (October, 1981).”

Firefighters Local 2784 v. City of Broken Arrow, PERB No. 00104.

OPINION

It is the finding of the Board as follows:

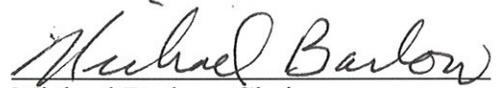
The Union’s Motion for Summary Judgment should be DENIED because the Union failed to prove that there has been a change in the nepotism provisions of the Lawton City Charter, the Lawton City Code, or the CBA (Collective Bargaining Agreement), or that the City has changed its application of these provisions. The issues of how the Grandfather Clause applies; if there is a past practice; does the City’s interpretation and application of the nepotism provisions violate the CBA; or if the Union has waived its right to demand performance, are contract interpretation issues to be determined by an arbitrator and not the Board.

The City’s Motion for Summary Judgment should be GRANTED. The facts in this case are not in dispute and the plain language of the Lawton City Charter permits existing employees to continue to be employed and promoted.

Pursuant to 11 O.S. 2001, § 51-104b and OAC 585: 2-7-12, the Board finds that upon a preponderance of the testimony taken and of the evidence, that the Complainant has failed to meet its burden of proof and the Respondent has not engaged in any unfair labor practice.

Because no substantial controversy exists as to a material fact and the Respondent is entitled to judgment as a matter of law, the Respondent’s Motion for Summary Judgment should be and hereby is GRANTED and the Complainant’s Motion for Summary Judgment should be and hereby is DENIED.

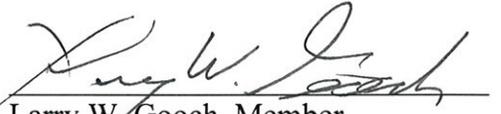
Dated this 12 day of JANUARY, 2012



Michael Barlow, Chairman
Public Employees Relations Board



C. Max Speegle, Member
Public Employees Relations Board



Larry W. Gooch, Member
Public Employees Relations Board