

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD  
STATE OF OKLAHOMA

FRATERNAL ORDER OF POLICE,	)	
LODGE 122,	)	
	)	
Complainant,	)	
	)	
v.	)	PERB No. 2011-ULPC-503
	)	
CITY OF NORMAN, OKLAHOMA,	)	
	)	
Respondent.	)	

**ORDER GRANTING UNION’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING CITY’S MOTION TO STRIKE  
AN EXHIBIT AND PORTIONS OF TWO AFFIDAVITS**

This matter came on for hearing before the Public Employees Relations Board (the “Board”) meeting in a Regular Meeting on the 12<sup>th</sup> day of January, 2012, at 9:00 a.m., in the Oklahoma Department of Agriculture, Agriculture Building, First Floor Board Room, 2800 N. Lincoln Boulevard, Oklahoma City, Oklahoma, on the following motions: (1) Respondent’s Motion for Summary Judgment and Supporting Brief filed by the City of Norman, Oklahoma (the “Respondent” or “City”), on October 31, 2011; (2) Complainant’s Motion for Summary Judgment entitled “Complainant’s Response to Respondent’s Motion for Summary Judgment” filed by the Fraternal Order of Police, Lodge 122 (the “Complainant” or “Union”) on November 16, 2011; and (3) Respondent City of Norman’s Motion to Strike Complainant’s Exhibit J and Portions of Affidavits of Two Norman Police Officers filed on December 5, 2011 (the “City’s Motion to Strike”).

The Complainant 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 alleged violation(s) in this matter was 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. 51-101 through 11 O.S. 51-113 et seq. (sometimes referred to herein as the "FPAA").

Subsequent to the filing of the alleged violation(s) in this matter, the parties herein filed an Application for Entry of Agreed Protective Order on October 7, 2011, to protect certain confidential and proprietary information relating to the City's polygraph procedures, certain confidential personnel information and the results of a certain polygraph examination administered to the Complainant's member in this proceeding pursuant to the authority of the federal Employee Polygraph Protection Act, 29 U.S.C. § 2008 and 29 C.F.R. § 801.35(a)(3). On October 28, 2011, the Board's Chairman issued a Protective Order in this matter to limit the use and dissemination of all information related to "protected polygraph information" as defined in said Order in accordance with the said Protective Order.

The Board, having reviewed the written motions filed herein, having heard the arguments of counsel and having engaged in extensive questioning 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 of the evidence,

that there is no substantial controversy as to the following facts or issues:

1. The City is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma.

2. The Union is, and was at all times material herein, the bargaining agent for all of the City's police officers except for the Chief of Police and one administrative assistant as provided in Oklahoma's Fire and Police Arbitration law, 11 Okla.Stat. §51-101 *et seq.* Complainant's Undisputed Fact No. 1 (Amended).

3. 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.*

4. The Norman Police Officer to whom the polygraph examination was administered (the "Officer") is a member of the bargaining unit represented by the Complainant. Complainant's Undisputed Fact No. 2 (Amended).

5. The Officer was the subject of an internal investigation involving the Officer's alleged participation with another police officer in an inappropriate conversation while in uniform and on-duty that took place at a restaurant in Norman, Oklahoma, that was overheard by a mother and daughter and which resulted in the mother's lodging of a telephone complaint regarding the Officer's conduct. Complainant's Undisputed Fact No. 3 (Amended) and Respondent's Undisputed Fact No. 1 (Amended).

6. The Officer was "compelled" pursuant to an Office Memorandum from Police Chief Phil Cotton dated September 13, 2010, to take a polygraph examination on September 14, 2010, as part of an internal investigation from which polygraph examination the Officer believed that discipline could result. Complainant's Undisputed Facts No. 5 and No. 6 (Amended).

7. At the appointed time for the compelled polygraph examination, the Officer, accompanied

by a *Weingarten* (Union) Representative Doug Vernier, Attorney at Law with the firm of James R. Moore & Associates, P.C., arrived at the Norman Police Department (the "Department") for the examination. The Complainant admits that Mr. Vernier is not a member of the bargaining unit of which the Officer is a member. Attorneys from James R. Moore & Associates, P.C., have represented members of the Union's bargaining unit as *Weingarten* (Union) Representatives for well over ten years. Complainant's Undisputed Fact No. 8, No. 9, No. 12 and No. 13 (Amended) and Complainant's Response to City's Statement of Undisputed Facts No. 21 (Amended).

8. The Officer wanted Doug Vernier to serve as the Officer's *Weingarten* (Union) Representative during the polygraph examination, as evidenced through the Officer's action of physically bringing Mr. Vernier to the Department for the examination. The Complainant admitted that the Officer did not directly ask for the Officer's *Weingarten* (Union) Representative to be present during the polygraph examination. Complainant's Undisputed Fact No. 10 (Amended) and Complainant's Response to City's Statement of Undisputed Facts No. 20 (Amended).

9. Upon arrival at the Department for the compelled polygraph examination, the Officer, Mr. Vernier, the Department's internal affairs investigator and the polygraph examiner all met to discuss the pending polygraph examination. At that time the Officer was informed that the *Weingarten* (Union) Representative accompanying the Officer would not be allowed to represent the Officer in the compelled polygraph examination and no exam questions were discussed. Complainant's Undisputed Fact No. 14 (Amended).

10. The polygraph suite at the Department consists of two separate rooms: (1) the polygraph examination room; and (2) an observation room next door separated by a one-way mirror through which observers can watch the polygraph examination being conducted in the polygraph room in full as well as watching and listening to the examination on the observation room's television monitor

with full visual and real-time audio. While undergoing the polygraph examination, the Officer could not see or hear the people in the observation room next door which precluded the Officer from receiving the benefit of Mr. Vernier's representation during the pre-polygraph interview. Respondent's Undisputed Fact No. 6 (Amended) and Complainant's Response to City's Statement of Undisputed Facts No. 6 (Amended).

11. During the pre-polygraph interview phase of the polygraph examination process conducted by the polygraph examiner in the absence of the Officer's *Weingarten* (Union) Representative, the polygraph examiner asked the Officer a number of questions related to the subject matter of the internal investigation in order to craft the questions that would be asked in the polygraph examination. Complainant's Undisputed Fact No. 16 (Amended).

12. The Complainant did not dispute that the Officer submitted to the pre-polygraph interview without the presence of the Officer's *Weingarten* (Union) Representative. Complainant's Response to City's Statement of Undisputed Facts No. 8 (Amended).

13. The polygraph examination that was administered to the Officer is referred to as a "You-phase" polygraph examination, which is composed of three phases: (1) the pre-test phase; (2) the in-test phase; and (3) the post-test phase, also known as the test data analysis phase. Respondent's Undisputed Fact No. 10 (Amended).

14. During the pre-test phase of the polygraph examination, the examiner attempts to build a rapport with the examinee, obtains back ground information, provides the examinee the Polygraph Bill of Rights, and reviews questions that will be asked during the examination. The examiner attempts to calm the examinee and to place the examinee in a homeostatis state in order to achieve accurate results from the examination. The examiner maneuvers the examinee to get him focused on his integrity and certain questions known as "Probable Lie Comparison Questions", which are

also referred to as “Control Questions”. Probable Lie Comparison Questions are questions to which the majority of people will lie, which is necessary for the examination. The examiner also reviews the Relevant Questions with the examinee during the pre-test phase of the examination, which are the questions that specifically deal with the matter at issue. All questions are reviewed with the examinee multiple times prior to the in-test phase of the examination. Respondent’s Undisputed Fact No. 11 (Amended).

15. During the in-test phase of the polygraph examination, the polygraph instruments are connected to the examinee. The polygraph machine measures the physiological responses of the examinee to the questions asked. Both the Probable Lie Comparison Questions and the Relevant Questions are asked of the examinee. Each question is asked multiple times in order to obtain multiple responses for comparison. Once the examiner is done with the questions, the instrument is removed and the in-test phase of the polygraph examination is completed. Respondent’s Undisputed Fact No. 14 (Amended).

16. During the post-test phase of the polygraph examination, the examiner reviews the data recorded by the polygraph machine. The examiner compares the examinee’s physiological responses to the Probable Lie Comparison Questions to the examinee’s physiological responses to the Relevant Questions to determine if the examinee was deceptive in his responses to the Relevant Questions. The examiner prepares a chart analysis and then informs the examinee of the results of the polygraph examination. Respondent’s Undisputed Fact No. 15 (Amended).

### **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).

5. The Complainant, in asserting a violation of 11 O.S. §§ 51-101 et seq., has the burden of proving the allegations of unfair labor practice by 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.

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. "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)." *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006).

8. "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).” *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006).

9. “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.” *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006).

10. “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.” *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006).

### OPINION

It is the finding of the Board as follows:

The City’s Motion to Strike now pending in this matter should be and hereby is DENIED as it proved to not be relevant to the Board’s ultimate decision on the remaining summary judgment motions.

Board Member Gooch moved to GRANT the Complainant’s Motion for Summary Judgment based upon the case of *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006), which motion was seconded by Chairman Barlow. Subsequently the Board voted unanimously to GRANT the Complainant’s Motion for Summary Judgment.

Board Member Speegle noted that he voted to GRANT the Complainant’s Motion for

Summary Judgment on the basis that the case of *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006) did allow the Union Representative to be excluded during the polygraph test but the said *Oklahoma City* case goes further to provide that if only the questions asked in the polygraph test are the relevant questions to be asked have been “discussed” with the Union Representative, that he voted yes based on that precedent and that the said *Oklahoma City* case requirement of the relevant questions being “pre-approved” goes too far.

Chairman Barlow expressed his agreement with Board Member Speegle to GRANT the Complainant’s Motion for Summary Judgment noting that where the said *Oklahoma City* case says the relevant question must be “pre-approved”, he does not believe that a relevant question has to be “approved” but that it had to be asked in the presence of the employee having the opportunity to have a Union Representative with him or her at the time that the relevant question was “disclosed” to the employee that that question was going to be asked. It does not even have to be the exact phraseology that would be asked but the subject of it, that the relevant question does not have to be approved and he concurred with Board Member Speegle that the said *Oklahoma City* case requirement of the relevant questions being “pre-approved” goes too far.

The holding in the instant case before the Board is thus distinguished from the holding of the Board in the previous case of *Fraternal Order of Police, Lodge 123 v. City of Oklahoma City*, PERB Case No. 432 (2006), in that a polygraph exam itself is not a *Weingarten* investigatory interview if the questions have been previously discussed in the presence of a *Weingarten* (Union) Representative and only questions that are so discussed in the presence of a *Weingarten* (Union) Representative are asked during the exam. The tape, electronic or other recording of the polygraph exam assures that only questions that are discussed in the presence of a *Weingarten* (Union) Representative are asked in the polygraph examination. As a result, the examinee is not entitled to union representation during

the actual polygraph exam.

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 met its burden of proof and the Respondent has engaged in an unfair labor practice.

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

Dated this 8 day of MARCH, 2012.

  
Michael Barlow, Chairman  
Public Employees Relations Board

  
Max Speegle, Member  
Public Employees Relations Board

  
Larry W. Gooch, Member  
Public Employees Relations Board