BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

FRATERNAL ORDER OF POLICE, LODGE NO. 173,	)	
Charging Party,	)	
vs.	)	Case No. 00164 12281 UC
CITY OF YUKON, OKLAHOMA,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

This matter came on for hearing before the Public Employees Relations Board (PERB or the Board) on April 15, 1988, on Charging Party's Unfair Labor Practice charge and Unit Clarification application. The Charging Party (hereinafter referred to as "Union") appeared by and through its attorney Richard Mildren and certain of its officers and members; the Respondent appeared by and through its attorney Charles Ellis along with certain of its employees. The Board received documentary and testimonial evidence; the Board also solicited and received post hearing submissions (Proposed Findings of Fact, Conclusions of Law and supporting briefs) from the parties.

The Board is required by 75 O.S. 1981, § 312, to rule individually on Findings of Fact submitted by the parties. The submittal of the Respondent is treated as follows:

1. Respondent's Proposed Findings 1-13 have been substantially adopted by the Board. Because the Union did not submit individually listed Findings of Facts, the PERB need make no comparable rulings. The Statement of Facts contained in the Union's brief cannot be addressed individually because the facts are not asserted individually. Such assertions, when material and when at odds with the assertions of the City, will be addressed in the body of the opinion.

FINDINGS OF FACT

1. On December 11, 1981, the union filed its Representation Petition wherein it sought to be certified as the bargaining agent for the following employees of the City:

> All permanent, full-time Police Officers, excluding the Chief of Police and the Administrative Assistant (Major) (City Exhibit No. 4).

2. By letter dated December 11, 1981, the PERB advised the acting City Manager of the City that:

> The Board informs you that it has previously construed the statutory language, "unit appropriate for collective bargaining" to mean a departmental wide unit excluding only the Chief and his designated Administrative Assistant, and certain temporary or seasonal employees.
>
> . . . You are required . . . to furnish to the Board . . . an alphabetical list of names, addresses, departments and job titles of all employees within the proposed bargaining unit as shown by the Petition filed by the bargaining agent.

3. Pursuant to those instructions the City submitted to the PERB a list of all employees in the City of Yukon Police Department. On this list was included the name of Gary Garren whose duties were listed as "animal control". The PERB determined the individuals included in the bargaining unit described above by striking from the list the names of those individuals that were not included in the bargaining unit. Mr. Garren's name was among those names stricken from that list. Mr. Garren did not vote in the election and no protest was filed. The union received a majority of the votes in the election and was certified as the bargaining agent of the police officers of the City.

4. Gary Garren has been employed with the City for approximately ten (10) years (Tr. p. 27). He was hired as an Animal Control Officer in charge of the Animal Control Division at the Yukon Police Department (Tr. p. 27). In the course of performing his duties Mr. Garren picks up stray animals, takes dead animals off the public streets, disposes of dead animals, cleans and maintains the animal shelter, transports animals to the vet, supervises one other employee of the Animal Control Division, and performs certain administrative paperwork (Tr. p. 49).

5. Occasionally, in the past, Mr. Garren has been utilized in road blocks, manhunts, handling of prisoners, and arrests (Tr. p. 27), although he has never taken a person into custody or transported them to jail by himself (Tr. p.

54). In 1981 he was assigned to the Detective Division to assist in narcotics investigation and participated in those investigations for approximately one year (Tr. p. 28). Mr. Garren's participation in these "police duties" - as opposed to animal control duties -increased between 1978 and 1981.

6. On April 6, 1981, Mr. Garren was issued a commission card by Yukon Chief of Police, J.D. Ervin (Tr. p. 28). Up until February, 1986, he was authorized to wear a firearm as a part of his uniform (Tr. p. 43). At one time Mr. Garren wore a uniform which was exactly the same as the uniform of a Yukon Police Officer except for the absence of a tan stripe on the left pant leg.

7. At the present time Police Chief Huffman, who has the authority to assign Mr. Garren duties (Tr. p. 67), restricts Mr. Garren's law enforcement activities to the enforcement of animal control ordinances (Tr. p. 77). He is not authorized to enforce any other laws or municipal ordinances of the City (Tr. p. 77), nor is he authorized to make an arrest (Tr. p. 77). He is authorized to serve citations relating to animals which summon individuals to appear in court (Tr. p. 78), but he is not authorized to serve warrants or make arrests (Tr. p. 77). At the present time the City's animal laws are the only laws that Mr. Garren is charged with enforcing (Tr. p. 52).

8. The commission card issued to Mr. Garren by the previous police chief in 1981 was also issued to a number of

people in and out of the police department (Tr. p. 80). Furthermore, new commission cards have been issued and the one carried by Mr. Garren is no longer in effect (Tr. p. 85).

9. Police Chief Ervin's letter of February 18, 1986, (City Exhibit No. 2), terminated Mr. Garren's authority to wear a firearm. Mr. Garren does not have certification by the Council on Law Enforcement Education and Training (CLEET) which requires, among other things, not less than 300 hours of accredited instructions and is a requirement of every police officer in the State of Oklahoma. 70 O.S.Supp. 1987, § 3311 (Tr. p. 57).

10. At the present time he wears no patches, breast pads, or collar brass on his work clothes and he has a large patch on the back of his shirt stating "Animal Control". (Tr. p. 44).

11. Mr. Garren serves on the FOP bargaining committee and is a member of the FOP (Tr. p. 44). His union dues are deducted from his salary by the City and remitted periodically to the FOP (Tr. p. 14). Mr. Garren's prepaid legal premium is also withheld by the City and remitted to the prepaid legal insurance company (Tr. p. 17). Mr. Garren receives $50.00 a month cleaning allowance paid by the City (Tr. p. 29).

12. The collective bargaining agreement between the City and the FOP provides that the City will deduct the monthly union dues of those employees in the bargaining unit

and remit them to the union and pay $50.00 per month for cleaning and maintenance of uniforms to those employees (Joint Exhibit No. 1). There is no provision in the collective bargaining agreement for the deduction and payment of prepaid legal premiums. The City does not make contributions on Mr. Garren's behalf to the Policemen's Pension and Retirement Plan authorized for police officers (Tr. p. 46).

13. In July of 1987, before the City and the FOP had agreed to a collective bargaining agreement for the fiscal year 1987-1988 (and therefore before any members of the bargaining unit had received an increase in pay or vacation benefits), Mr. Garren received a 2-1/2 percent increase in pay and one (1) additional day holiday which was extended to all other civilian employees of the City (Tr. p. 59).

CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this dispute pursuant to 11 O.S. Supp. 1987, § 51-104(b).

2. In an administrative proceeding before the PERB, the complainant has the burden of persuasion by a preponderance of the evidence as to the factual issues raised by its ULP charges. See e.g., Prince Manufacturing Co. v. United States, 437 F. Supp. 1041 (D.C. Ill. 1977). In this case the Union has failed to prove its allegations that Mr. Garren meets the statutory definition of "officer" and that the City

has wrongfully refused to include such employee in the bargaining unit.

OPINION

In order to be included within the bargaining unit, Gary Garren must meet the definition of "officer" in the Fire and Police Arbitration Act, 11 O.S. 1981, §§ 51-101, et seq. (FPAA or the "Act"). Section 51-102(1) of the Act provides that police officers "shall be those persons as defined in Section 50-101."

Section 50-101(6) provides:

> "Officer" means any duly appointed and sworn full-time officer of the regular police department of a municipality whose duties are to preserve the public peace, protect life and property, prevent crime, serve warrants, enforce all laws and municipal ordinances of this state, and any political subdivision thereof, and who is authorized to bear arms in the execution of such duties;

Based upon the evidence adduced at the hearing it is clear that Mr. Garren once arguably fit this definition. However, it is equally clear that Mr. Garren, due to the nature of his duties since 1986, no longer meets the statutory definition of a police officer.

For the purposes of unit clarification the Board is constrained to examine the facts as they exist at the time of the filing of the petition for clarification. Whether an employee constitutes an "officer" for the purposes of determining the bargaining unit is controlled by the

employees duties at the time of the request for clarification.

The Board will look to past duties of an employee only upon an allegation that the City has altered an employee's duties based upon anti-union motivation. No such allegation has been made by the Union in its pleadings nor was any evidence presented to the Board which supports a finding of anti-union motivation.

The evidence presented to the Board establishes that Mr. Garren is not currently authorized to serve warrants, make arrests, enforce all the laws or carry a firearm. The Board concludes that he does not, at this time, meet the statutory requirements for inclusion in the bargaining unit. Should his duties change in the future so as to satisfy the requirements of § 50-101, the Board, upon proper application, will re-examine his status.

Concerning the Charging Party's evidence that the City impliedly considered Mr. Garren to be a member of the bargaining unit, the Board finds that acts of the City which may indicate its willingness to include a particular employee, not otherwise includable in the bargaining unit under statute, are irrelevant. Neither the City nor the Union may unilaterally alter the statutory requirements for inclusion in the bargaining unit either by express or implied act. The bargaining unit is established by statute and is

not a subject of negotiation Oliver v. City of Tulsa, 654 P.2d 607 (Okla. 1982).

Finally, the Board feels it is necessary to clarify the issue of the propriety of unit clarification procedure in this action. The City maintains that unit clarification is improper for those historically or intentionally excluded from the bargaining unit, citing NLRB v. Mississippi Power & Light Co., 769 F.2d 276 (5th Cir. 1985).

Unit Clarification is properly invoked where the employee is a new employee or when an employee's duties evolve in such a manner as to require his inclusion in the unit. As stated in NLRB v. Mississippi Power & Light, supra:

> Unit clarification procedures permit the NLRB to add employees to a particular bargaining unit. The addition is accomplished without an election. The added employees are considered covered by the existing collective bargaining agreement. The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included due to changed circumstances (for example, evolving or newly created jobs).
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> * * *
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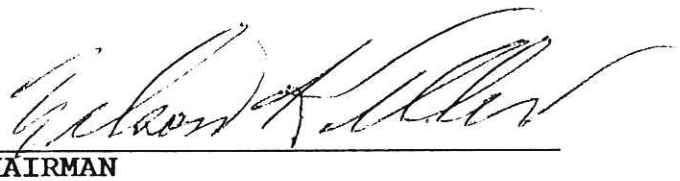
> Employees may be added by unit clarification where, as in the creation of new job, their existence was unforeseen and they are functionally identical to employee classifications included within the existing unit. Employees cannot be added by unit clarification, however, where they intentionally and historically were excluded from the existing bargaining unit.

(Citations omitted).

The Board finds that Gary Garren is not a "police officer" within the meaning of the FPAA and therefore is not entitled by statute to be included in the bargaining unit. The Board further finds that the City has not committed an unfair labor practice by its refusal to include Mr. Garren therein or to acknowledge his right to be included. The Union's prayers for relief in both actions filed herein are denied.



CHAIRMAN

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