

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

LODGE NO. 127, FRATERNAL ORDER OF POLICE,)	
)	
Complainant,)	
)	
v.)	Case No. 00375
)	
THE CITY OF MIDWEST CITY, OKLAHOMA,)	
)	
Respondent.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
OPINION, AND FINAL ORDER**

NOW ON this 6th day of June, 2001, there comes on before the Oklahoma Public Employees Relations Board (the "Board") the above-styled and numbered administrative action. The Complainant, Lodge No. 127, Fraternal Order of Police ("Union") appears through its attorney of record, James R. Moore; Respondent, City of Midwest City ("City") appears through its attorney of record, Margaret McMorrow-Love. The parties agreed to waive testimony and requested that the Board render its decision based upon the written briefs and undisputed facts as stated. The Board, having received the briefs and exhibits of the parties, heard oral argument, and otherwise being fully apprised of the facts and matter alleged, makes the following determination regarding findings of fact and conclusions of law and issues its Final Order.

DETERMINATION OF PROPOSED UNDISPUTED FINDINGS OF FACT

1. The parties did not submit Proposed Findings of Fact; however, the City did submit a Statement of Material Facts Not in Controversy and the Union submitted a response to same, with no dispute as to Nos. 1, 2, 3, 4, 10 and 11. Further, the Union did not dispute Nos. 5, 6, 7 and 8, subject to submission of additional facts, which were undisputed by the City during oral argument. In its Proposed Finding of Fact No. 6, the Union objected to the City's Proposed Finding of Fact No. 9 as immaterial; and the City objected to the Union's Proposed Finding of Fact No. 6, as legal argument. Accordingly, the facts submitted by the parties will be considered by the Board as Proposed Findings of Fact.
2. The Board accepts the following Proposed Findings of Fact of the City, which are undisputed by the Union: Nos. 1-4, 10 and 11.
3. The Board accepts the following Proposed Findings of Fact of the City: Nos. 5- 8, subject to the additional facts submitted by the Union.
4. The Board accepts Proposed Finding of Fact No. 9 by the City.
5. The Board accepts the Proposed Findings of Fact of the Union: Nos. 1-5, 7 and 8, and accepts Proposed Finding of Fact No. 6 of the Union as a Proposed Conclusion of Law, but not as a statement of fact.

FINDINGS OF FACT

1. The City has adopted a council-manager form of government and is and was, at all times material herein, a municipal corporation organized and existing pursuant to the laws of the State of Oklahoma, and in particular the terms and provisions of the Fire and Police Arbitration Act, 11 O.S. 1991 and Supp. 2000, §§ 51-101, *et seq.*

2. The Union is the duly recognized and exclusive bargaining agent for members of the Midwest City Police Department.
3. For several years, the City and the Union entered into collective bargaining agreements pursuant to the terms of the Fire and Police Arbitration Act, 11 O.S. 1991, §§ 51-101, *et seq.* (“FPAA”).
4. The current collective bargaining agreement (“CBA”) covers the period July 1, 2000 through June 30, 2001, as amended effective February 17, 2000, through June 30, 2001 (Brief of Respondent City of Midwest City, Exhibit 1).
5. From 1994 through 1999, the City issued written conditional offers of employment to successful applicants for positions as patrol officers with the Midwest City Police Department which were signed by applicants upon acceptance of the offer (“Letter”). (Brief of Respondent Midwest City, Exhibit 2). The Letter included a requirement that applicants sign a separate written Contract for Physical Fitness Requirements (“Contract”). (Brief of Respondent Midwest City, Exhibit 3).
6. The Letter contained an agreement by the applicants to “maintain the current established physical fitness standards for Midwest City Police Officers while employed with the police department.”
7. The Letter further provided that failure to meet any of the conditions contained therein would result in withdrawal of the offer of employment and notice that the applicant would no longer be considered for employment with the City.
8. The Contract contained an agreement by applicants, in consideration of employment with the City, to comply with the City’s physical fitness standards (“Standards”).

9. The Contract contained an agreement by applicants, in consideration of continued employment with the City, to maintain the Standards and to submit to semi-annual physical fitness testing to determine the level of compliance with the Standards.
10. The Contract contained an agreement by applicants that they would be subject to discipline “up to and including termination of employment with the City” if at any time during the course of employment they were unable to satisfy the Standards.
11. During the period 1994 through 1999, approximately thirty-six (36) applicants were hired by the City as patrol officers upon condition of execution of the Letters and individual Contracts by the applicants.
12. During the period 1994 to the date of hearing, neither the Union nor any member of the Union has filed a formal grievance regarding the City’s requirement that applicants execute the Contract as a condition of employment.
13. Until the fall of 1999, no member of the bargaining unit was required to execute the Contract.
14. In the fall of 1999, upon discovery that some or all of the Contracts had been lost or misplaced, the patrol officers who had been required to execute the Contracts initially as applicants, and were then employees and members of the Collective Bargaining Unit (“CBU”), covered by the CBA, were required by the City to re-execute undated Contract forms as a condition of employment. (Brief of Respondent City of Midwest City, Proposed Finding of Fact No. 6, and Exhibit 4).

15. Also, in the fall of 1999, a Physical Fitness Committee (“Committee”) was created, which included representation by the City and the Union, to review physical fitness requirements. (Brief of Respondent City of Midwest City, page 2).
16. Pending the outcome of the Committee’s study and report, the City notified the Union that physical fitness testing had been deferred. (Brief of Respondent City of Midwest City, page 3).
17. Since 1994 to the date of hearing, the City has not enforced the Contracts, nor has any disciplinary action regarding the Contracts been taken against any of the affected 36 members of the CBU.
18. The Contracts, which the 36 employees were required to re-execute in 1999, did not contain or include the Standards as a separate attachment. (Brief of Respondent City of Midwest City, Exhibit 4).
19. On October 1, 2000, the Union submitted written notice to the City of its objection to the required execution of the Contracts as a condition of employment and challenge to the validity of individual Contracts between the City and 36 members of the CBU. (Brief of Respondent City of Midwest City, Exhibit 4).
20. On October 13, 2000 and November 15, 2000, the City Manager responded in writing to the Union’s objections setting forth the City’s position that the individual agreements were valid and enforceable (Brief of Respondent City of Midwest City, Exhibits 6 and 7).
21. On November 30, 2000, the Union filed the instant unfair labor practice charge alleging violations by the City in (1) requiring execution of individual contracts with applicants prior to their employment, and (2) expressing the intent to enforce the individual

contracts against patrol officers after they became employees and members of the CBU, covered by the CBA.

22. The CBA contains an agreement for a “voluntary” health physical to be provided by the City to employees at a minimum of every five (5) years at no cost, which does not require semi-annual fitness testing, the Standards or the Contract. (Brief of Respondent City of Midwest City, Exhibit 1, Article 33, § 1).
23. The CBA includes a management rights clause which allows the City to manage the affairs of the police department “so long as they do not affect mandatory subjects of bargaining which are required to be negotiated.” (CBA, Article 5, § 2(A)).

CONCLUSIONS OF LAW

1. This matter is governed by the provisions of the FPAA, 11 O.S. 1991 and Supp. 2000, §§ 51-101, *et seq.*, and the Board has jurisdiction to rule on this unfair labor practice charge.
2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 1991 and Supp. 2000, §§ 308a, *et seq.*
3. It is appropriate to consider federal labor law 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. 1991, § 51-104b(A).
5. The Union, in asserting a violation of Section 51-102(6), has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. OAC 585:1-7-16.
6. “Unfair labor practice” includes, but is not limited to, any action by the City interfering with, restraining, intimidating or coercing employees in the exercise of the rights

- guaranteed them by the FPAA. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(1).
7. “Unfair labor practice” includes, but is not limited to, any action by the City dominating or interfering with the formation, existence or administration of any employee organization or bargaining agent. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(2).
 8. The test of unfair labor practice “is not whether the attempt to intimidate, interfere or coerce succeeded or failed, but that the conduct was such that it tends to interfere with the free exercise of those rights.” *DeQueen General Hospital v. NLRB*, 744 F.2d 612, 614 (8th Cir. 1984).
 9. A complaint shall be deemed untimely if filed with the Board more than one (1) year following the alleged violation. OAC 585:10-1-4(a)(2).
 10. Firefighters and police officers in any municipality shall have the separate right to bargain collectively with their municipality and to be represented by a bargaining agent in such collective bargaining with respect to wages, salaries, hours, rates of pay, grievances, working conditions and all other terms and conditions of employment. 11 O.S. 1991, § 51-103(A).
 11. Under the FPAA, an employer’s unilateral change in mandatory subjects of bargaining during the term of a contract is permissible only “when a management rights clause evidences a grant of permission by the union to unilaterally effect such changes.” *I.A.F.F. Local 2171 v. City of Del City*, PERB Case No. 194 (1990).
 12. All rules, regulations, working conditions, departmental practices and manner of conducting the operation and administration of the Midwest City Police Department, which were in effect upon the effective date of the CBA, are deemed a part of the CBA.

11 O.S. 1991, § 51-111; CBA, Article 6, § 1.

13. A past practice is binding on both parties only if it is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time, as a fixed and established practice accepted by both parties. *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954).
14. An individual hiring contract is subsidiary to the terms of the collective bargaining agreement and may not waive any of its benefits. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 336 (1944).
15. Individual contracts, no matter what the circumstances that justify their execution or their terms, may not be used to limit or condition the terms of the collective bargaining agreement. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 337 (1944).
16. An individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the collective bargaining agreement. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 338 (1944).
17. The benefits and advantages of the collective bargaining agreement are available to every employee of the collective bargaining unit, regardless of the terms of a pre-existing contract of employment. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 338 (1944).

OPINION

Factual Background

Between 1994 and 1999, the City of Midwest City required approximately thirty-six (36) applicants for employment to execute individual Contracts, which required certain unidentified physical fitness standards to be met as a condition of employment and maintained throughout their employment as a condition of continued employment as patrol officers.

In October, 1999, upon discovery that the Contracts had been lost or misplaced, the patrol officers, who were then member employees of the CBU, covered by the CBA, were required to re-execute undated Contract forms. This was the first and only occasion on which the City required patrol officers, covered by the CBA, to execute the Contracts.

The Contracts, which referenced physical fitness standards as “attached”, in fact, did not have such Standards attached to the Contracts. At approximately the same time, in the fall of 1999, the Committee was created, which included representation by the City and the Union, to review physical fitness requirements. Thereafter, pending the outcome of the Committee’s study and report, the City announced that physical fitness testing required by the Contracts would be deferred. The City has never had occasion to enforce the Standards referenced in the Contracts, nor has any disciplinary action been initiated against any member of the CBU for failure to comply with the terms of the Contracts.

The CBA between the parties includes a provision which limits the municipality in its right to manage the affairs of the police department to the determination and enforcement of policy, rules, regulations, and orders *only so long as they did not affect mandatory subjects of bargaining* which were required to be negotiated (Article 5, § 2(A)). During oral argument in the

hearing before the Board, the attorney for the City stipulated that the physical fitness requirements did constitute a term or condition of employment and did not rebut the Union's argument that the requirements were a subject for collective bargaining, in regard to which the police officers had a right to be represented by the Union.

On October 1, 2000, the Union submitted written notice to the City of its objection to the execution of the Contracts as a condition of employment and challenged the validity of individual Contracts between the City and patrol officers who were members of the CBU, covered by the CBA.

The City responded in writing on October 13, 2000 and November 15, 2000, setting forth the City's position that the individual Contracts, which required physical fitness standards and semi-annual testing throughout the employment of patrol officers, were valid and enforceable.

On November 30, 2000, the Union filed the instant unfair labor practice charge alleging violations by the City (1) in requiring execution of individual Contracts with *applicants* regarding mandatory subjects of collective bargaining prior to their employment, and (2) by expressing the intent to enforce the individual Contracts against *employees* after they became part of the CBU.

Timeliness

The first violation cited in the Union's complaint is untimely as it was filed more than one (1) year following the alleged violation, i.e., the City's requirement of execution of individual Contracts with applicants for employment between 1994 and 1999. The Union failed to present evidence that any of the Contracts were initially executed by applicants within one (1) year prior to the filing of the instant complaint on November 30, 2000.

The second alleged violation, which is based upon the City's requirement, in the fall of 1999, that employees re-execute the Contracts as a condition of employment, and the City's subsequent notice to the Union, in October and November, 2000, that the individual Contracts were enforceable against the thirty-six (36) members of the CBU, was timely filed by the Union as a charge of unfair labor practices on the part of the City.

Past Practice

The City argues that the physical fitness requirements imposed by the Contracts are enforceable as past practice based upon the longevity of the practice in regard to *applicants*, from 1994-1999, coupled with the failure of the Union to object through a formal grievance. However, the requirement that *employees covered by the CBA* execute the Contracts occurred only once in regard to a unique situation, i.e., the discovery of the loss of Contracts in the fall of 1999.

A "past practice," to be binding on the parties, must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954); *International Association of Fire Fighters Local 1881 and City of Ardmore*, FMCS Arbitration No. 90-22990 (Springfield, 1990). The Board finds no past practice in the record before it. The actions relied upon by the City simply do not support the requisite clarity, acceptability and consistency necessary to establish a past practice.

Under the FPAA, an employer's unilateral change in mandatory subjects of bargaining during the term of a contract is permissible only "when a management rights clause evidences a grant of permission by the union to unilaterally effect such changes." *I.A.F.F. Local 2171 v. City of Del City*, PERB Case No. 194 (1990). Unilateral rule changes by the employer regarding

employee safety and discipline are permissible only when the management rights clause grants permission by the union to the employer to effect such changes. *Continental Telephone Co.*, 274 NLRB 1452 (1985). However, the management rights clause in question does not permit unilateral changes in mandatory subjects of bargaining.

The City further argues that the subject of physical fitness had never been negotiated or bargained by the parties and in the absence of a conflicting provision in the CBA, the “past practice” should prevail. The Board has concluded, however, that *enforcement* of the Standards against members of the CBU is not a past practice.

The only language in the CBA which refers to the health and fitness of employees conferred a *benefit* to employees as opposed to a *requirement* for physical fitness, which subjects employees to discipline up to and including termination. The CBA includes an agreement for a “voluntary” health physical to be provided by the City to employees at a minimum of every five (5) years at no cost; however, this provision does not require semi-annual fitness testing, the Standards, or the Contract which provides for disciplinary action against the officers (Brief of Respondent City of Midwest City, Exhibit 1, Article 33, § 1).

Based upon the stipulated facts, the unambiguous understanding between the City and Union regarding physical fitness requirements, prior to execution of the CBA, was that (1) Contracts were required *only of applicants for employment* during the period 1994-1999; (2) physical fitness requirements had never been enforced against nor required through discipline of any *employee covered by the CBA*; (3) enforcement was deferred by the City pending the outcome of the study and report from the Committee; and (4) the City had required *employees* to re-execute the Contracts on only *one* occasion in response to a unique event, i.e., the City’s

discovery that the original Contracts with applicants had been lost.

On these facts, the City has failed to present evidence to support its argument that mandatory execution of individual Contracts with *members of the CBU* constituted a past practice enforceable as an unwritten term of the CBA. The City's requirement of execution of individual Contracts, by *employees who were members of the CBU, covered by the CBA*, which effected terms and conditions of their employment, limited the benefit of freedom from such requirements enjoyed by other members of the CBU.

Individual Contracts

The United States Supreme Court has unequivocally addressed the status of individual contracts which purport to govern conditions of employment of members of a collective bargaining unit. The Court held in *J. I. Case Co. v. National Labor Relations Board*, that (1) an individual hiring contract is subsidiary to the terms of the collective bargaining agreement and may not waive any of its benefits; (2) individual contracts, no matter what the circumstances that justify their execution or their terms, may not be used to limit or condition the terms of the collective bargaining agreement; (3) an individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the collective bargaining agreement; and (4) the benefits and advantages of the collective bargaining agreement are available to every employee of the collective bargaining unit, regardless of the terms of a pre-existing contract of employment. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 336-338 (1944). The purpose of providing by statute for the collective agreement is to supercede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. *Id.* at 338.

The test of unfair labor practice “is not whether the attempt to intimidate, interfere or coerce succeeded or failed, but that the conduct was such that it tends to interfere with the free exercise of those rights.” *DeQueen General Hospital v. NLRB*, 744 F.2d 612, 614 (8th Cir. 1984); *Fraternal Order of Police Lodge No. 163 v. City of Mustang*, PERB Case No. 136 (1987). The City’s notice to the Union of its position that the individual agreements covering terms and conditions of employment were enforceable clearly met this test of unfair labor practice. This action on the part of the City constituted an interference with, restraining, intimidating or coercing of the affected employees in the exercise of their right to be represented by the Union in regard to all terms and conditions of employment. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(1). Again, in response to objection by the Union, the City’s response that the individual Contracts, which did not affect other members of the CBU, were valid and enforceable against the 36 police officers, constituted an interference with, restraining, intimidating or coercing of the 36 employees in the exercise of the right to be represented by the Union in regard to all terms and conditions of employment. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(1).

Finally, the City’s insistence that these Contracts were enforceable against some, but not all, members of the CBU, further constituted interference with the administration of the Union as a bargaining agent for the employees. 11 O.S. 1991 and Supp. 2000, § 51-102(6a)(2).

ORDER

IT IS THEREFORE THE ORDER of the Public Employees Relations Board that the unfair labor practice allegation of the Union charging violation based upon the execution of individual contracts between the City and *applicants for employment* as police officers between 1994 and 1999 is **DISMISSED** as untimely filed. The unfair labor practice allegations of the

Union based upon the mandatory re-execution of individual Contracts by thirty-six (36) members of the CBU in the fall of 1999 and the subsequent notice in October and November, 2000, by the City of the enforceability of same are hereby **UPHELD** and the City is hereby ordered to **CEASE AND DESIST** from future execution of individual contracts, which effect terms and conditions of employment, with members of the CBU, and further the City is ordered to **CEASE AND DESIST** from the enforcement or threat of enforcement of any existing individual Contracts which affect terms and conditions of employment of members of the CBU.



Craig W. Hoster, Chair

Date: September 12, 2001