

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

FILED

OCT 13 2011

Public Employees Relations
Board

FRATERNAL ORDER OF POLICE,)	
LODGE 102,)	
)	
Complainant,)	
)	
v.)	PERB No. 2011-ULPC-504
)	
CITY OF STILLWATER,)	
)	
Respondent.)	

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 11th day of August, 2011, 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) Complainant's Motion for Summary Judgment filed by the Fraternal Order of Police, Lodge 102 (the "Complainant" or "Union") on July 1, 2011; and, (2) City's Motion for Summary Judgment & Brief in Support filed by the City of Stillwater, Oklahoma (the "Respondent" or "City"), on July 1, 2011. The Complainant appeared by and through its attorney Sue Wycoff, James Moore & Associates, P.C., Oklahoma City, Oklahoma. The Respondent appeared by and through its Deputy City Attorney Larry V. Simmons. 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 March 23, 2011, and alleged that the Respondent through its City Manager Dan Galloway, bypassed the Complainant, the designated bargaining agent, and engaged in direct dealing with the members of the bargaining unit about matters that are subject to collective bargaining on March 4, 2011, by means of an email

with attachments 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. ("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, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma. Respondent's Undisputed Fact No. 1.
2. The Union is, and was at all times material herein, the bargaining agent for certain employees of the City's police department. Respondent's Undisputed Fact No. 2.
3. The parties were, at all times material herein, engaged in collective bargaining pursuant to Oklahoma's Fire and Police Arbitration law, 11 Okla.Stat. §51-101 *et seq.* Respondent's Undisputed Fact No. 3.
4. On March 2, 2011, duly appointed representatives of the parties met formally for the first time to exchange bargaining proposals for the upcoming contract year. Respondent's Undisputed Fact No. 4.
5. At the meeting of the parties on March 2, 2011, the City Manager provided Union President Todd Parry seven (7) hard copies of the City's contract proposal, including a proposed health care plan, and cover letter explaining the City's bargaining objectives. Respondent's Undisputed Fact No. 5 (Amended).
6. On March 4, 2011, the City Manager provided all members of the bargaining unit (via

email) a digital copy of the exact same information previously provided to the Union President which consisted of the City's contract proposal, including a proposed health care plan, and cover letter explaining the City's bargaining objectives. Respondent's Undisputed Fact No. 6 (Amended).

7. The material provided to the bargaining unit members in the email from the City Manager sought no response from the employees and expressly acknowledged the Union as the bargaining representative for the employees. Respondent's Undisputed Fact No. 7 (Amended).

8. There was no reference in the email from the City Manager that could be construed as an invitation for direct bargaining. Respondent's Undisputed Fact No. 8 (Amended).

9. The material in the email from the City Manager threatened no reprisal or force and contained no promises of benefit. Respondent's Undisputed Fact No. 9 (Amended).

10. On March 23, 2011 the Union filed this action charging that the City violated 11 Okla.Stat. §51-102(6a)(5) and committed an Unfair Labor Practice ("ULP") when it provided bargaining unit members (via email) with copies of the material previously provided to the Union's chief negotiator (Union President Todd Parry) consisting of the City's contract proposal, including a proposed health care plan, and cover letter explaining the City's bargaining objectives. Respondent's Undisputed Fact No. 10 (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 evidence. 11 O.S. §51-104b (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. In determining if a party has met its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603, 1984 WL 36775 (NLRB 1984), *Fraternal Order of Police, Lodge 122 v. City of Norman*, PERB Case No. 421, Conclusion of Law ¶ 10.

8. "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board (N.L.R.B.)". (explanation added). *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969).

9. "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969).

10. "The National Labor Relations Board has held that an employer may lawfully communicate directly with members of a bargaining unit in the following circumstances:

- (a) to communicate information on the status of negotiations;
- (b) to explain positions previously advanced by the employer to the Union, either at the bargaining table or in connection with the disposition of a grievance;
- (c) to refute inflammatory charges openly made by the Union;
- (d) to criticize bargaining strategy and certain related tactics of the Union leadership which were the asserted reason for an inability to reach an agreement ;
- (e) to explain positions taken by the parties during the course of a grievance resolution.

(emphasis added) Procter & Gamble Mfg. Co., 160 NLRB 334 (1966); Safeway Trails, Inc., 223 NLRB 1078 (1977)." *International Association of Firefighters, Local 2095 v. City of Stillwater*, PERB Case No. 225, Conclusion of Law ¶ 4.

OPINION

It is the finding of the Board as follows:

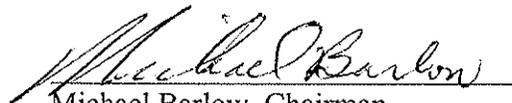
The City may communicate its position to the Union membership as long as it continues to bargain collectively in good faith. This email communication from the City Manager that sought no response from the employees, that expressly acknowledged the Union as the bargaining representative of the employees, that could not be construed as an invitation for direct bargaining, that threatened no reprisal or force and that contained no promises of benefit, does not violate Title 11, Oklahoma Statutes 2001, § 51-102(6a)(5).

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 13 day of OCTOBER, 2011.



Michael Barlow, Chairman
Public Employees Relations Board



Max Speegle, Member
Public Employees Relations Board

Larry W. Gooch, Member
Public Employees Relations Board

(Dissent Attached)

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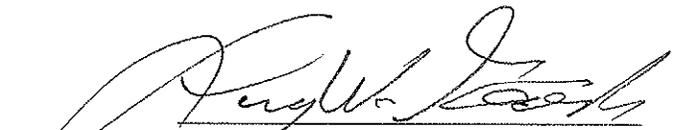
Larry W. Gooch Dissent

I dissent from the majority opinion in this case.

The Board is mistaken to rely on NLRB decisions without considering that these decisions apply to the private sector where the right to strike is a given and often Unions are allowed to negotiate a Union security clause into their collective bargaining agreements. Competition for employee loyalty is not an issue.

The FPAA provides that fire and police have all the rights of labor except for the right to strike and in exchange should expect a higher standard of good faith than is imposed in the private sector. The Oklahoma Supreme Court has called for the "highest standard".

It is undisputed that the City's bargaining committee submitted its entire bargaining proposal to the Union's bargaining unit before the union could respond. In a similar case involving the city of Lawton and the IAFF, the Union submitted its bargaining proposal to the City Council and the Board ruled correctly that this was direct dealing and an unfair labor practice. There is not enough difference between these two cases for the Board to now rule differently.



Larry W. Gooch, Member
Public Employees Relations Board