

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

TEAMSTERS LOCAL # 523)	
)	
Complainant,)	
)	
vs.)	Case No. 00306
)	
CITY OF CUSHING,)	
)	
Respondent.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Public Employees Relations Board (PERB or the Board) on the 6th day of December, 1994 on Complainant's Unfair Labor Practice (ULP) Charge. The Complainant appeared by and through its attorney, Thomas F. Birmingham. The Respondent appeared by and through its attorney, J. Stewart Arthurs.

The Board received documentary and testimonial evidence. The Board also solicited post-hearing submissions (Proposed Findings of Fact, Conclusions of Law, and supporting briefs) from both parties. The Board is required by 75 O.S. 1991, § 312, to rule individually on Findings of Fact submitted by the parties. The submission of the Complainant is treated as follows:

1. Proposed Findings of Fact Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, and 26 are substantially adopted by the Board.

2. Proposed Findings of Fact Nos. 11 and 23 are rejected.

The Board treats the submission of the Respondent as follows:

1. Proposed Findings of Fact Nos. 1, 2, 3, 6, 7, 8, 9, 10,

11, 12, 13, 14, 15, 16, 17, and 18 are substantially adopted by the Board.

2. Proposed Findings of Fact Nos. 4 and 5 are accepted in part and rejected in part.

FINDINGS OF FACT

1. Complainant, Local 523, International Brotherhood of Teamsters ("Union") is the duly certified bargaining representative for the Cushing Police Department.

2. Respondent, City of Cushing ("City") is a municipal corporation operating under a charter form of government.

3. Bill McCarty ("Grievant") was employed by the City on August 26, 1991 in the job classification of Animal Control Officer. (Tr. 38)

4. While employed with the City of Cushing, McCarty's primary duties and responsibilities have been animal control. (Tr. 68).

5. During his employment, McCarty attended police officer training with the Council on Law Enforcement Education and Training and received his certification of completion on February 26, 1993. (Union Exh. C-8, Tr. 40)

6. Throughout his tenure with the City, McCarty's job classification, according to the City's Change of Status Forms, has been: Animal Control Officer; Animal Control/Patrolman II; Animal Control and Patrolman II; and Animal Control/Patrolman. (City Exh. 3)

7. The only times McCarty was utilized by the Patrol Division

of the Cushing Police Department, to perform duties other than animal control, was when he was called as a backup for other officers who were on vacation, holiday or were sick. He also occasionally backed up officers who were in primary receipt of a call. (Tr. 68, 160-164).

8. During McCarty's tenure with the City and as a member of the Police Department, the line item of the personnel budget for the Police Department reflecting his position has been titled Animal Control. (Tr. 114-119, City Exh. 9)

9. The vehicle McCarty has had assigned to him by the Police Department has been designated as the animal control vehicle. (Tr. 67-68, 169-170)

10. The Union began organizing during May - June 1994 and the first meeting with the Union was conducted the 22nd or 23rd day of August, 1994. (Tr. 27-28) The organizers tried to keep the organizational activities as quiet as they could among themselves. (Tr. 48) On August 29, 1994, Union filed a Petition with the Public Employees Relations Board ("PERB") requesting certification as bargaining representative for the permanent paid members of the Cushing Police Department. The City was served with notice of such filing. (Union Exh. #C-13)

11. On September 1, 1994, Alvin Leon Rippee ("Chief Rippee") became Chief of Police of City. (Tr. 188-189)

12. On or before September 8, 1994, McCarty approached Chief Rippee requesting a transfer from Animal Control to a Police Officer classification. Chief Rippee then discussed the transfer

with the City Manager, Robert H. Collings, who denied the request. Based upon his discussion with the City Manager, Chief Rippee, on September 8, 1994, prepared a Memorandum to Captain Anita Retherford, McCarty's direct supervisor, directing that the Animal Control Officer, Bill McCarty, would no longer be utilized as a Police Officer. Chief Rippee discussed this action the same day directly with McCarty before Bill McCarty received any written notification. (City Exh. #7; Tr. 54, 189-191) Chief Rippee felt that if he wasn't good enough to be a full-time Police Officer, he didn't want him doing Police Officer duties. (Tr. 190)

13. On July 6, 1994, McCarty was interviewed by the Police Review Board for a position as a patrol officer. (Tr. 47)

14. McCarty was not chosen to fill the position because he did not have the education or experience that was desired. (Tr. 144, 149, 154, 156)13. The City Manager of the City of Cushing has the exclusive power to appoint all officers and employees of the City, unless such power is vested in the City Commission, pursuant to Article Four, Section 5(c), of the Charter of the City of Cushing. (City Exh. #1; Tr. 113).

15. Bill McCarty was present during the evening City Commission meeting on September 8, 1994, when the Union's Petition was considered by the City. At such meeting, no objection was voiced to the formation of the Union or to the conducting of an election for selection of a bargaining representative. McCarty left the meeting following the City's decision on the Union's Petition. (Tr. 50-51, 61-62)

16. On September 9, 1994, Captain Anita Retherford delivered to McCarty a memorandum stating that he would no longer be utilized by the Police Division. That he was to enforce the Animal Control Ordinances of City. Captain Retherford's memorandum was prepared and delivered to McCarty in response to the memorandum she received from Chief Rippee. (Union Exh. #C-4; City Exh. #8; Tr. 52, 171)

17. On September 9, 1994, the City Manager, pursuant to the action of the City Commission the preceding evening, forwarded to the PERB a letter waiving the City's right to contest the Petition and consenting to the Union election. Attached was a list of Police Department personnel and job classifications. The letter requested PERB staff assistance in identifying employees eligible to vote. Bill McCarty's job classification was listed as Animal Control. (Union Exhibits #12 and #13; Tr. 135)

18.. Responding to a letter from PERB dated September 14, 1994 (Union Exhibit #13), the City Manager, on September 16, 1994, wrote to the PERB reserving the right to challenge any votes cast in the election by Animal Control and Lake Patrol personnel. (Union Exhibit #13)

19. Based upon information received from PERB and upon advice from the City Attorney, no votes were challenged at the election. McCarty was allowed to vote in such election without challenge. (Union Exhibit #13; Tr. 138-139)

20. The City Manager was unaware and had no knowledge that McCarty was involved in the Union organization efforts. (Tr. 122) Chief Rippee was unaware of his Union involvement on September 8,

1994, when he prepared the Memorandum to Captain Retherford. (Tr. 191) Captain Retherford was also unaware of his Union involvement when she prepared and delivered the September 9, 1994, Memorandum to him (Tr. 186)

21. Bill McCarty did not know of anyone in City administration who knew he was involved in Union organization or was a Union member prior to his filing this action. (Tr. 73-74)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S. § 51-104 (b).

2. In an administrative proceeding before the PERB, the charging party has the burden of persuasion by a preponderance of the evidence as to factual issues raised in its Unfair Labor Practice (ULP) charge. 11 O.S. Supp. 1990, § 51-104 (6) (C). See, e.g., Prince Manufacturing Co. v. United States, 437 F.Supp. 1041 (1977); Gourley v. Board of Trustees of the South Dakota Retirement System, 289 N.W. 2d 251 (S.D. 1980).

3. The Board finds that the Complainant has failed to prove by a preponderance of the evidence the Unfair Labor Practice Charge alleged, specifically that the City retaliated against Bill McCarty for his Union organizing activities.



Chairman

Dated this 9th day of ^{June} May, 1995.