

**BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD**

**STATE OF OKLAHOMA**

**CITY OF ARDMORE, OKLAHOMA,** )  
 )  
 **Complainant,** )  
 )  
 vs. ) **PERB Case No. 00308**  
 )  
 **INTERNATIONAL ASSOCIATION** )  
 **OF FIRE FIGHTERS, LOCAL** )  
 **1881,** )  
 )  
 **Respondent,** )  
 )  
 **STEVEN SMITH, BUDDY** )  
 **BOYDSTON, DOYLE ELLIS,** )  
 **CHARLES TANNER AND** )  
 **JEFF WOOD,** )  
 )  
 **Intervenors.** )

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER OF THE PERB**

**THIS MATTER** came on for hearing before the Public Employees Relations Board ("PERB" or the "Board") on the 16th day of December, 1994, on Respondent's Countercharge of Unfair Labor Practice ("ULP"). Prior to hearing, Complainant dismissed its ULP charge against the Respondent. Complainant appeared by and through its attorney of record, F. Anthony Zahn. Respondent and Intervenors appeared through their attorney of record, James R. Moore.

The Board received documentary and testimonial evidence as well as joint exhibits. The Board also solicited post-hearing submissions of proposed Findings of Fact, Conclusions of Law and briefs in support.

The Board is required by 75 O.S.Supp.1994, §312 and its rules to rule individually on Findings of Fact submitted by the parties. The submitted Proposed Findings of Fact of the Complainant are treated as follows:

1. Proposed Findings of Fact Nos. 1, 2, 3, 5, 6 (in part), 7, 8, 9, 10 (in part), 11 (in part), 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 34, 35, 36, 37, 42, 43, 44, 45, 46, 47, 49, 60, 61, 62, 63, 64, 65, 66, 69 and 70 are substantially adopted by the Board.

2. Proposed Findings of Fact 4, 6 (in part), 10 (in part), 11 (in part), 14, 15, 16, 27, 33, 38, 39, 40, 41, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 67 and 68 are rejected.

The submitted Proposed Findings of Fact of the Respondent are treated as follows:

1. Proposed Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9 (in part), 10 (in part), 11, 12, 13, 14, 15 (in part), 17 (in part), 18 (in part), 19 (in part) and 22 (in part) are substantially adopted by the Board.

2. Proposed Findings of Fact 9 (in part), 10 (in part), 15 (in part), 16, 17 (in part), 18 (in part), 19 (in part), 20, 21, 22 (in part), 23, 24, and 25 are rejected.

#### **FINDINGS OF FACT**

1. On June 23, 1994, Respondent filed a grievance which alleged that the Complainant violated Article 4 of the 1993-1994 Agreement between the City of Ardmore and the International Association of Fire Fighters, Local No. 1881, (the "Agreement") by splitting fire fighters' shifts, resulting in fire fighters working hours other than the 24 hours on duty and 48 hours off duty that were set forth by the terms of the Agreement. (Ex. 30, Tr. Phelps 40-42, 127-129, 152-154, Ex. 28.

2. On June 27, 1994, a notice of a command staff meeting for July 8, 1994, was issued. (Ex. 30, Tr. Phelps 25)
3. On or about July 1 through 3, 1994, thirty one members of the Ardmore Fire Department circulated and signed a Vote of No Confidence in Phelps. (Ex. 2, 30, Tr. Boydston 302, Smith 339, Tanner 355, Ellis 366 and Wood 375)
4. On July 5, 1994, the Vote of No Confidence was delivered to the City Manager. (Ex. 3)
5. On July 7, 1994, the City Manager responded in a letter to the Vote of No Confidence, stating that the Vote of No Confidence did not contain specifics which could be grieved under the Agreement and that the communication was outside the chain of command contained in the Agreement. (Ex. 3)
6. On July 8, 1994, three (3) more grievances were delivered to the Complainant. (Ex. 30 Phelps 155)
7. On July 8, 1994, during the command staff meeting Phelps stated that because of the June 23, 1994, grievance regarding the 24 hours on-duty/ 48 hours off-duty policy, he ended constant manning and previously-allowed shift changes. Chief Phelps further made changes in work duties of some fire fighters by changing their job descriptions. Job descriptions were specified in the Agreement and trading time was a prevailing right enjoyed since the FSLA became applicable to cities in 1986. (Tr. of staff meeting, Ex. 27, Ex. 28 p. 19, Ex. 1, Art. 4, Art. 17.)
8. During this meeting, Intervenor Tanner stated to Phelps that the members of the fire department despise Phelps. (Tr. of staff meeting, Ex. 27, Ex. 28 p. 17)

9. During this meeting, Intervenor Smith alleged that Phelps was protecting Fire Inspector Hoosier and Training Officers West and Coble. (Ex. 28, pp. 38 and 39)
10. On July 8, 1994, the July 7 letter of the City Manager was posted on the fire department bulletin board. (Tr. Boydston 83-84)
11. At the direction of Phelps, Hoosier visited with Victor Pena to discuss Hoosier's concerns over job descriptions.
12. Acting upon Hoosier's concerns and incidents of July 8, Pena met with Commander Marion, Intervenor Ellis, Hoosier, West, Coble and Chief Phelps. (Ex. 30, Pena 169-170)
13. On July 11, 1994, Hoosier, West and Coble discussed the issue of job descriptions with Phelps. (Ex. 30, Phelps 35-37, Hoosier 267, West 246, Coble 256)
14. On July 11, 1994, Intervenor Smith showed to West a hand-written note which said, substantially, "The Chief is going to fall this week. If you don't want to get knocked down also, you will stay out of the way." (Ex. 30, West 244-245, Smith 335-336)
15. West reported this note to Coble and the Chief. On July 12, 1994, West reported this incident to Pena. (Ex. 30, Phelps 37-38, West 246-247, Coble 254-255, Pena 169)
16. On July 11, 1994, Intervenor Boydston advised Coble in a telephone conversation, to the effect, "Something big is going down and it might be a good idea not to get on any limbs." (Ex. 30, Coble 256, Boydston 312; Tr. Boydston 91.)
17. On July 11, 1994, Coble reported this incident to Phelps. Phelps then reported the incident to Pena. On July 12, 1994, Coble reported the incident to Pena. (Ex. 30, Phelps 38-39, 43, Coble 256, Pena 170-174)
18. On July 12, 1994, fire fighter Schwaaf delivered the Union's July 11, 1994, letter to

Pena. (Ex. 30, Pena 177)

19. On July 12, 1994, the Respondent Union filed a grievance regarding minimum manning. (Ex. 30, Phelps 51-52, Pena 182-183)

20. On July 12, 1994, Chief Phelps recommended disciplinary action against Intervenors Boydston, Ellis, Smith, Tanner and Wood. Thereupon, Notices of Adverse Action or Warning were drafted by Pena and reviewed by Phelps. (Ex. 30, Phelps 47-67, Pena 173)

21. On July 12, 1994, Pena telephoned Intervenor Smith to set up a meeting for July 13, at 8:00 a.m. Smith requested that Phelps not be present. (Ex. 30, Phelps 92, Smith 344)

22. On July 13, 1994, Pena delivered the Notice of Adverse Action to each Intervenor. (Ex. 30, Pena 176-177, 236-237)

23. Pena asked the Intervenors if they signed the Vote of No Confidence voluntarily, if they were aware of the City Manager's July 7, 1994, response to the Vote of No Confidence and if, although aware of the City Manager's response of July 7, 1994, they signed the July 11, 1994 letter. (Ex. 30, Pena 173-178, Tr. Boydston p. 83-84)

24. The proposed disciplinary action against the Intervenors came on for a Loudermill-type pretermination/disciplinary hearing on September 9, 1994, before Hearing Officer David Blankenship, Municipal Judge for the City of Ardmore. The hearing was formal, with both parties represented by counsel and a record made. (Ex. 30)

25. In the hearing, the Intervenors admitted to the factual issues contained in the Specific Issues for Disciplinary Action for the respective Intervenors. (Ex 30, Pena 237-237, Boydston 301-313, Smith 334-348, Tanner 355-359, Ellis 366-369, and Wood 375-377)

26. The Hearing Officer concluded that:

The affected employees engaged in a concerted action to both have the Fire Chief Phelps terminated by the City of Ardmore and to isolate the Fire Chief Phelps from other members of management staff of the Ardmore Fire Department through veiled warnings and threats[;]

and

At the staff meeting of July 8, 1994, the same being taped by one or more of the affected employees, the affected employees engaged in confrontational tactics with the view toward goading Fire Chief Phelps into anger and inappropriate behavior and comment.

Upon which the Intervenors were demoted.

27. On September 26, 1994, the City Manager issued his ruling upholding the decision of the Hearing Officer in all respects. (Ex. 33)
28. On October 6, 1994, the City Manager received grievances filed under the Collective Bargaining Agreement. (Ex. 34)
29. On or about October 12, 1994, the City Manager denied that the grievances were arbitrable under the Agreement. (Ex. 35)
30. On October 17, 1994, the IAFF filed a "Request for Arbitration Panel" with the Federal Mediation and Conciliation Service concerning the demotions of the Intervenors.
31. On November 1, 1994, the City filed a Petition for Declaratory Judgment and Motion for Temporary Injunction in the District Court of Carter County requested that Court to (1) enjoin the IAFF's attempt to compel the arbitration of the disciplinary proceedings against the Intervenors, (2) declare that the appeal of the Intervenors is not a dispute which is regulated by the FPAA, and (3) declare the appropriate forum for any appeal from disciplinary proceedings is the District Court.
32. A hearing on the City's Motion for Temporary Injunction on November 30, 1994, was

stricken pursuant to representation of the Intervenors that they would not seek to pursue arbitration unilaterally.

33. The statements of Intervenors Smith and Boydston were perceived by Marion, West and Coble as attempts to interfere with, strain, intimidate or coerce them in the exercise of their rights under the Act. (Ex. 5, 6, and 7; Ex 30 West 242-247, Coble 254-257, Hoosier 264-267, Pena 171-172) The Unfair Labor Practice charge filed by the City in this regard in this case was dismissed by the City prior to hearing on the merits.

34. Despite the admonition of the PERB in its Order Case No. 00263, filed January 18, 1994, to the management and staff of the Ardmore Fire Department to learn to cooperate with each other, neither side in this dispute, which are essentially the identical parties of the January 18, 1994, Order, has made substantial progress in discussing or acting upon differences between management and staff. Instead, as evidenced by numerous acts on both sides reflected herein, both sides herein have acted to impel the other side to cross over the line of appropriate conduct so as to allow the other party to declare an infraction of one sort or another. The evidence in the hearing before this Board, two days shy of one year after the Order in Case No. 000263, shows ill will on both sides of this dispute and a total lack of understanding that the parties herein must work with one another. This Board's work is made all the greater by the marked reluctance of the parties herein to cooperate.

35. IAFF Local 1881 is the certified bargaining agent for the fire fighters employed by the City of Ardmore, including the five Intervenors. (Ex. 1) The Intervenors were all Shift Commanders who were demoted to the entry level rank of fire fighters on or about September 26, 1994. (Ex. 33) The Intervenors have 24, 16, 15, 13, and 8 years of service with the City

at the time of their demotions. All are members of the state Fire Pension System, which allows vesting at twenty (20) years and additional benefits at twenty-five (25) years. Pension benefits are based on salary earned by the fire fighters before retirement. (Tr. 46, 11 O.S. § 49-101 et seq.)

36. The IAFF and City are parties to a Collective Bargaining Agreement (the "Agreement") for FY 1994-95 and have been parties to numerous such agreements of the past years. (Ex. 1, IAFF Ex. 2)

37. The Agreement contains a provision for submitting disputes to a grievance and arbitration procedure. (Ex. 1, pg 24, section 1) The procedure in the Agreement defines a grievance as "any dispute which may arise involving the interpretation or application of any of the provisions of this Agreement or the actions of any of the parties thereunder, except that it shall not apply to the rights of management." (Ex. 1, pg 24, Section 2)

38. The management rights clause gives the City the right to demote employees for just cause. (Ex. 1, pg 4, Section 1(C))

39. The procedure ends in final and binding arbitration as required by 11 O.S. § 51-111. (Ex. 1, pg 24, Section 7(D))

40. Kevin Evans, the City Manager of Ardmore, is the Chief Executive Officer of the City. Evans makes the final decision on discipline of City Employees. (Ex. 18, pg 58)

41. Evans also has authority to make or change the City of Ardmore policies regarding personnel. (Ex. 30, pg 227)

42. City policies permit employees to file a grievance with the City if they "feel they have been improperly or unfairly treated in their job." (Ex. 18, pg 58, Section 143.1) Those policies

state, "No adverse action shall be taken against any employee for reason of his/her exercise of the right to file a grievance." (Ex. 18, pg 59, Section 143.4) The policies also state, "Discrimination against employees who file grievances shall not be tolerated and such actions shall be in violation of the personnel rules of the City of Ardmore." (Ex. 18, pg 60, Section 144.3; Ex. 30, p. 231)

43. Wayne Phelps is the Fire Chief for the City of Ardmore and has been since late 1989.

44. Victor Pena is Human Resources Director for the City of Ardmore.

45. The City of Ardmore Safety Manual, issued by the Manager, encourages employees to make the City of Ardmore "the safest place in the state." (Ex. 20, Manager's cover letter) The manual states further, "every effort shall be made to keep the workplace safe and to eliminate unsafe and hazardous work environments... 1. Any employees noting what they feel is an unsafe working condition, shall immediately report such to the City Manager or his designee...

3. No employee shall be reprimanded or in any way retaliated against for filing a truthful 'Unsafe Condition Report'." (Ex. 20, pg 7)

46. City employees had previously gone to the Manager with problems and complaints about the City, but no City employee had ever been punished for doing that. (Ex. 30, pp. 98-99, 209-211)

47. In regard to the vote of no confidence in the Fire Chief, (Ex. 2) the Manager additionally responded to the three fire fighters to provide him with specifics and if it were a union matter to bring it through the grievance procedure. (Ex. 3)

48. Prior to the letter of no confidence and the July 11, 1994, letter to the Manager, the City had never punished an employee for failing to follow a grievance procedure in processing a

complaint. (Ex. 30, pg 112; Testimony of Phelps)

49. The Intervenors expressed concerns over the order of Phelps in regard to minimum manning, as follows:

a. The Chief had previously testified in an arbitration hearing that the minimum manning was necessary to protect the safety of fire fighters and the citizens of Ardmore. (Ex. 30, pg 127)

b. The fire fighters thought the change violated the Agreement and the FPAA by unilaterally changing existing terms and conditions of employment. (Tr. 55-59)

c. The Chief refused to put this order into writing. (tr. 57-59)

(Ex. 30, pp. 127, 131-132, 211-212)

50. After the July 8, 1994, meeting the Intervenors reviewed the City Safety Manual and wrote the July 11, 1994, letter to the City Manager. (Ex. 4.) They did not express to the public, or anyone other than the Manager, any of the concerns in the letter. (tr. 69.) The five individual Respondents had an honest and reasonable belief that the Chief was violating both the Agreement and the FPAA at the time they wrote their letter. (Tr. 54-59.)

51. The Intervenors had never been told they should not write the City Manager regarding things contained in the letter of July 11, 1994.

52. None of the Intervenors had ever previously been disciplined and were considered to be good employees. (Tr. 145)

53. The Intervenors were demoted by the Manager. All five were disciplined for writing the July 11, 1994, letter to the Manager and for signing the vote of no confidence. (Ex. 9, 11, 13, 15, 17)

54. The Intervenors were the only ones of the thirty-one fire fighters who signed the vote of

no confidence who were disciplined. (Tr. 77-79) They were the only ones of the thirty-one who also signed the July 11, 1994, letter to the Manager.

55. The Board finds that the demotion of the Intervenors was not for just cause.

### CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this complaint pursuant to 11 O.S.1991, § 51.104b.

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.1991, § 51-104b (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. Title 11 O.S.1991, § 51-101, provides, in part:

It is declared to be the public policy of this state to accord to the permanent members of any paid fire department or police department in any municipality all of the rights of labor, other than the right to strike or to engage in any work stoppage or slowdown.

4. Fire fighters and police officers are granted the right under the FPAA to engage in concerted action for mutual aid and protection. Fire Fighters Local 2551 v. City of Broken Arrow, PERB Case No. 104 (1986). This is supported by the weight of federal decisions of a similar nature. See, e.g., NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), NLRB v. J. Weingarten, 420 U.S. 251 (1975).

5. The Respondent and Intervenors have met their burden of proof to show the letter sent by the five intervenors to the city manager on or about July 11, 1994, and the vote of no confidence signed by, among others, the five intervenors, related to matters of the working

conditions at the City of Ardmore Fire Department.

6. As likewise determined by Hearing Officer Blankenship, the evidence shows that the action of the five intervenors was concerted action.

7. The five Intervenors are persons who are entitled to the coverage and protection of the FPAA.

8. The Intervenors provided information to the City Manager, in their letter of July 11, 1994, which, under the circumstances, was an activity protected by the FPAA.

9. The City Manager, acting on behalf of the City, disciplined the Intervenors for exercising rights protected by the Act. The exercise of rights and conduct protected by the FPAA was a substantial motivating factor in the City's decision to discipline the Intervenors.

10. As such, the Board finds that the City did not have just cause for the demotions of the five intervenors.

11. As such, the actions of the City of Ardmore constitutes a violation of 51 O.S.1991, § 51-102 (6a) (1), (3) and (4) for which the Board is empowered to issue a cease and desist order.

12. From the evidence, the Board cannot say with positive assurance that the dispute over the demotion of the Intervenors is excluded from the arbitration procedures of the Agreement. At a minimum, some doubt exists as to the exclusion of the dispute and in such a case the doubt is to be resolved in favor of arbitration.

13. The legislative intent behind the FPAA is that all disputes involving the provisions of collective agreements or the actions of the parties thereunder be submitted to speedy and immediate arbitration. The Board concludes that the grievance over the demotion of the Intervenors is such a dispute and that there is no recognized legal basis for the City's refusal to

arbitrate that grievance.

14. Refusal to arbitrate the dispute constitutes a violation of 11 O.S. § 51-102(6a)(5).

15. The findings should not be taken by either party as the Board's approval of the tactics of either party or any intervenor herein. Certainly, the Board does not condone in any sense the dubious propriety of the actions of all parties to this action. Indeed, the Board finds the actions of the parties and intervenors to be a continuing spiral into actions so confrontational as to constitute action as a matter of law outside the protection of the FPAA. See, e.g., NLRB v. City Disposal Systems, Inc., supra. The Board finds that this case involved close questions of fact to the point that slight variations of the circumstances could change the outcome. The parties and the intervenors are strongly warned that the purpose of the FPAA is to provide but a framework within which both sides of a labor dispute may work to a mutually satisfactory conclusion of a disagreement. Both sides must make a concerted effort to establish a basis for mutual trust.

16. The findings, conclusions and Order of the Board should not be taken by either party as any form of prohibition upon the City of Ardmore to discipline employees of the City for just cause. The Board makes no such determination.

ORDER

The City of Ardmore is hereby ordered, pursuant to 11 O.S.1991, § 51-104b (c), and consonant with the Findings or Fact and Conclusions of Law entered herein, to cease and desist from refusing to arbitrate in good faith the demotions of the five intervenors and from otherwise violating the FPAA as concluded herein. This Order shall be posted prominently within the Ardmore Fire Department for not less than thirty (30) days.

  
Chairman

Dated this 20<sup>th</sup> day of June, 1995

JRJ/jj:Ardmore.ord