

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

<b>FRATERNAL ORDER OF POLICE,</b>	)	
<b>LODGE 108,</b>	)	
<b>Complainant</b>	)	
	)	
v.	)	<b>Case No. 00364</b>
	)	
<b>CITY OF ARDMORE,</b>	)	
<b>Respondent.</b>	)	

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

This matter comes on before the Public Employees Relations Board (the "Board") this 7<sup>th</sup> day of December, 1999, following oral argument of the parties, the Fraternal Order of Police, Lodge 108 ("Union"), and the City of Ardmore ("City"). The Board received written briefs, evidence, heard the testimony of witnesses and heard oral argument on September 17, 1999. The Board received a supplemental brief from the City on October 7, 1999 and heard further oral argument on December 7, 1999. Admitted without objection at the December 7, 1999 hearing was the Ardmore city charter. The Board, being fully apprised of the facts and matters asserted, makes the following Findings of Fact, Conclusions of Law, and Final Order:

**Findings of Fact**

1. On July 14, 1997, Nathan Fountain began employment with the City's Police Department and was sworn in as a Police Officer.
2. On June 22, 1998, the City terminated Nathan Fountain's employment as a Police Officer.
3. On June 23, 1997, Kenneth Bridgeman began employment with the City's Police Department and was sworn in as a Police Officer.

4. On June 22, 1998, the City terminated Kenneth Bridgeman's employment as a Police Officer.
5. At the time of their termination, both Mr. Fountain and Mr. Bridgeman were probationary officers with the City's Police Department.
6. On June 26, 1998, the Union filed a grievance on Mr. Fountain's behalf. On July 6, 1998, the Union filed a grievance on Mr. Bridgeman's behalf. Both grievances were appeals of the terminations.
7. The City refused to proceed under the grievance procedure set forth in the Collective Bargaining Agreement on the basis that both officers were excluded from the bargaining unit in the labor contract.
8. The Union and the City had a Collective Bargaining Agreement for the time period July 1, 1997 through June 30, 1998. The Collective Bargaining Agreement set forth, in part, as follows:

Section 2.1 of Article 2, Recognition Clause:

Section 2.1: The City recognizes Lodge #108 of the Fraternal Order of Police as the exclusive bargaining agent for all permanent, full-time, commissioned police officers of the City of Ardmore, excluding: a) The Chief of Police. b) The deputy Chief/Administrative Assistant. c) Employees who have not successfully completed one(1) year probationary period from initial date of employment except as provided for by the Oklahoma State Law.

9. The City and the Union have had a Collective Bargaining Agreement since 1990. Since 1990, each Collective Bargaining Agreement has excluded probationary officers. (Tr. at 7).

10. The City's personnel policies are incorporated in the Collective Bargaining Agreement. The City's personnel policies provide that a probationary employee can be terminated at any time during the probationary period without cause. (Tr. at 11).
11. The Collective Bargaining Agreement provides for arbitration for disputes over the Agreement.
12. The City's probationary police officers are members of the State Police Pension and Retirement System but are not eligible for the City's insurance plan until they have completed at least six months of their probationary period. The City's probationary police officers are not eligible for a take home vehicle, are not eligible for vacation pay, and are not eligible for educational pay during their probationary period. The City's probationary police officers' salary is less than permanent police officers.

#### Conclusions of Law

1. This action is governed by the provisions of the Fire and Police Arbitration Act (the "FPAA"), and the Board has jurisdiction herein. 11 O.S.1991 and Supp.1999, § 51-101 *et seq.*
2. For purposes of the FPAA, police officers are defined at 11 O.S.1991 § 51-102(1) as:  
  
... the **permanent** paid members of any ... police department in any municipality with the State of Oklahoma but shall not include the chief of police and an administrative assistant ... The administrative assistant shall be that person so designated by the chief of the police department. "Police officers" as used herein shall be those persons as defined in Section 50-101 of this title. (Emphasis added.)

The Municipal Police Pension and Retirement System definition, at 11 O.S.1991, §50-101(6) defines "officer" as:

... 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.

3. Pursuant to 11 O.S.1991 § 51-103(A), the legislature has set forth the following collective bargaining rights for police officers:

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.

4. Pursuant to 11 O.S.1991 § 51-103(D), the Board has the following responsibility:

In order to assure to fire fighters and police officers of any municipality the fullest freedom in exercising the rights guaranteed by this article, the Board shall decide in each case before it in which the issue is raised the unit appropriate for the purposes of collective bargaining, and shall consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.

5. Pursuant to 11 O.S.1991 § 51-104b, the Board has the following responsibility:

The Public Employees Relations Board is empowered, as hereinafter provided, to prevent any person, including bargaining agent and corporate authorities, from engaging in any unfair labor practice as defined herein.

6. The Board, therefore, has the authority to determine which employees are to be included in the bargaining unit. *Oklahoma City v. Public Employees Relations Board*, 942 P.2d 244 (Okla.Civ.App.Div.1 1997). The Board's "area of expertise, then necessarily includes unit clarification." *Id.* at 247.

7. Probationary police officers are included in the bargaining unit for purposes of voting membership in the bargaining unit representation. *Id.*

8. Probationary police officers, upon termination, are not entitled to invoke the arbitration provisions of the Collective Bargaining Agreement.

9. The City's argument that this case is governed by its city charter is unpersuasive. *Fraternal Order of Police Lodge No. 93 v. City of Tulsa*, Case No. CJ-98-04298-Frizzell as filed in the District Court of Tulsa County, Oklahoma.

### Opinion

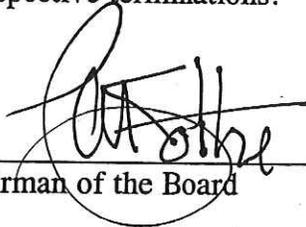
The Board holds that the City's terminated probationary police officers are not entitled to invoke the arbitration provisions of the Collective Bargaining Agreement. A "probationary" employee is not synonymous with a "permanent" employee. A probationary employee has to fulfill certain qualifications. A probationary police officer is in training. Those new officers are continually evaluated by their supervisors for suitability in what may be the most stressful job on earth. The probationary officers are exposed to situations that they have never encountered. Whether an individual has the temperament to handle police duties is impossible to determine before they are hired. Only after some period of time "on the job" can an objective determination be made as to whether a person is suited for police work. In fact, several Oklahoma statutes dealing with law enforcement personnel acknowledge the need for "on the job" training and monitoring by providing that probationary officers are at-will. *See*, 47 O.S. § 2-105 (highway patrol); 74 O.S. § 840-4.13 (ABLE Commission agents); and 63 O.S. § 2-103 (narcotic agents).

The law is clear that probationary employees are included in the bargaining unit for purposes of voting rights. *Oklahoma City v. Public Employees Relations Board*, 942 P.2d 244 (Okl.Civ.App.Div.1 1997). In the *Oklahoma City* case, however, the Court was careful to limit its holding to the single issue of whether probationary employees were permanent for purposes of voting membership in the bargaining unit. In fact, the Court specifically stated that while the probationary employees were "permanent" for purposes of voting, "such employees retain

probationary status.” *Id.* at 246. We interpret the *Oklahoma City* case to hold that probationary employees are included in the description of the bargaining unit only for the purpose of voting on representation.

The law does not prevent a municipality from determining qualifications of a police officer as distinguished from the bargaining status of probationary employees. The City and the Union bargained for the provisions contained in the Collective Bargaining Agreement. One provision included the incorporation of the City’s personnel policies which specifically provides that probationary employees may be discharged without cause. This Board therefore finds that the probationary police officers are not entitled to the arbitration provisions of the Collective Bargaining Agreement for purposes of grieving their respective terminations.

Date: January 12, 2000

  
Chairman of the Board

**Board Member Craig W. Hoster, dissenting:**

I respectfully dissent from the majority as my review of the Oklahoma statutes and prior court and board decisions leads to the conclusion that probationary police officers are statutory members of the bargaining unit beyond merely voting purposes.

Officers Bridgeman and Fountain were police officers for the City of Ardmore (the “City”) until their employment was terminated on June 22, 1998. Both were probationary officers, having served the City as police officers for less than one year. Both officers had passed their CLEET (Council on Law Enforcement Education and Training) examination for police officer certification<sup>1</sup> and were “police officers” within the meaning of 11 O.S. 1991, § 59-101(6).<sup>2</sup>

The City refused to arbitrate the discharges because the Collective Bargaining Agreement excludes probationary officers from the bargaining unit. The Fraternal Order of Police, Lodge 108 (the "Union") filed an unfair labor practice charge with the Public Employee Relations Board ("PERB" or the "Board") on May 4, 1999.

The issue before PERB is whether under the Fire and Police Arbitration Act (the "FPAA") a probationary officer is a member of the collective bargaining unit. Any analysis of this issue must begin with the statutory language of the FPAA.

Under the FPAA, all **permanent** members of a municipality's police department are members of the bargaining unit **except** the chief of police and an administrative assistant. 11 O.S. 1991, § 51-102(1). There is no reference in the FPAA to "probationary" police officers and the term "permanent" is not defined by the legislature. The Collective Bargaining Agreement between the City and the Union, however, unlike the FPAA, specifically excludes "probationary officers" from the bargaining unit. Under the terms of the Collective Bargaining Agreement, a probationary officer is anyone who has worked as a police officer for less than one year.

The Oklahoma Supreme Court has determined that the make-up of a collective bargaining unit is not subject to negotiation by the parties. *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 611 (Okla. 1995); *Stone v. Johnson*, 690 P.2d 459, 461 (Okla. 1984); *Oliver v. City of Tulsa*, 654 P.2d 608, 612 (Okla. 1982). The PERB – following the mandates of the legislature as expressed in the statutory language – decides who is in the bargaining unit. 11 O.S. 1991, § 51-103(B); *City of Oklahoma City v. Public Employees Relations Board*, 942 P.2d 244, 245-47 (Okla. App. 1997). The issue before the Board today requires a determination of what the legislature intended when it statutorily defined the unit to include **permanent** members of the police department. And, more specifically, whether probationary officers are permanent police officers within the meaning of 11 O.S. 1991, § 51-102(1).

The legislature did not define “permanent” in the FPAA and the PERB has grappled with this problem on numerous occasions. Indeed, the make-up of the bargaining unit has been hotly debated for years. The PERB ruled that probationary employees were not members of the bargaining unit in *Fraternal Order of Police, Mayes County, Lodge #116 v. City of Pryor, Oklahoma*, PERB Case No. 12269P (1987). However, in 1992 the Board reversed its *Pryor* ruling in *Twin Cities Fraternal Order of Police Lodge No. 135 v. City of Blanchard*, PERB Case No. 12310PD (1992) (holding that any police officer performing the duties enumerated in 11 O.S. 1991, § 50-101(6) is included in the bargaining unit) and in *Fraternal Order of Police, Lodge 123 v. The City of Oklahoma City*, PERB Case No., 12303UC (1992) (holding that probationary officers after CLEET certification are “permanent” employees, have met “all statutory requirements for membership in the bargaining unit,” and thus are members of the bargaining unit and eligible to vote in certification elections).<sup>3</sup> The Board revisited this issue in *In the Matter of the Representative Petition of the Okmulgee Police Officers’ Association*, PERB Case No. 12331RM (1995), again holding:

In [the *Oklahoma City*] case, this Board held that police recruits who have graduated from the Police Academy and who have been certified by C.L.E.E.T. meet all the statutory requirements for membership in the bargaining unit and must be given membership therein. There is no compelling reason at this time for the Board to depart from that holding.

Id. at p. 6.<sup>4</sup>

The Board’s next consideration of this issue was in *Fraternal Order of Police, Lodge No. 93 v. City of Tulsa*, PERB Case No. 00358 (1998). By this time, the Court of Appeals had issued its opinion in the appeal of the *Oklahoma City* case.<sup>5</sup> The Board, in *Tulsa*, was unwilling to eliminate probationary status, reasoning that there is “a strong public policy in favor for the allowance of probationary status of police officers.”<sup>6</sup> PERB’s ruling was appealed to the District Court for Tulsa

County, Case No. CJ-98-4298-Frizzell. This is the latest judicial pronouncement on the issue before us today. I find the reasoning and rationale in the Order entered by the court on August 2, 1999 to be most persuasive. Judge Frizzell found the Court of Appeals decision in the *Oklahoma City* case “difficult to limit to voting membership in the bargaining unit.” Order at p. 4. The court concluded that:

PERB and the Court of Appeals were correct as a matter of law that probationary officers are “permanent” employees of the City upon graduation from the police academy and certification by CLEET, and that as permanent employees they meet all statutory requirements for membership in the bargaining unit.

Order at p. 5.<sup>7</sup> The district court affirmed the PERB decision to dismiss the unfair labor practice charge on the ground that the bargaining agent elected a method of appeal to which it was not entitled (an issue that is not present in this case).

Police officers – or at least all permanent officers covered by FPAA – do not have the right to strike or engage in any work stoppage or slowdown. 11 O.S. 1991, § 51-101. The “trade-off” for the strike prohibitions is binding grievance arbitration. *See*, 11 O.S. 1991, § 51-111. This public policy “trade-off” has been recognized by the Oklahoma courts in *Bethany v. Public Employees Relations Board*, 904 P.2d 604, 611 (Okla. 1995); *City of Yukon v. International Ass’n of Firefighters, Local 2055*, 792 P.2d 1176, 1179 (Okla 1990); and *Stone v. Johnson*, 690 P.2d 459, 463 (Okla. 1984). This public policy balance, as reflected in the FPAA, should not be disturbed by the PERB or the courts.

The legislature specifically excluded the chief of police and an administrative assistant from the bargaining unit. Did the legislature also exclude, by implication, probationary employees? The majority points out that several Oklahoma statutes dealing with law enforcement personnel carve out special provisions for probationary officers thus demonstrating the need for “on the job” training

and monitoring. The Oklahoma legislature undoubtedly knows how to distinguish between probationary employees and the other employees. Nevertheless, the legislature did not mention probationary officers when it crafted the FPAA. Had the legislature intended to exclude probationary officers from membership in the bargaining unit, it could have done so in clear language, as it did when it excluded the chief of police and the administrative assistant. *See, City of Hugo v. State ex rel Public Employees Relations Board*, 886 P.2d 485, 494 (Okla. 1994); *Toxic Waste Impact Group, Inc. v. Leavitt*, 755 P.2d 626, 630 (Okla. 1988). Accordingly, this Board is not empowered to rewrite legislation in accordance with its own concept of prudent policy. *See, Comer v. Preferred Risk Mutual Ins. Co.*, 1999 OK 86, ¶ 20, \_\_\_\_\_ P.2d \_\_\_\_\_.

*City of Bethany v. Public Employees Relations Board*, 904 P.2d 604 (Okla. 1995) addresses the parameters of negotiated agreements between labor and management under the FPAA. The legislature balanced the requirement that collective bargaining agreements contain a no-strike provision with the right to grievance arbitration. *Id.* at 609. Any dispute over the interpretation or application of any provision of the collective bargaining agreement is subject to grievance arbitration. *Id.* The parties may bargain with respect to the mechanics and procedures of grievance administration but they may not create a two-tier grievance system in which some grievances are arbitrable and others are not. *Id.* at 610. In this case – if probationary officers are members of the bargaining unit – a *de facto* “two-tier grievance system” has been established: the discharge of probationary officers is not arbitrable; the discharge of other police officers is arbitrable.

I would hold that probationary officers are statutory members of the bargaining unit and that any dispute over the interpretation or application of the Collective Bargaining Agreement is subject to grievance arbitration. I believe this conclusion is mandated by the FPAA as well as previous court and PERB decisions. The make-up of the bargaining unit is not subject to negotiation. The parties

cannot, after a recruit obtains CLEET certification and thus is no longer classified as “temporary,”<sup>8</sup> negotiate a term of probation if that results in a change in the statutorily mandated make-up of the bargaining unit. This Board cannot act as a super-legislature by re-writing the FPAA to conform with its view of public policy. The exclusion of probationary officers from the bargaining unit is an act more appropriately performed by the legislature.

We have been given no compelling reason to depart from this Board’s previous rulings holding that probationary police officers are permanent employees under the FPAA. I must, therefore, dissent.<sup>9</sup>

  
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Craig W. Hoster, Member  
Public Employees Relations Board

**End Notes:**

1. Stipulation of Fact nos. 2 and 8.
2. Title 11 O.S. 1991, § 51-102(1) provides that “police officers” as used in the Fire and Police Arbitration Act are defined in § 50-101(6). Thus, a police officer is “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.” The City acknowledges that Bridgeman and Fountain were “police officers” at the time their employment was terminated. Transcript of September 17, 1999 hearing, pp. 37-39.
3. This PERB decision was affirmed by *City of Oklahoma City v. Public Employees Relations Board*, 942 P.2d 244 (Okla. App. 1997). The majority interprets Judge Joplin’s opinion in *Oklahoma City* to hold the probationary officers are in the bargaining unit **only** for the purpose

of voting on representation. I respectfully suggest that the majority's interpretation is flawed. The Court of Appeals stated that the only issue before the court was whether probationary officers are permanent employees for purposes of voting. *Id.* at 246. Judge Joplin never suggests, however, that a probationary officer's membership is limited solely to voting. Indeed, such a determination would be contrary to the Board's ruling. Instead, the court affirmed PERB's determination of membership in the bargaining unit. *Id.* at 247.

4. The PERB in *Okmulgee* went ever further holding that "there is no compelling reason for the Board to restrict membership to police recruits who have been C.L.E.E.T. certified." I would disagree with this portion of the *Okmulgee* holding. In accordance with 70 O.S. 1991, § 3311(D)(3), a police officer is temporary until he or she is CLEET certified. While my reading of the FPAA leads me to conclude that a probationary officer is a "permanent" employee, I do not believe that a temporary officer is a permanent employee. Indeed, the statutory framework indicates that the relevant distinction is between a "temporary" employee and a "permanent" employee – as opposed to a purported distinction between a "probationary" employee and "permanent" employee.

5. *City of Oklahoma City v. Public Employees Relations Board*, 942 P.2d 244 (Okla.App. 1997). See end note 3 *supra*.

6. The source of this "strong public policy" in favor of probationary status is unclear. It is the legislature, not the courts or this Board, which is vested with responsibility for declaring the public policy of this state. *City of Bethany v. Public Employees Relations Board*, 904 P.2d 604, 612 (Okla. 1995). When PERB makes public policy pronouncements, they are worthy of respect only when they are rooted in specific sources of law and not in the policy preferences of the board that renders them. *Id.* The City, the Union and the Board agree that probationary status is desirable and I certainly concur. I, however, find no justification in the FPAA for elevating this preference to the level of a public policy.

7. Great weight should be given to continual construction of a statute by the agency charged with its enforcement, and where the legislature has not expressed its disapproval with the agency's construction of the statute, the legislature's silence may be regarded as acquiescence in or approval of the agency's construction. *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 910 P.2d 972, 976, fn. 3 (Okla. 1995) (dictum); *United Airlines, Inc. v. State Board of Equalization*, 789 P.2d 1305, 1311-12 (Okla. 1990).

8. Every person who has not been CLEET certified as a police officer holds his or her position "on a temporary basis only." 70 O.S. 1991, § 3311(D)(3).

9. I do concur, however, with all the majority's Conclusions of Law except nos. 7 and 8.