



either party to these proceedings.

The alleged violation in this matter was filed as an Unfair Labor Practice charge by the Complainant on October 1, 2012 (the "ULP"). The ULP alleged that on July 9, 2012, the Complainant learned that the Respondent covertly installed a global positioning tracking device (GPS) on the police vehicle operated by Police Officer and Complainant's President Jason Smith, that this GPS tracking device was placed on the vehicle by the Respondent without the knowledge or approval of Complainant's President Jason Smith, that the Respondent used the GPS device for disciplinary purposes, that this GPS technology was unilaterally implemented by the Respondent and that through such actions the Respondent has engaged in an unfair labor practice in violation of 11 O.S. 2011, §51-102(6a)(1, 2 and 5).

The Respondent filed a written Answer with the Board on October 11, 2012 (the "Answer"), in response to all four (4) of the items listed as the Complainant's Statement of Facts from the ULP filed in this matter on October 1, 2012.

As to Statement of Fact No. 1, the Respondent acknowledged in the Answer that it installed a global positioning device (GPS) on the Respondent's police patrol unit utilized by Officer Smith on April 17, 2012, and the fact that Officer Smith is the Lodge President is immaterial to these proceedings and apparently was stated to improperly influence this Board. Respondent's Answer alleged that when Complainant discovered the GPS device, on or about May 27, 2012, Officer Smith disconnected it and it was reconnected by the Respondent on June 14, 2012; and the date upon which Officer Smith informed the Complainant is unknown to the Respondent.

As to Statement of Fact No. 2, the Respondent stated in the Answer that the GPS device was placed on the Respondent's patrol unit without the knowledge of Officer Smith, whose

consent was not necessary since the patrol unit is the property of the Respondent.

As to Statement of Fact No. 3, the Respondent stated in the Answer that the results of the GPS tracking on the Respondent's patrol unit revealed that Officer Smith was neglecting his job responsibilities of patrolling and that information along with other information, prior written reprimands and counseling did result in disciplinary action against Officer Smith.

As to Statement of Fact No. 4, the Respondent acknowledged that it unilaterally installed the GPS device; that the Chief of Police was aware of a previous incident in which Officer Smith was not in uniform when he was supposed to be on duty as well as comments from others that when Officer Smith would come on duty, he would vanish for extended periods of time; after consultation with the Respondent's City Attorney and City Manager, the GPS device was installed to determine if Officer Smith was performing his duty of patrolling the City of Jenks. Continuing, the Respondent acknowledged that subsequent review determined that Officer Smith issued fourteen citations from January 4, 2012, through February 17, 2012, but issued no further citations from February 17, 2012, through July 9, 2012, and that this information supported his lack of patrol activity and the GPS also verified his extended stays at his home and other non-patrol locations while on duty.

The Respondent further answered in Section 5 of its Answer that it has the absolute right to install a GPS device in any of its municipally-owned vehicles, including patrol units.

The Respondent further answered in Section 6 of its Answer that putting a GPS device on a police unit in no way can be construed as an unfair labor practice under the definition of the same at 11 O.S.2011, §51-102(6).

The Complainant filed no response to the Respondent's Answer in this matter.

Subsequently, the Respondent filed its Motion for Summary Judgment on May 30, 2013, including a list of six allegedly “Uncontested Facts”.

Uncontested Fact No. 1: because of concerns as to whether Officer Smith was performing his patrol duties, a GPS tracking device was placed on the City of Jenks Police Department owned police unit that Officer Smith used.

Uncontested Fact No. 2: the patrol unit was and is owned by the City of Jenks Police Department and that it is not the personal vehicle of Officer Smith.

Uncontested Fact No. 3: Officer Smith or the Lodge 146 were not informed of the installation of the GPS device in order to make effective use of the GPS device.

Uncontested Fact No. 4: Officer Smith was not performing his duties of patrol.

Uncontested Fact No. 5: the GPS data was not the sole reason for disciplinary action with Officer Smith.

Fact No. 6: Police Chief Cameron Arthur promoted Officer Smith to the position of Sergeant effective September 1, 2011, while Officer Smith was the Vice-President of Lodge 146.

Continuing in its Motion for Summary Judgment, the Respondent on page 3 thereof admits all four of the Complainant’s allegations in the ULP, although the Respondent notes that the GPS data was not the only matter related to disciplinary action with Officer Smith. The Respondent states in its Motion for Summary Judgment on page 5, that the mere assertion that Officer Smith was the Complainant President is not sufficient to show the use of the GPS device violated any of the prohibitions of 11 O.S.2011, §51-102(6a)(1), (2) or (5).

The Complainant filed its Counter Motion for Summary Judgment on June 14, 2013,

although it did not label or denominate it as such. In its Counter Motion for Summary Judgment, the Complainant includes a brief statement on page 1 labeled “Background” in which, among other things, the Complainant states that this case “...is a matter of first impression for the Public Employees Relations Board...” The Complainant included its “FOP’s Statement of Undisputed Material Facts” in its Counter Motion for Summary Judgment on page 2 listing twenty-five (25) material facts that the Complainant alleges are undisputed, the first ten of which the Complainant characterizes as “PERB’s Jurisdiction and Authority” and the last fifteen of which the Complainant characterizes as being “Operative Facts Supporting the FOP’s ULP Charge Against the City of Jenks”.

Complainant’s Undisputed Fact No. A1: in Oklahoma, municipal collective bargaining for firefighters and police officers is governed by the Fire and Police Arbitration Act (the “FPAA”), 11 O.S.2011 & Supp.2012, §51-101 et seq.

Complainant’s Undisputed Fact No. A2: the FPAA authorizes collective bargaining between a “collective bargaining representative” and a municipality over “wages, hours, and other terms and conditions of employment” (11 O.S.2011, §51-101 (a)) and these topics are considered mandatory subjects of bargaining. (*IAFF v. City of Cushing*, PERB Case No. 15, Conclusions of Law Nos. 4-5).

Complainant’s Undisputed Fact No. A3: since 1997, the Complainant has served as the collective bargaining representative for the permanent paid police officers employed by the City of Jenks; has been certified by the Board as the same (*Certification of Representative*, Case No. 12344P (1997)); and the Complainant by statute (11 O.S.2011, §51-102(1)) cannot represent “...the Chief of Police and the Chief’s designated

administrative representative [*sic*]”.

Complainant’s Undisputed Fact No. A4: the terms and conditions of employment as identified in the FPAA can include many different topics, but specifically, terms and conditions of employment such as “[s]afety rules, disciplinary systems and rules of employees conduct are mandatory topics of bargaining.” *IAFF v. City of Del City*, PERB Case No. 194, Conclusion of Law No. 2.

Complainant’s Undisputed Fact No. A5: a municipality violates the FPAA and commits an unfair labor practice if it makes changes to mandatory topics of bargaining without first negotiating said changes with the employees’ collective bargaining representative. 11 O.S.2011, §51-102(6)(6a)(5).

Complainant’s Undisputed Fact No. A6: the Board is an Oklahoma administrative agency created by the FPAA and “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.” 11 O.S.2011, §51-104b.

Complainant’s Undisputed Fact No. A7: under the FPAA, a municipality commits an unfair labor practice if it commits any of the following (in pertinent part):

\*\*\*

“(5) refusing to bargain collectively or discuss grievances in good faith with the designated bargaining agent with respect to any issue coming within the purview of this article;” 11 O.S.2011, §51-102 (6)(6a)(5).

Complainant’s Undisputed Fact No. A8: changes to terms and conditions of employment without bargaining are often called “unilateral” changes in the Board’s

jurisprudence. (*See* Complainant's Undisputed Fact No. 9 following).

Complainant's Undisputed Fact No. A9: throughout its history, the Board has consistently held unilateral changes in mandatory subjects of bargaining are unfair labor practices and proceeds to list twelve Board cases in support.

Complainant's Undisputed Fact No. A10: under the FPAA, if the Board finds a party committed an unfair labor practice, it is authorized to issue a cease and desist order. 11 O.S.2011, §51-104b.

Complainant's Undisputed Fact No. B1: the Respondent and the Complainant have engaged in collective bargaining over wages, hours, and other terms and conditions of employment and have memorialized the results of the bargaining into a collective bargaining agreement (CBA) for fiscal years 2011 through 2016.

Complainant's Undisputed Fact No. B2: at all relevant times Jason Smith was an employee of the Respondent, a member of the Complainant and that Jason Smith was elected to serve as Complainant's President in November 2011.

Complainant's Undisputed Fact No. B3: on April 17, 2012, the Respondent installed a global positioning system (GPS) device on the police vehicle operated by Police Officer and Complainant President Jason Smith.

Complainant's Undisputed Fact No. B4: based on the installation instructions, the GPS tracking device purports to work by receiving electronic signals from between nine and fourteen satellites and then uses such signals to determine its location and then reports its location to whoever has purchased access.

Complainant's Undisputed Fact No. B5: based upon testimony from an arbitration,

the Respondent does not know the degree of accuracy for the GPS device it installed on Complainant President's patrol car.

Complainant's Undisputed Fact No. B6: based upon testimony from an arbitration, if the GPS device loses its ability to access the satellites, it reports its last known location over and over again until it reacquires the satellites.

Complainant's Undisputed Fact No. B7: the GPS device was placed on Jason Smith's police vehicle by the Respondent without the knowledge or approval of Jason Smith or the Complainant.

Complainant's Undisputed Fact No. B8: based upon testimony from an arbitration, the GPS device was not installed by its manufacturer or retailer, or by a credentialed mechanic, but was installed by the Assistant Chief's brother.

Complainant's Undisputed Fact No. B9: based upon the installation instructions and testimony from an arbitration, the Respondent did not install the GPS device in a proper position on Jason Smith's patrol car, that it was installed exactly where the installation guide showed to be a "poor location", "just before the windshield, underneath the fire wall...surrounded by wiring and had to go through a metal fire wall before it could get to the open air".

Complainant's Undisputed Fact No. B10: based upon testimony from an arbitration, after the GPS device was installed, the Respondent monitored the GPS data for a period of two months and then used the GPS data to demote Jason Smith two ranks.

Complainant's Undisputed Fact No. B11: as a result of the demotion, Jason Smith's wages were reduced and he lost pay.

Complainant's Undisputed Fact No. B12: the GPS data was inaccurate and it contained many physical impossibilities including three instances where Officer Smith reported being on a call when the GPS shows him sitting stationary in a different location.

Complainant's Undisputed Fact No. B13: based upon the testimony of Officer Oxford from an arbitration: on one of the three instances Officer Smith showed up on a scene as backup; on the second instance Officer Oxford pulled a car over on a routine traffic stop with the driver being a fellow police officer and Officer Smith drove by as Officer Oxford waved to him that he was okay; and the third instance where the GPS device showed Officer Smith's car to be stationary, Officer Smith testified he actually backed up another officer on a barking dog complaint, with the Complainant alleging that based upon Officer Smith's arbitration testimony Respondent produced no credible evidence that Officer Smith failed to back up the other officer.

Complainant's Undisputed Fact No. B14: based upon testimony from an arbitration, Officer Smith produced video evidence that contradicted the GPS data including GPS data that showed Officer Smith to be sitting stationary at a certain location while his video evidence showed him to be making a traffic stop about a mile from that location at the same time and GPS reports showing no data on a certain date while his video evidence showed him working a multiple-vehicle car accident on the same day.

Complainant's Undisputed Fact No. B15: the Respondent had never before used a GPS tracking device to discipline a police officer.

The Complainant's Counter Motion included a response to each of the six allegedly "undisputed facts" from the Respondent's Motion for Summary Judgment under the

heading “FOP’s Response to City’s Statement of Undisputed Facts”.

The Complainant disputed Respondent’s first alleged “undisputed fact” that the GPS device was used because of concerns as to whether Officer Smith was performing his patrol duties. The Complainant alleges that management had no reasonable basis to conclude that Officer Smith was performing his job poorly and that as the night shift supervisor Officer Smith wrote 466% more citations than the day shift supervisor and 350% more citations than the evening shift supervisor.

The Complainant did not dispute Respondent’s second alleged “undisputed fact” that the patrol unit was and is owned by the Respondent’s Police Department and that such patrol unit is not the personal vehicle of Officer Smith.

The Complainant disputed Respondent’s third alleged “undisputed fact” that Officer Smith or the Lodge 146 were not informed of the installation of the GPS device in order to make effective use of the GPS device. The position of the Complainant was that it did not dispute it was unaware of the installation of the GPS, but it did dispute the Respondent’s proffered motive.

The Complainant disputed Respondent’s fourth alleged “undisputed fact” that Officer Smith was not performing his duties of patrol. As to its reason for disputing this “undisputed fact”, the Complainant simply states “*See FOP Response to City’s Fact No.1.*”

The Complainant disputed Respondent’s fifth alleged “undisputed fact” that the GPS data was not the sole reason for disciplinary action with Officer Smith. As to its reason for disputing this “undisputed fact”, the Complainant simply states “*See FOP Response to City’s Fact No.10.*”

The Complainant did not dispute Respondent's sixth alleged "undisputed fact" that Police Chief Cameron Arthur promoted Officer Smith to the position of Sergeant effective September 1, 2011, while Officer Smith was the Vice-President of Lodge 146.

Complainant's Counter Motion for Summary Judgment states in its "FOP's Response to City's Argument and Authority" on page 13, that the "...ULP Charge does not concern the installation of the GPS device; rather, the FOP asserts that if a GPS device is to be used for disciplinary purposes, then the disciplinary effect of the GPS must first be negotiated with the FOP prior to implementation."

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 evidence that there is no substantial controversy as to the following facts or issues:

1. The Complainant is, and was at all times material herein, the exclusive bargaining representative for certain employees of the Jenks Police Department, City of Jenks, Oklahoma.
2. The Respondent is, and was at all times material herein, a municipal corporation duly organized and existing under the laws of the State of Oklahoma as the City of Jenks, Oklahoma.
3. Officer Jason Smith is employed as a police officer for the Respondent. (Complainant's Counter Motion for Summary Judgment Undisputed Material Fact B3.)
4. Officer Jason Smith is a member of the Complainant and was elected as the President of

the Complainant in November 2012. (Complainant's Counter Motion for Summary Judgment Undisputed Material Fact B2.)

5. The Respondent admitted it installed the GPS tracking device without first bargaining over the issue with the Complainant. (Complainant's Counter Motion for Summary Judgment Section 1 Background page 1 and Respondent's Answer No. 4.)

6. The Respondent's Chief of Police was aware of a previous incident in which Officer Jason Smith was not in uniform when he was supposed to be as well as comments from others that Officer Jason Smith would come on duty and then vanish for extended periods prompting the Respondent's unilateral installation of a global positioning device (GPS) on the Respondent's police patrol vehicle utilized by Officer Jason Smith, without Smith's knowledge, to determine if Smith was performing his duty of patrolling the City of Jenks. (Respondent's Answer No. 2 and No. 4.)

7. On April 17, 2012, the Respondent installed GPS on the Respondent's police patrol vehicle utilized by Officer Jason Smith, without Smith's knowledge, whose consent was not necessary as the police patrol vehicle is the property of the Respondent. (Respondent's Answer No. 1 and No. 2.)

8. On or about May 27, 2012, Officer Jason Smith disconnected the GPS. (Respondent's Answer No. 1.)

9. On June 14, 2012, the Respondent reconnected the GPS device. (Respondent's Answer No. 1.)

10. The tracking results derived from the use of the GPS device convinced the Respondent that Officer Jason Smith was neglecting his job responsibilities of patrolling the City of Jenks and

together with other information and prior written reprimands and counseling did result in the additional disciplinary action by the Respondent against Officer Jason Smith. (Respondent's Answer No. 2 and No. 3.)

11. The Complainant acknowledges in its Counter Motion for Summary Judgment that the unilateral use of a global positioning device (GPS) and the data derived from such unilateral use by a municipality for disciplinary purposes without first bargaining over the issue with a union is a matter of first impression for the Board. The Respondent provides no argument or authority to the contrary. (Complainant's Counter Motion for Summary Judgment Section 1 Background page1.)

#### **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. 2011 & Supp.2012, §51-101 et seq. and the Board has jurisdiction over the parties and the subject matter of this complaint pursuant to 11 O.S.2011, §51-104b.

2. The hearing and procedures herein are governed by Article II of the Administrative Procedures Act, 75 O.S.2011, §308a et seq. and the meeting was convened and conducted in accordance with the provisions of the Oklahoma Open Meeting Act, 25 O.S.2011, §301 et seq.

3. The burden of proof in this matter is 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.2011, §51-104b (A).

5. The Complainant, in asserting a violation of 11 O.S.2011 & Supp.2012, §51-101 et seq.,

has the burden of proving the allegations of unfair labor practice by a preponderance of the evidence. 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.

### OPINION

It is the finding of the Board as follows:

Taking the totality of the situation, the unilateral use of a global positioning device (GPS) and the data derived from such unilateral use by the Respondent for disciplinary purposes without first bargaining over the issue with the Complainant is not an unfair labor practice under 11 O.S. 2011, §51-102(6a)(1), (2) or (5). A municipality is not required to negotiate with a union prior to the installation, implementation or use of a global positioning device (GPS) or use of the data derived from such global positioning device (GPS) in a disciplinary process.

Pursuant to OAC 585: 2-7-12, the Board finds upon a preponderance 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 is hereby GRANTED and the Complainant’s Counter Motion for Summary Judgment should be and hereby is DENIED.

Dated this 29<sup>th</sup> day of October, 2013.



Robert McCampbell, Chairman  
Public Employees Relations Board



Sue Wycoff, Member  
Public Employees Relations Board



Greg Buckley, Member  
Public Employees Relations Board



Jessica Perry, Member  
Public Employees Relations Board



Gary Chilton, Member  
Public Employees Relations Board