PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

In re: CERTIFICATION PETITION OF FRATERNAL ORDER OF POLICE, LODGE 133, CITY OF KIEFER, OKLAHOMA	)))))	PERB No. 12398P

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER

NOW on this 11th day of December, 2003, there comes on before the Oklahoma Public Employees Relations Board (the "Board" or "PERB") in the above-styled and numbered administrative action. The Fraternal Order of Police, Lodge 133, ("Union") was represented by Patrolman Joseph Koss. The City of Kiefer ("City") was represented by Steve Hurry, Trustee. On the 13th day of November, 2003, the parties presented oral argument and requested the Board to render its decision on certification of a petition for representation. The Board, having received the briefs and exhibits of the parties and otherwise being fully advised of the facts and matters alleged, makes the following determination regarding findings of fact and conclusions of law and issues its Final Order.

Findings of Fact

1. The Union, through Joseph Koss, filed a Petition for Certificate of Representation for the purpose of collective bargaining on behalf of employees of the Kiefer Police Department on August 3, 2003.

2. On August 3, 2003 as well as on November 13, 2003, the police department of the City of Kiefer consisted of a chief of police, an administrative assistant and one additional police officer, Joseph Koss, who was a probationary employee.

Conclusions of Law

1. This matter is governed by the provisions of the Fire and Police Arbitration Act ("FPAA"), 11 O.S. 2001, §§ 51-101, et seq., and the Board has jurisdiction to rule on this matter.

2. The hearing and procedures herein are governed by Article II of the Oklahoma Administrative Procedures Act, 75 O.S. 2001, §§ 308, et seq.

3. "Police officers" are defined in the FPAA as "permanent" paid members of any police department within the State of Oklahoma "but shall not include the chief of police and an administrative assistant." 11 O.S. 2001, § 51-102(1).

4. An officer does not become a member of the bargaining unit and cannot be represented by a bargaining agent until after an established probationary period passes from the date of hire. *City of Midwest City v. Public Employees Relations Bd.,* 2003 OK CIV APP 36, 69 P.3d 1218, 1223.

5. Probationary police officers are excluded from a collective bargaining unit for the purpose of grievance arbitration rights. *Fraternal Order of Police, Lodge 108 v. City of Ardmore*, 2002 OK 19, 44 P.3d 569, 574.

6. It is the public policy of the State of Oklahoma through enactment of the FPAA, to accord the rights of labor to the "permanent" members of any paid fire department or police department. 11 O.S. 2001, § 51-101(B).

7. Firefighters and police officers in any municipality have the right to bargain collectively with their municipality and to be represented by a bargaining agent. 11 O.S. 2001, § 51-103(A).

8. PERB will recognize and certify a one-person bargaining unit provided the person is a permanent paid member of a fire or police department.

ORDER

PERB is squarely faced with the issue of whether or not a one-person bargaining unit should be certified. The FPAA does not resolve the question and the Board has not previously addressed this issue.

PERB is cognizant that some states recognize a one-person bargaining unit while the NLRB does not. The Board often finds NLRB precedent persuasive in similar situations arising under the FPAA. On the issue of whether a grouping of two or more firefighters or police officers is required for a unit under the FPAA, the Board has concluded that it should certify a proper petition for representation of a one-person unit consisting of a permanent member of any paid fire department or police department in any municipality in this state.

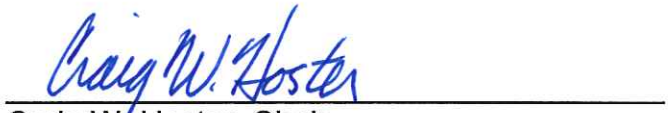
Under the FPAA, it is the public policy of Oklahoma to accord to the "permanent members of any paid fire department or police department" all rights of labor except the right to strike or engage in any work stoppage or slowdown. 11 O.S. 2001, § 51-101(B). The Board is persuaded that since the right to strike is taken from every member of a paid fire department or police department under the provisions of the FPAA, 11 O.S. 2001, § 51-113, we should recognize the right of a permanent member of a paid fire or police department to be represented by a bargaining agent in his or her collective bargaining with the municipality.

Here, however, Patrolman Koss was a probationary employee of the City of Kiefer at all relevant times. This Board currently observes significant differences

between the rights of probationary employees and the rights of permanent employees. See, *Fraternal Order of Police, Lodge 108 v. City of Ardmore, PERB Case No. 00364 (2000),* affirmed by the Oklahoma Supreme Court in *Fraternal Order of Police, Lodge 108 v. City of Ardmore,* 2002 OK 19, 44 P.3d 569. While the Board today recognizes a one-member bargaining unit, the one member must be a "permanent" paid firefighter or police officer as opposed to a probationary employee.

The petition for representation seeks certification for a single probationary employee. The certification petition is denied.

DATED this 8 day of October, 2004.



Craig W. Hoster, Chair
Public Employees Relations Board

Dissenting Opinion by Member Larry W. Gooch. I believe the certification petition should be granted. The reasons for my dissent are sent forth in the three definitions and discussion that follow:

Probationary Employee

Probationary employment is not defined by the FPAA. Probationary employment is a matter of the collective bargaining agreement or policy and not law. Typically, probationary status in employment is defined as a new employee who is on trial and attempting to establish a right to permanent status. During the probationary period, the individual usually does not have seniority rights and may be discharged without cause, except where the discharge discriminates against an individual because of union

membership or activity, including voting in a certification of bargaining agent election. The Board has previously held that probationary employees may vote in recognition elections but may not be permitted in the bargaining unit or represented by a collective bargaining agreement. *In re Representation Petition of Okmulgee Police Officers Assoc.*, PERB Case No. 12331RM (1995); *City of Oklahoma City v. Public Employees Relations Bd.*, 1997 OK CIV APP 34, 942 P.2d 244.

Permanent Employee

Oklahoma is an employment-at-will state. Permanence in employment does not exist except by contract, or possibly by promises of continued employment in the personnel policy, or by pension statutes. The Supreme Court has defined permanent employment as employment that can be terminated at discretion with no set term of employment. *Dicks v. Clarence L. Boyd Co.*, 1951 OK 328, 238 P.2d 315. Otherwise, permanent employment is not defined by the FPAA.

Bargaining Agent/Union

The certified bargaining agent is the exclusive representative of a group of employees, or in this case, employee, known as the Bargaining Unit. The employees do not have to be union members. The agent in the singular does not have to be an employee.

Discussion

Koss is considered a probationary employee by personnel policy and not by contract or FPAA. He is also a certified Police Officer and subject to employer personnel policies which may provide expectations of continued employment or permanent status. For the purposes of the FPAA, however, Koss may vote to certify

the FOP as the bargaining agent for all permanent members of the Kiefer Police Department, whether they exist or not; may belong to the union and serve as the Bargaining Agent, whether he is a permanent employee or not; but cannot be represented by the CBA while serving in probationary status which is a matter of contract or policy and not law.

The petition for representation seeks certification of a bargaining agent, the FOP, for employees, present and future, and not for a single probationary employee. If a certification election is called, Koss is eligible to vote in this election.

For these reasons, I believe the certification petition should be granted.