

STATE OF KANSAS
PUBLIC EMPLOYEE RELATIONS BOARD

FRATERNAL ORDER OF POLICE)
LODGE #5, WICHITA, KANSAS, INC.)
)
Petitioner,)
)
v.)
)
CITY OF WICHITA, KANSAS,)
)
Respondent.)

Case No. 75-CAE-23-1994

INITIAL ORDER

On the 28th day of June, 1995, the above entitled matter came on for a formal hearing in Wichita, Kansas before Don Doesken, presiding officer. Petitioner appeared by its attorney, Mr. Steve A. J. Bukaty of Blake and Uhlig, 475 New Brotherhood Bldg., 753 State Avenue, Kansas City, Kansas 66101. The Petitioner called Thomas S. Burnett as a witness and also submitted depositions of Rick Stone, Gary Tabor, and Terry Nelson. Respondent appeared by its attorney Ms. Kelly J. Rundell, City Attorney's Office, City Hall - Thirteenth Floor, 455 North Main Street, Wichita, Kansas 67202. Respondent did not call any witnesses.

The parties through their respective counsel stipulated and admitted into evidence as part of the record, Joint Exhibits #1 through 6.

On December 13, 1995, this matter was re-assigned to Lelyn J. Braun as Special Presiding Officer to issue a decision pursuant to K.S.A. 77-514.

Questions Presented

1. Whether Respondent violated K.S.A. 75-4333(b)(1),(5) and (6) by:

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- a. Failing to provide F.O.P. with sufficient information relating to an administrative investigation of Officer Kimble, so the Union could determine whether a grievance should be filed and prosecuted;
- b. Bypassing the F.O.P. through direct negotiation with individual members of the bargaining unit regarding the requirement that a confidentiality agreement be signed.

The Special Presiding Officer in rendering its Initial Order in this matter has taken into account the testimony of the hearing held on June 28, 1995, along with the deposition testimony of Gary Tabor, Terry Nelson, and Rick Stone, which depositions have been stipulated into the record by counsel.

The Special Presiding Officer has also reviewed the file in this matter, and finds that the following motions and responses are still pending:

- a. Respondent's request to dismiss complaint filed July 11, 1994.
- b. Petitioner's response to request to dismiss complaint dated December 20, 1994.
- c. Respondent's reply to Petitioner's response filed January 3, 1995.

The Special Presiding Officer notes that a pre-hearing conference was held in this matter on December 6, 1994 before Monty Bertelli, the then Presiding Officer. However, Mr. Bertelli's pre-hearing conference order issued January 27, 1995 makes no reference to the motion and the responses, and to date no other order has been entered to decide the motion. The motion was not mentioned by either party on June 28, 1995,

during their review of preliminary matters at the beginning of the administrative hearing nor was there a request made by either party for Don Doesken the Presiding Officer to issue a ruling on the motion.

IT IS THEREFORE the Order of this Special Presiding Officer that the Respondent's Motion to Dismiss is overruled, because the parties through their respective counsel have proceeded to a hearing on the merits of the case.

Findings of Fact

1. Joint Exhibits #1, 2, 3, 4, and 5 are memorandum agreements between the parties to this action. Joint Exhibit #2 had a beginning date of January 1, 1994 and an ending date of December 30, 1994. Joint Exhibit #2 covered the issues to be decided in this matter.

2. Petitioner Fraternal Order of Police Lodge #5 is the exclusive bargaining representative of all the employees in a bargaining unit which includes all law enforcement officers employed in the Wichita, Kansas, Police Department below the rank of Lieutenant.

3. The City of Wichita, Kansas (the "City"), is a municipality and city of the first class in the State of Kansas, and has made an election to come under the provisions of the Kansas Public Employer-Employee Relations Act, pursuant to K.S.A. 75-4321(c).

4. The City and the F.O.P. are parties to a memorandum of agreement. (Joint

Exhibit #1).

5. Internal Affairs is a unit of the Wichita Police Department. Its purpose is to investigate complaints of misconduct by Wichita Police Department employees; shootings in which officers have fired weapons in the line of duty; and minor civil claims based on actions by police officers. Internal Affairs is a fact-finding, investigative unit; it gathers all of the information available on a particular incident, and puts that information in report form.

6. Internal Affairs does not discipline officers (Tr. 40). Internal Affairs has no input into discipline and makes no disciplinary recommendations (Nelson Depo. p.10; Tabor Depo. p.5; Tr. p.40).

7. Prior to the execution of Joint Exhibit #1, the words "Internal Affairs Unit" were substituted for the words "department director" in section 2. The Internal Affairs Unit was granted the authority to establish a system for the receipt, investigation and determination of all complaints against employees that could result in disciplinary action. All three witnesses, Burnett, Nelson, and Tabor testified as to their understanding how Internal Affairs investigations are conducted or were conducted by the Department Director (Tr. 28).

8. Once a complaint is filed, the investigation consists of the taking of statements from the officer or employee being investigated and other witnesses. Internal

Affairs then prepares a report of the results of its investigation. The report is then sent to the Chief of Police. Prior to June 16, 1995, Internal Affairs reports were submitted to the Captain of Support Services, who in turn reviewed the investigation report. The report was then forwarded to the Deputy Chief of Support Services for further review, before it was presented to the Chief of Police. Under the present systems, a report now goes directly from Internal Affairs to the Chief of Police (Tr. 29). The Chief of Police then makes the final determination as to whether or not discipline is imposed upon the officer (Tr. 30). Employees that have been investigated are allowed to review their file in the office of Internal Affairs. However, the file can not be copied without the protective agreement having been executed (Tr. 39).

9. Officers Burnett and Kimble were investigated by Internal Affairs, and discipline was imposed by the Chief of Police (Tr. 31). After he signed a protective agreement (Joint Exhibit #6), Mr. Burnett was given copies of the Internal Affairs files, including all statements (Tr. 31).

10. Police officers under investigation by Internal Affairs are not allowed to be represented either by counsel or by F.O.P representatives. This policy was implemented by the Planning and Research Section of the Wichita Police Department. The policy was approved by the Command Staff and the Chief of Police (Stone Depo. p.8). This policy is outlined in the grievance procedure of Joint Exhibits #1 and 2. This policy was

in effect prior to 1989 when Chief of Police Stone was hired (Stone Depo. p.9).

11. After the investigative report is given to the Chief of Police, he does not discuss the report with the affected employee prior to making his ruling on the question of discipline. However, following the imposition of discipline, he does allow for explanatory meetings upon request of the disciplined officer (Stone Depo. p 10-11).

12. Officer Nelson is Commander of the Internal Affairs Section. His duty is to act as a fact-finder. He provides and gathers all the information that is available involving the particular incident he is investigating. He puts the information in report form, and the report is then forwarded to the Chief of Police. Once the Chief of Police reviews the report, the decision whether to discipline is made by the Chief of Police. Internal Affairs makes no recommendations regarding discipline (Nelson Depo. p 9-10).

13. During Officer Nelson's assignment to Internal Affairs, there have been approximately one half-dozen requests by officers or employees being investigated, for representation by F.O.P. No representatives have been allowed to appear before Internal Affairs because of Department policy and the memorandum agreements (Nelson Depo. p.13). However, employees may have representatives (either from F.O.P., or attorneys) during disciplinary hearings or hearings before the Safety Board. The investigation by the Internal Affairs Office is not part of a disciplinary hearing or hearing in front of the Safety Board. Representatives are not allowed to be present for an Internal Affairs

interview, because they would tend to interrupt the function of the investigator (Nelson Depo. p.14). The records of Internal Affairs are only available to other members of Internal Affairs, the Chief of Police, and the Law Department, upon request to Officer Nelson (Nelson Depo p.18). An officer who has been disciplined may use the contents of the interviews from Internal Affairs in a disciplinary hearing or grievance procedure (Nelson Depo. p.21).

14. If during an investigation, information is given to Internal Affairs which may involve the commission of a crime, it is immediately reported to the Chief of Police, who then makes the decision whether the investigation will continue as criminal or administrative. If it is criminal, the administrative investigation is immediately suspended (Nelson Depo. p.26).

15. Respondent complied with all of the provisions of Article XIII, Section 2 of Joint Exhibit #2 and Article XIII, Section 2 Joint Exhibit #1 regarding the discipline of Officer Kimble.

Conclusions of Law

1. The burden of proving a prohibited practice complaint is on the complaining party by a preponderance of the evidence Boeing Airplane Company v. National Labor Relations Board 140 F. 2d 423 (10th Cir.). Furthermore, the complaining party must prove that the action taken was "willful". K.S.A. 75-4333. A

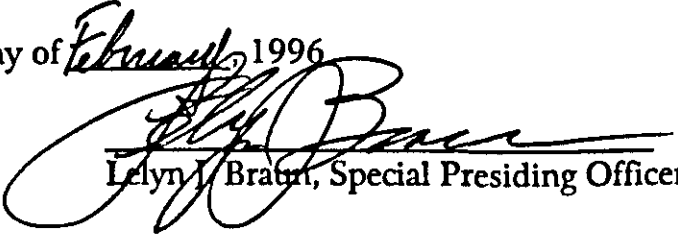
"willful" act is "an act performed with the designed purpose or intent on the part of a person to do a wrong or to cause an injury to another" Weinzril v. The Wells Group Inc. 234 Kan 1016 (677 p.2d 1004) (1984) Syll.4.

2. The Petitioner in this case has failed to carry its burden of proof by a preponderance of the evidence that Respondent committed a prohibited act as set forth in K.S.A. 74-4333(b)(1) or (5). The Petitioner has also failed to carry its burden of proof that Respondent had committed a breach of the memorandum agreement, and in particular the provisions relating to disciplinary actions and grievance.

3. The Special Presiding Officer further concludes that if Respondent violated the rights of its employees, then such violation was subject to the grievance procedure outlined in Article XIV of the memorandum agreement. There is no evidence in the record from which this Special Presiding Officer can find that the grievance procedure was invoked by the Petitioner or Officer Kimble prior to the filing of the prohibited practices complaint.

4. The Special Presiding Officer, having found in favor of the Respondent and against the Petitioner, concludes that the issues of res judicata and collateral estoppel need not be addressed.

IT IS SO ORDERED this 1st day of February 1996


Lelyn J. Brann, Special Presiding Officer

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, and original petition for review must be received no later than 5:00 p.m. on the 20th day of February, 1996 addressed to: Public Employee Relations Board, 1430 SW Topeka Blvd., Topeka, Kansas 66612.

CERTIFICATE OF SERVICE

The undersigned employee of the Kansas Department of Human Resources, hereby certifies that on the 2nd day of February, 1996, true and correct copies of the foregoing Order were served upon the attorneys representing each of the parties to this action, in accordance with K.S.A. 77-531, by depositing said copies in the U.S. Mail, first-class, postage pre-paid, addressed to:

Petitioners: Mr. Steve A. J. Bukaty
BLAKE & UHLIG, P.A.
475 New Brotherhood Building
Kansas City, Kansas 66101

Respondent: Kelly J. Rundell
Senior Assistant City Attorney
Office of the City Attorney
City of Wichita
455 N. Main - 13th Floor - City Hall
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Sharon G. Gunstall