

CITY COUNCIL CONFERENCE MINUTES

July 28, 2020

The City Council of the City of Norman, Cleveland County, State of Oklahoma, met in a virtual conference at 5:00 p.m. hosted in the Municipal Building Council Chambers on the 28th day of July, 2020, and notice and agenda of the meeting were posted at the Municipal Building at 201 West Gray 48 hours prior to the beginning of the meeting.

PRESENT: Councilmembers Bierman, Foreman, Hall, Holman, Peacock, Perry, Petrone, Wilson, Mayor Clark

ABSENT: None

Item 1, being:

DISCUSSION RELATED TO PUBLIC SAFETY BARGAINING UNITS IN NORMAN AND OKLAHOMA.

Mr. Rick Knighton, Assistant City Attorney, said Staff received a request to initiate an independent and public review of factors limiting transparency and accountability in the Norman Police Department (NPD). He said tonight he will present information to Council regarding why there are labor unions and how they are set up, which will provide Council a better discussion base on issues raised by the request. He will also present information on the Norman Fire Department (NFD) and NPD Arbitration Act in O.S. § 51-101 through O.S. § 51-113, the Open Records Act (ORA) as it applies to personnel records that may be in possession of the City, and other municipalities procedures.

The Fire and Police Arbitration Act (FPAA) originally enacted in 1971, was amended in July 1978, and states, “The protection of the public health, safety and welfare demands that the permanent members of any paid fire department or police department in any municipality not be accorded the right to strike or engage in any work stoppage or slowdown. This necessary prohibition does not, however, require the denial to such employees of other well-recognized rights of labor such as the right to organize, to be represented by a collective bargaining representative of their choice and the right to bargain collectively concerning wages, hours, and other terms and conditions of employment; and such employees also have the right to refrain from any and all such activities.”

Mr. Knighton said the Legislature explicitly balanced the requirement that collective bargaining agreements (CBAs) contain a no-strike provision with the right to grievance arbitration. Invalidating grievance arbitration would destroy this vital, conscious public policy decision. He said “any” dispute over the “interpretation or application of any provision” of the CBA is subject to grievance arbitration and neither side can bargain to exclude certain contractual provisions from grievance arbitration.

Mr. Knighton said Article 10, Section 2, of the Fraternal Order of Police (FOP) contract states that any dispute between the employer and the FOP or any employee concerning the interpretation or application of this Agreement, or the actions of the parties under the Agreement, or dismissal, demotion, or other discipline of an employee, shall be handled in the following manner:

The City Manager or designee shall submit his written answer to the Chief of Police and the grievant within ten (10) business days. If the City Manager and the grievant have not settled the grievance within that time, the FOP may notify the City Attorney's Office in writing of the FOP's intent to arbitrate the grievance within twenty (20) calendar days from the City Manager's response.

Mr. Knighton said pursuant to the FPAA, the award of the Arbitrator shall be final and binding on the parties to this Agreement. He said there have been instances when the discipline imposed by the Chief of Police was amended or vacated by an arbitrator and whether or not this has "prevented" the City from disciplining officers depends on the alternatives, such as District Court to Supreme Court. He said the Oklahoma Supreme Court generally rules on the side of the arbitrator and there are no other alternatives at that point.

The City Charter allows bargaining, non-binding interest, binding grievance, and no strikes while the FPAA allows bargaining, binding interest, binding grievance, and no striking. He said Oklahoma Police Pension System requires a civil service board of review for municipalities that have not negotiated a CBA to hear appeals concerning the discharge of members so police officers will always have some type of review if they were terminated. He said Section 50-123 creates a property interest and creates a due process right in continued employment, which is significant when talking about alleged violations of the Federal Constitution and the ability to go to Federal Court to sue the City for a due process violation because the City failed to comply with the provisions of the Police Pension System and provide officers with a hearing prior to discharging them. He said O.S. § 50-101 designates who can serve on the civil service board that includes the Mayor, two police officers, a lawyer, and a physician. He said the problem with the Mayor serving on the Board is the City's Charter language in Article III, Section 6, that prohibits the Mayor and Councilmembers from being involved either directly or indirectly with the appointment or removal of anyone subordinate to the City Manager.

Mr. Knighton said on October 17, 1969, police officers and firefighters in Montreal, Canada, went on strike for 16 hours and during that 16-hour period, six banks were robbed, 100 shops were looted, 12 fires were set, 40 carloads of storefront glass was broken, and \$3 million in property damage was inflicted. He said today, that damage would total \$21,754,713 when adjusted for inflation. Two years later, Oklahoma was not the only State to enact provisions that prohibit public safety officers from striking and it is suspected this decision was based on what happened in Montreal, and that was when arbitration language was added to offset the no striking rule.

He said the original request also included identifying impediments to independent review and the ability of NPD to hold officers accountable for violation of department policies and procedures, including but not limited to specific union contract terms. He said he is not clear on how the term “independent review” is being defined. He said many would argue that the arbitration process is an independent review, but not really knowing how that is defined it would be difficult to determine if that process satisfied the independent review. He said binding arbitration impacts the Police Department’s ability to discipline officers but the extent to which it is an impediment to holding officer’s accountable for policy violations is not clear, i.e., the alternatives also impact NPD’s ability to discipline officers.

Mr. Knighton said the Open Records Act (ORA) is affected by the FPAA because 51 O.S. § 24A.7 states that a public body may keep records confidential under the following circumstances:

1. Records which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or
2. Records where disclosure would constitute a clearly unwarranted invasion of personal privacy such as employee evaluations, payroll deductions, employment applications submitted by persons not hired by the public body, and transcripts from institutions of higher education maintained in the personnel files of certified public schools employees: provided, however, that nothing in this sub section shall be construed to exempt from disclosure the degree and the curriculum on the transcripts of certified public school employees.

All personnel records not specifically falling within the exceptions provided in subsection 24A.7 of this section shall be available for public inspection and copying including, but not limited to, records of any final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination.

Mr. Knighton said in the case of *Oklahoma Public Employees versus Oklahoma Office of Personnel Management*, it was determined the examples in A(1) and A(2) are *per se* prohibited from disclosure. He interprets that to say any internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation are prohibited from disclosure. He said all personnel records not specifically falling with the exceptions provided in subsection A of this section shall be available for public inspection and copying, including but not limited to, records of any final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination.

Mr. Knighton said Article 6, Section 1, of the FOP contract states, “The City reserves the right to discipline or discharge any employee for just cause subject to the provisions of this Agreement. Discipline and discharge shall be the right and responsibility of management and may include, but not be limited to, written reprimand, suspension, probation, demotion, and discharge.”

Regarding the request that the City properly inform the public when known incidents of misconduct, excessive use of force, and evidence of racism emerge, Mr. Knighton said unless Statute 51 O.S. § 24A.7 is amended or the Oklahoma Supreme Court overrules its opinion in the Oklahoma Public Employees Association case, Legal Staff will continue to advise that the City is prohibited from disclosing written reprimands and probation to the public.

Councilmember Wilson asked if there is a way for the public to rate or review an officer other than a complaint system. She says the community wants to know who the bad apples are as well as good things officers are doing. Mr. Knighton said there is a complaint process if someone believes an officer acted inappropriately and people routinely send letters of commendation that go into the officer's personnel file. The NPD also has a Citizen's Advisory Board that reviews complaint allegations and gives the Police Chief feedback with regard to incidents submitted, but there is currently no system for public reviewing of officers.

Mr. Knighton highlighted police data available that can be found on the City website that includes Norman demographics; complaints and inquiries; use of force; contacts, community engagement; and hate crimes.

There is also data regarding the Norman Citizens Advisory Board that includes current members, applying to become a member, quarterly listening sessions, and the Board's Constitution and Bylaws as well as a feedback form.

Councilmember Perry said it is his understanding that once the City has gone through arbitration negotiations with NPD and NFD, if Council is not prepared to accept that arbitration, the arbitration issue could go to a vote of the people and Mr. Knighton said that is correct. He said the interest arbitration provision provides that after the arbitrator issues his or her decision and the decision is in favor of the labor union, then the governing body of the municipality has the option of sending the issue to a vote of the people. During his tenure with the City of Norman, there has never been an election regarding arbitration.

Ms. Kathryn Terry, Attorney with Phillips Murrah, P.C., said she represents cities in the metro area and NPD's investigation and reporting procedures are significantly better than most Police Departments in the Oklahoma City metro area. She said Norman's document management system is quite good and very effective in tracking an incident. She said labor and management relationships depend greatly on union leadership and whether or not that leadership is aggressive or collaborative.

Article 11, O.S. § 51-102(6)(3), Unfair Labor Practice, prohibits municipalities from interfering in any manner whatsoever with the process of selection by fire fighters or police officers of their respective bargaining agents or attempting to influence, coerce, or intimidate individuals in such selection.

Ms. Terry said there is no "independent" entity that conducts public safety administration investigations in Oklahoma.

Councilmember Bierman asked if disciplinary records are confidential to other City Departments or Staff, e.g., Legal Department or City Manager's Office, because one of the conversations she has had with the community is a recognition that there are many people who have had bad experiences with police officers and do not feel comfortable making a complaint. She said involving other departments would give another layer of oversight. Ms. Terry said it would depend on the type of complaint, but the Legal Department or Human Resources Office would be the two main departments to be involved in a complaint other than the Police Department and City Manager.

Councilmember Petrone said if there are any bad apples in the NPD, there needs to be a process to get rid of them so how would that be done? Ms. Terry said it is difficult, but one of the things Mr. Knighton addressed is the collective bargaining agreement, which is an impediment to discipline because that triggers a grievance process requiring arbitration and the employee will have nothing to lose. The concept of discipline is to correct behavior and is not designed to be punitive. Her advice is to discipline and if that discipline is termination, then work through that grievance process and hopefully the City can win at arbitration, but if not, she will negotiate to end that person's employment. She said this can be expensive for municipalities, but negotiating to sever employment from an attorney's perspective is often less expensive than negotiating to reinstate employment after a grievance. She said while transparency is ideal, it is difficult within the constraints of FPAA and collective bargaining agreements.

Items submitted for the record

1. PowerPoint presentation entitled, "City Council Conference," dated July 28, 2020

* * * * *

The meeting was adjourned at 6:27 p.m.

ATTEST:



City Clerk



Mayor

