IN THE MATTER OF ARBITRATION
BETWEEN

THE CITY OF SHAWNEE, OKLAHOMA

AND

INTERNATIONAL UNION OF POLICE ASSOCIATIONS,
AFL-CIO, LOCAL #3, SHAWNEE, OKLAHOMA

FMCS CASE NO. 07-55168
(MINIMUM STAFFING/LEAVE POLICY GRIEVANCE)

APPEARANCES FOR THE CITY OF SHAWNEE

Margaret McMorrow-Love, Attorney, LAW OFFICES OF MARGARET McMORROW-LOVE
Oklahoma City, Oklahoma

William H. Mathis, Chief of Police, City of Shawnee Oklahoma

APPEARANCES FOR THE UNION:

Douglas D. Vernier, Attorney, MOORE & VERNIER P.C. Oklahoma City, Oklahoma

Ken King, Sergeant and President of Shawnee Police Association , Local # 3

ARBITRATOR: Ronald G. Iacovetta FMCS 3342

AWARD: The Grievance Filed by IUPA Local # 3 is Sustained.

In compliance with the Collective Bargaining Agreement between the Employer and the Union the Arbitrator of record was notified via letter of April 13, 2007 of selection by the parties to adjudicate the grievance at issue and to render an award based on the specific evidence offered in consideration of the stipulations and/or limitations of the Collective bargaining agreement as it pertains to the instant grievance.

The Arbitration hearing commenced at 10.00 a.m. on Friday, August 22, 2007 at City Hall, 16 West 9th Street in Shawnee Oklahoma. A transcript of the hearing was taken by Realtime Reporting, Oklahoma City. Witnesses were sworn and testimony and joint sharing of exhibits occurred. The Official Transcript of the hearing was received by the Arbitrator on September 3, 2007 and Post hearing briefs were submitted to the Arbitrator via joint mailing on October 10, 2007 and received October 12, 2007.

ISSUE BEFORE THE ARBITRATOR

The issue before the Arbitrator as stipulated by the parties is as follows: Did the City of Shawnee violate the Collective Bargaining Agreement by changing the terms of Policy 308 and, if so what should be the remedy. The Union filed the initial grievance in this matter via letter of February 8, 2007 from Ken King (President, Shawnee Police Association) to Chief William Mathis in response to a February 6, 2007 notification of changes to Policy 308. The Grievance cited in this letter and in the subsequent letter of March 2nd from Ken King to City Manager James Collard was based on the contention that unilateral policy changes absent consideration and approval, or rejection, by the Local was in violation of the Collective Bargaining Agreement and requested that such policy change(s) be rescinded pending approval, or rejection, by the Local (Jt. Ex. 6).

The Chief responded to Sergeant King's February 8, 2007 letter on February 26, 2007 and defended the right to make the policy changes without approval of the

local in compliance with the provisions of the CBA. The Chief held that Article 7, Section 2 of the CBA grants the City the right to make such changes. Article 7, Section 2 of the CBA provides :

> When it becomes necessary to upgrade or modify policy the Policies and Procedures Manual of the Shawnee Police Department, the four (4) elected officers of the I.U.P. A. shall meet with the administrative police department personnel to review and make recommendations concerning the new changes within fourteen (14) days.

The Chief held that this provision clearly and unambiguously states that the Executive Board of the local may make recommendations regarding the proposed changes but does not grant the Board veto power over such changes in policy. In addition, the Chief concluded that Article 7, Section 2 of the CBA does not provide for a vote by the entire union membership. The Chief noted that while the Grievance states that policies and procedures are part of the CBA and, as such, are subject to approval by the local, no authority for this proposition was offered. The Chief also noted that if the Union was referring to Article 5 of the CBA ("Maintenance of Standards") it fails to support the proposition. Article 5 of the CBA provides:

> All rights, privileges, and benefits of the employees covered by this Agreement or existing prior to this Agreement shall be regained in full force and effect, with the exception of Those rights, privileges and benefits abridged or modified by this Agreement.

The Chief concluded that Article 7 Section 2 of the CBA was a modification of Article 5 in anticipation that policies and procedures may be changed by management, following notification of the Executive Board of the Local and affording them with the opportunity to make recommendations regarding the proposed changes. The Chief concludes that "If the administration was not vested with the right to change policies and procedures during the term of the CBA, there would be no need for Article 7, Section 2. For the reasons noted the Chief denied the grievance.

City Manager James Collard, in his March 23, 2007 response to Ken King's grievance letter of March 2, denied the grievance indicating that he concurred with

Chief Mathis' response to the grievance and noted that "I have reviewed Chief Mathis' response to that grievance and the applicable provisions of the Collective Bargaining Agreement. For reasons set forth in the Chief's response, the grievance is denied". (Jt. Ex. 6).

BACKGROUND FACTS AND POLICY CONSIDERATIONS

The International Union of Police Association (IUPA) and the City of Shawnee, Oklahoma, are parties to the Collective Bargaining Agreement (Jt. Ex. 1). The CBA was entered into pursuant to the terms and requirements of the Oklahoma Fire and Police Arbitration Act (FPAA). Pursuant to this act the IUPA is the duly designated bargaining agent for Shawnee police officers. In accordance with the terms of the CBA and the FPAA, disputes "with respect to interpretation, enforcement, or application of the provisions" of the CBA are to be resolved through final and binding arbitration (Jt. Ex. 1, Article 14).

The instant grievance resulted from the City's unilateral change to Policy 308 pertaining to minimum staffing levels. The Current Collective Bargaining Agreement became effective July 1, 2005 and extended through June 30, 2007 (Jt. Ex. 1. Article 3). The CBA provides the following policy stipulations:

Section 1. All departmental rules and regulations of the Policies and Procedures Manual of the Shawnee police Department are incorporated into and made a part of this Agreement with the following exceptions:

a. Those departmental rules and regulations abridged or modified by this Agreement;

b. Those departmental rules and regulations held to be invalid or unconstitutional by a court or competent jurisdictions.

c. Those departmental rules and regulations which are inconsistent or in conflict with any provision of this Agreement, in which case this Agreement will prevail.

Policy 308 is incorporated and made part of the CBA by the terms of Article 7, Section 1. The Union contends that there is no agreement that certain policies may

be changed or modified without negotiating with the IUPA. Moreover, the Union contends that the only pertinent limitation on incorporation of policy is where policy is "abridged or modified by this agreement." The Union contends that there is nothing in the CBA that abridges or modifies minimum staffing levels from what is stipulated in Policy 308.

Policy 308 provides in relevant part the following:

> B.3. Leave requests shall be approved provided that the established minimum staffing requirements will be maintained. Under normal operating conditions, minimum staffing shall be 4 officers (regardless of rank) and one supervisor, except for Friday and Saturday evening and midnight shifts, which shall have a minimum of 5 officers (regardless of rank) and one supervisor. (Jt. Ex. 2).

On February 1, 2007, the City unilaterally changed policy 308. (Jt. Ex. 3: King at 12). The new policy read as follows:

> B.3. Leave requests shall be approved provided that the established minimum staffing requirements will be maintained. Under normal operating conditions, minimum staffing shall be 5 officers (regardless of rank) and one supervisor, except for Friday and Saturday evening and midnight shifts, which shall have a minimum of 6 officers (regardless of rank) and one supervisor. The minimum staffing levels may be reduced by the Chief of Police or his designee. (Jt. Ex. 3).

ARGUMENT AND POSITION OF THE UNION.

The International Union of Police Associations, Local 3, City of Shawnee argues that the City unilateral increase in minimum staffing levels and the added language allowing the Chief the discretion to reduce minimum manning levels was in violation of the Collective Bargaining Agreement in effect when these changes were given the fact that the City did not negotiate these changes with the Union. The City has argued that the changes in minimum staffing levels was required given increased call activity (City Ex. 2). The Union noted that the minimum manning level of 4 officers and a supervisor on weekdays and 5 officers and a supervisor on weekends has been in place since June 2002. (Jt. Ex. 2, King at 60).

The Union cites the fact that the total number of calls from 2004 to 2005 increased by only 12% and this increase did not require an increase in minimum manning at that time. The Union noted in argument that the increase in calls from 2005 through 2006 increased by only 5% and that such a small increase did not require an increase in minimum manning. Finally, the Union notes that the number of calls anticipated in 2007 represented an increase of only 6% over 2007 and contends that such an increase does not require an increase in minimum manning.

The Union has argued in testimony and in post-hearing brief that even if an emergency were a permissible reason for the City to circumvent the duty to bargain in this matter, there is no emergency or new development that mandates the City to act without bargaining with the Union during the term of an existing contract. The Union position is that the City was obligated to negotiate any changes in minimum manning with the Union and any changes to Policy 308 that impact wages, hours and terms and conditions of employment during the term of the Collective Bargaining Agreement. Accordingly, the Union argues that the City's unilateral change(s) to Policy 308 should be declared null and void until the City negotiates with the Union with respect to these changes noting the following Argument and Authority in support of its position:

A. Mandatory Subjects of Bargaining

Union Counsel notes that the FPAA Sections 51-101 & 51-102(5) provide that "Collective Bargaining shall mean the performance of the mutual obligation of the municipal employer . . . and representative fo the employees . . . to confer in good faith with respect to wages, hours and other conditions of employment." (11O.S. Sections 51-101 &51-102(5). The Union also contends that consistent with the FPAA the Collective Bargaining Agreement provides:

> Section 2. The I.U.P.A. recognizes the City Manager or his designated representative or representatives as the sole representative of the City of Shawnee for the purpose of collective bargaining. The I.U.P.A. agrees to bargain in good faith with the City Manager or his designees in all matters relating to wages, hours and other conditions of employment. The City agrees to bargain in good faith with the I.A.P.A. in all matters relating to wages, hours and other conditions of employment. (Jt. Ex.1, Article 2).

The Union contends the City agreed it would bargain with IUPA over "all matters" relating to wages, hours and other terms and conditions of employment, and did so without any exceptions. The Union holds that Mandatory subject of bargaining include such things as holiday and vacation leave, workloads, work standards, work schedules, plant rules and management rights. (Elkouri &Elkouri, How Arbitration Works, 6th Ed, 2003, at 544-645; See also Developing Labor Law, 5th Ed. 2006 at 1309-10 (Policies are considered subjects of bargaining, "which means that an employer cannot unilaterally implement or change such ..." without bargaining.) The Union contends that the minimum staffing levels contained in Policy 308 were established to provide the number of officers to be on the street for purposes of obtaining leave. (King at 80). The Union argues that minimum staffing levels (or changes therein) relate to and impact wages, hours and terms and conditions of employment. (See Mathis at 84-85).

The Union argues that minimum staffing levels directly and substantially impact the ability of officers to take vacation leave. By increasing minimum staffing levels the ability of officers to take leave is reduced. (King at 13). The Union contends that since the City has increased staffing levels, police officers have been denied leave. (King at 14). And, if an officer is denied leave after accruing leave time to the maximum levels allowed, the officer loses the leave time altogether. (King at 14). In addition the Union argues that as a result of the increase in minimum staffing levels, IUPA President Ken King was denied leave time and lost accrued vacation leave and the benefit of that leave. (King at 14). Accordingly, the Union contends that the increase in minimum staffing requirement unilaterally imposed by the City adversely impacts benefits of employment.

The Union also contends that minimum staffing levels impact the work schedules of officers. Work schedules are posted in order for officers to decide what days they would like to take leave. When a shift is already at minimum manning officers do not request leave on those dates since Supervisors have been instructed to deny leave when a shift is at minimum manning. (King at 15) The Unilateral increase in minimum staffing adversely impacts the work schedules of officers and the opportunity for taking leave time. Most important, the Union contends that Minimum staffing levels as a threshold for obtaining leave are a mandatory subject of bargaining and must, for the duration of the Collective Bargaining Agreement remain as stated in Policy 308, as it existed on the effective date of the CBA unless the City negotiates a change to Policy 308 with IUPA. The Union contends that

changes to minimum staffing levels clearly impact mandatory subject of bargaining because it is a change of policy which impact leave and work schedules and changes in policy, ability to take leave and work schedules are mandatory subjects of bargaining .(Elkouri, supra.).

The Union also holds that the Unilateral change of Policy 308 which gives the Chief the discretion to reduce minimum manning is also a violation of the Collective Bargaining Agreement noting that Management rights are a mandatory subject of bargaining and the City's inclusion of the clause which grants "discretion" to change minimum staffing in the future represents an attempt to gain a management right that it does not have –a right that must be negotiated with the Union. Moreover, the Union contends that the City's attempt to include such discretion serves to affirm that the City does not have the unilateral right to change minimum staffing levels. Union Counsel has argued that if the City believed it had the right to make such changes it would not need to write into Policy 308 that the Chief has the "discretion" to do so. The Union contends the City does not have the authority to change Policy 308 as it existed on the effective date of the CBA without negotiating such changes with the Union.

B. Management Rights

The Union has argued that a Management Rights Clause in the CBA supplant the right of the Union to bargain changes to mandatory subjects of bargaining but such Management rights must provide "clear and unmistakable relinquishment of that right" (Elkouri, supra. At 68 (Citing Trojan Yacht Div., 319 NLRB 741 (1995). As Stated in Elkouri, "Management rights language that merely reserves to the employer the authority to create and enforce reasonable rules does not rise to the level of a clear and unmistakable waiver. . . [Even where a waiver clause is stated in sweeping terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and that the Union consciously yielded or clearly and unmistakenly waved its interest in the matter." (Elkouri, supra. At 649-650).

In the instant case the Management Rights Clause provides as follows::

Section 1.The City expressly reserves the right to plan, direct and control all operations not covered by the Agreement relating to the Police Department; and

to hire, promote, assign, suspend or discharge for cause shown any officer, subject to the Constitution and the State of Oklahoma and the United States Constitution, and the grievance procedures set forth in this Agreement.

Section 2. The City shall have the right to determine the source or sources from which new applicants for work in the Police Department shall be secured and shall be the sole judge of the requirements and qualifications of the officers during the term of this Agreement.

Section 3. Except as specifically abridged , delegated, granted or modified by this agreement or any supplemental agreements that may hereafter be made, all rights power, and authority the City had prior to signing of this Agreement, are retained by the City, and remain exclusively and without limitation within the rights of the City.

(Jt. Ex. 1, Article 4)

Union Counsel has noted that the City agrees that there are no terms in Article 4 which grant the City the unilateral right to change policy. (Mathis at 85). Counsel argues therefore that it cannot be argued that there is a "clear and unmistakable" waiver of the duty to bargain changes in policy relating to minimum staffing in the Management Rights Clause. Rather, the Management Rights Clause reserves only the right to plan, direct and control operations "not covered by the Agreement." Counsel also holds that there is no dispute that policies are covered by the Agreement (Jt. Ex. 1, Article 7) and that minimum staffing levels, as set forth in Policy 308 are specifically covered by the Agreement. Therefore, the Union contends that management does not have the right to unilaterally change policy matters specifically covered by the Agreement.

Union Counsel notes that Article 4, Section 1 of the Agreement states that the City retains rights in accordance with the Statute of the State of Oklahoma and that one of the statutory duties imposed on the City by the Laws of Oklahoma, the FPAA, is to bargain all matters that concern wages, hours and terms and conditions of employment. And Counsel notes that Section 1 clearly recognizes that the City is under duty to bargain and this is agreed to in Article 2, Section 2 wherein the City agreed it would "Bargain in good faith with the I.U.P.A. in all matters relating to

wages, hours, and other conditions of employment."

Counsel also notes that Section 3 of the Management Rights Clause is equally ineffective as a waiver of the duty to bargain. Section 3 retains the right the City had prior to entering the instant Agreement and Pursuant to the FPAA all matters which implicated wages, hours and terms and conditions of employment must be negotiated. In fact Counsel argues that the City lost the power to make unilateral changes to wages, hours and other conditions of employment when the Shawnee Police Officer Union was certified and entered into collective bargaining. (See 11.O.S. Sections 51-101&51-102 (5) (Municipalities whose police employees are represented by a bargaining agent must bargain in "good faith with respect to wages, hours, and other conditions of employment."

The Union contends that only through negotiations may the City gain the right to make unilateral changes to wages, hours and other conditions of employment and this is why labor law requires employers to demonstrate a "clear and unmistakable" waiver of the duty to bargain imposed by the law. Accordingly, Counsel has argued that there is no "power" or "authority" to unilaterally change policy embodied in the Collective Bargaining Agreement. The City has argued that Article 7, Section 2 of the CBA provides the City the right to unilaterally change policy on minimum staffing. However, the City has acknowledged that Section 2 does not say that .(Mathis at 88). Article 7, Section 2 stipulates that:

> When it become necessary to upgrade or modify the Policies and Procedures Manual of the Shawnee Police Department, the four (4) elected officers of the I.U.P.A. Shall meet with administrative police department personnel to review and make recommendations concerning the new changes within fourteen (14) days. (Jt. Ex. 1, Article 7).

Union Counsel holds that this language does not state that the City has the unilateral right to upgrade, modify, or change existing policies. Rather, Section 2 merely stipulates that the four elected officers of the Union shall meet with the administration to make recommendation (s) regarding policy matters , not that the City is given any right via this language to unilaterally change policy after such recommendations are made.

Counsel notes that with regard to the right to change polices, "very specific

bargaining and agreement are required to make their modification" a matter of management right. (Elkouri at 769). Elkouri holds that this is true "even where an agreement gave management a general right to make and modify rules. (Elkouri, supra). In the instant case, policies are specifically incorporated into the CBA as a statutory mandate and as a matter of contract. (See 11 O.S. Section 51-111; Jt. Ex. 1, Article 7 Section 1). The parties agreed in 2005 that the policies then in effect would become part of the CBA and the parties did not agree the City had the unilateral right to change those policies during the duration of the Agreement without bargaining on those changes.

Counsel also contends that a "Management Rights Clause granting an employer the unilateral right to make, change and enforce reasonable rules does not relieve the employer of the obligation to bargain with the Union absent a clear and unequivocal showing of waiver. "A waiver occurs when a Union knowingly and voluntarily relinquishes its right to bargain about a matter." (NLRB v U.S. Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993) (Developing Labor Law, 5th Ed. 2006 at 1312-13). Counsel also cites Oklahoma PERB , in Local 2567, I.A.F.F. v. City of Jenks, PERB Case No. 211 (1990) Attachment "A" which applied the same standard to FPAA collective bargaining finding that in order for there to be a waiver of duty to bargain there must be "clear and unmistakable showing of waiver of statutory rights." Likewise, in FOP, Lodge 125 v. City of Guymon, PERB Case No. 329 (1996) Attachment "B" the Board stated that "We take not that the standard of proof for waiver is a high one. The Party who asserts waiver must establish it in 'clear and unmistakable terms.'" and the party asserting waiver must show "by a preponderance of the evidence that (the Union) clearly and unmistakably waived the duty to bargain over mandatory issues."

Counsel also cites FOP, Lodge 141 v. City of El Reno, PERB No, 353, (Attached as "C") which held that "Under the FPAA, an employer's unilateral change in a mandatory subject of bargaining during the term of a contract is 'permissible when a management rights clause evidences a grant of permission by the union to unilaterally effect such change." The Union holds that the City's claim that the duty to bargain has been waived by the terms of Article 7, Section 2 is erroneous and does not indicate a waiver of the City's duty to bargain changes in policy. Counsel contends that neither Article 7, Section 2 or the Management Rights Clause grants the City the unilateral right to change policy or a waiver of the duty to bargain policy and procedure changes which affect wages, hours or terms and conditions of employment.

Counsel holds that the Language of Article 7, Section 2 only provides a notification requirement for proposed policy changes and not a waiver of the duty to bargain changes in policy. Counsel contends that Article 7, Section 2 establishes the procedure to initiate negotiation when management desires to upgrade or modify policy via requiring that the four elected members of the IUPA meet with the City to review and make recommendations. The Union contends that Article 7, Section 2 of the CBA does NOT stipulate in any way that following such review and recommendation(s) that the City could unilaterally make policy changes or modifications in the absence of good faith bargaining. In fact, Counsel noted in post-hearing brief (footnote 5) that The FPAA definition of "Collective Bargaining' states that the obligation to bargain does not "compel either party to agree to a proposal or require the making of a concession." (11 O.S Sections 51-102 (5). In fact, rather than unilaterally imposing changes when an agreement cannot be reached, the FPAA requires interest arbitration. (See 11 O.S. Sections 51-106). Moreover, Counsel noted that if the CBA contains ambiguous and disputed language, past practice is a well recognized means of determining the meaning and intent of the language and when faced with ambiguous language, most arbitrators rely exclusively on the parties manifestation of intent as shown through past practice and custom," (Elkouri, supra at 623.).

Union Counsel contends that when an Oklahoma contract is constituted between the parties, "the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." (15 O.S. Article 157). In addition Counsel has argued that Article 2 of the CBA specifically addresses the duty to bargain with the IUPA wherein the City "agrees to bargain in good faith with the I.U.P.A. in all matters relating to wages, hours and conditions of employment." (Jt Ex. 1, Article 2). The Union contends that the terms of the CBA do not exclude policy changes from the duty to bargain clause and the City's increase of minimum staffing and granting the Chief the discretion to change minimum manning represented an attempt to grant the new Chief the discretion to change minimum staffing levels violates the CBA and the duty to bargain.

PAST PRACTICE CONSIDERATION(S)

The Union has argued that the bargaining history between the City and the Union clearly indicates that policy changes have always been bargained and the terms

of Article 7, Article 2 have been in the CBA for the last 12 ½ years. (King at 11, 25). Counsel notes that while there have been changes in policy over the years no changes in policy has been unilaterally made by the City . (King at 25). The City does not dispute the fact that over the last 12 plus years if the City desired to make a policy change it inquired as to the next Union meeting date and would prepare proposals tor submission to the Union's executive board members in time for them to present such proposals to the Union membership at the scheduled meeting and union membership would vote to accept or reject the proposal. (King at 27). Finally, when the membership rejected a proposal the policy would either not be implemented or the parties would sit back down and try to negotiate an acceptable change in policy, (king at 27).

In this regard Counsel notes that as stated in Elkouri, "There would have to be very strong and compelling reasons for an arbitrator to change the practice by which contract provision has been interpreted in a plant over a period of several years and several contracts. There would have to be a clear and unambiguous direction in the language used to effect such a change." (Elkouri, supra. At 623-624). The Union contends that Article 7, Section 2 does not grant the City the right to unilaterally change policy. Rather, it merely sets forth the time line to bring proposals to the table for negotiations.

Union Counsel has noted that the history of negotiation policies encompassed the implementation of the complete current policy manual, including Policy 308 and the current policy manual was made effective only through negotiations in mid 2002. The City proposed a policy manual to the Union which was rejected and the City asked for a counter-proposal. Following subsequent negotiations the City and the Union agreed upon a policy manual. (King at 28-29). Therefore, the City did not implement any policies without the IUPA's agreement (King at 29). Counsel also cites the fact that Michael Chitwood, the Shawnee Police Chief prior to Chief Mathis wanted to make a change in Policy 308 which was negotiated with the Union and agreement reached over what changes would be made to the police (King at 30-33).

In support of the Union position Counsel notes that : "[O]nce . . . a policy has been subject to negotiation, it becomes a term of the parties' contract and subsequent unilateral changed may violate the contract." (Elkouri at 773) Counsel also cited the City's attempt to unilaterally implement a nepotism policy in 2004. Here the Union notified the City that such a policy must be negotiated. (King at 34-35; IUPA Ex. 4).

While the City attempted to change an officer's work schedule because of the nepotism policy the Union filed a grievance. (King at 35). The City then negotiated the policy with the IUPA and the parties reached an agreement on a new policy. (King at 37; IUPA Ex. 4). In addition in IUPA, Local 3 and City of Shawnee, FMCS No. 031011-00584-8, the IUPA grieved the City's attempt to implement a policy relative to the Family and Medical Leave Act ("FMLA") and the Arbitrator found that "sick leave benefits are covered by the Collective Bargaining Agreement and are a mandatory subject for negotiation. If the City wishes to have concurrent use of FMLA sick leave and paid sick leave benefits which are governed by Article 17 of the Collective Bargaining Agreement it is going to have to attain its goals trough negotiation."

Counsel notes that in the instant case policies Policy 308 is also covered by the CBA and the right to take leave is negatively impacted by the City's change in policy and the City cannot change the benefits afforded by policies anymore than the City can change the benefit of sick leave without negotiation. Union Counsel cites the City contention that prior to Chief Mathis' arrival all policy changes were discussed, negotiated with and approved by the IUPA prior to implementation (Tr. At 40). Counsel also notes that even after Mathis' arrival he did not implement a proposal or change the promotional posting time after the Union rejected the proposal. (See IUPA Ex. 9; King at 43). However, two policy changes were implemented by Chief Mathis after the Union rejected his proposal(s). One resulted in the instant grievance at hand here and the other is the subject of a pending grievance. (King at 43). The Union holds that long term past practice in negotiating with the Union on policy changes serves as evidence that the terms of the CBA does not grant the City the right to unilaterally implement policy changes without negotiation with the Union.

Counsel argues that the City contention is erroneous that it is not bound by the way things have been handled in the past since Chief Mathis put the Union on notice, via letter to the Union President, that the contract will be adhered to as written. The City also contends that this means Article 7, Section 2 of the CBA provides the City the authority to Unilaterally implement a change in minimum manning. Counsel disagrees noting that Chief Mathis (and the City) have taken the position that they can change or eliminate "any" policies simply by informing the Union of the policy changes desired. (Mathis at 88-90). Counsel contends that the City has essentially taken the position that it can undo wages, hours and terms and conditions of employment by effecting changes to policy even though policies are covered by and

incorporated into the CBA. The Union position is that such a view is contrary to contract provisions and the well recognized duty to bargain wages, hours, and terms and conditions of employment. (Post hearing brief, footnote 7). Finally, the Union contends that the City's unilateral action represented an attempt to bring an end to the history of negotiating with the Union changes in policy and procedures.

Finally, Union Counsel holds that the City cannot via unilateral proclamation gain a waiver of the duty to bargain policy and procedure changes. Rather , the City can only achieve through negotiation such a waver of such a duty. Counsel also notes that Chief Mathis' letter does not mention anything about negotiations or City's belief that it no longer must negotiate policy changes. Counsel holds that a practice is "not subject to unilateral termination during the term of the collective bargaining agreement" but only at the end of said term by giving notice of intent not to carry the practice over to the next agreement. . ." (Elkouri, supra at 619). Counsel argues that the City's mid-contract year letter to the Union that the contract will be applied as written does not eliminate the duty of the City to bargain changes to policy or the importance of the clear history of doing so.

UNION CONCLUSION

The Union affirms that there is no dispute that the City implemented significant changes to Policy 308 without negotiating these changes with the Union. The City had expressly agreed that it would negotiate all matters relating to wages, hours and other terms and conditions of employment with the Union. Policy 308 and the changes the City made to that policy affect hours, wages and other terms and conditions of employment including leave. The Union contends that neither the management rights clause nor Article 7 of the CBA provides the City the right to unilaterally change this policy. The Union believes that unilateral changes to Policy 308 are in clear violation of the Collective Bargaining Agreement and requests that the Arbitrator rule as such and order the City to rescind the changes to Policy 308 and enter into negotiation with the Union concerning the City desire to make such changes in policy.

CITY OF SHAWNEE POSITION

The City of Shawnee has argued that , based on the testimony and evidence

presented in this case its actions in changing the terms of Policy 308 was consistent with the Oklahoma Police and Fire Arbitration Act and the Collective Bargaining Agreement between the parties. The City has stipulated for the record that it is a municipal corporation and IUPA Local 3 is the duly recognized and exclusive bargaining agent for full time permanent members of the Shawnee Police Department, with the exception of the Police Chief and one designated Administrative Assistant. The City acknowledges that William Mathis is the current Chief of Police, having assumed the position October 1, 2006 and Sergeant Ken King is the Current President of Local No. 3. In addition the City acknowledged that the Local has a four member Executive Board with Sergeant King being a member of that board. (Tr. at 57).

The City has also noted that it has entered into collective bargaining agreements with Local No. 3 pursuant to the Oklahoma Fire and Police Arbitration Act, 11O.S. Articles 51-101 including a Collective Bargaining Agreement for FY 2005-2006 and 2006-2007. (Joint Ex. 1). Counsel has noted in testimony and in post-hearing brief that via memorandum to Sergeant King dated December 7, 2006, Chief William Mathis advised Local No. 3 that it was the intent of the City that the language of the CBA and policies and procedures would be applied as written. (City Ex. 1). City Counsel has also noted that at no time did Sergeant King ask Chief Mathis to clarify what was intended by the December 7th memorandum. In addition testimony indicates that Chief Mathis had oral conversations with Sergeant King in which he reiterated the position the position that he intended to adhere to the language of the CBA. (Tr. 75-76).

POLICY 308 HISTORY, CHANGES AND UNION GRIEVANCE

On June 17, 2002, the City of Shawnee Police Department adopted Policy 308-Leave, which was later amended on or about June 14, 2005. (Joint Ex. 2). In December of 2006, Chief Mathis proposed a change to Policy 308 (Joint Ex. 4) and the parties stipulated that the only proposed change was to Section III, B.3 (Tr. at 10). The Chief's rationale for the proposed changes included: 1) officer and safety issues (City Ex, 2); 2) need for a gang unit to address increased gang activity in the community; and 3) to address service to the City's lake area. (Tr. at 73-74; City Ex. 4). The proposed change to Policy 308 included increasing minimum staffing from 4 to 5 officers under normal operating conditions and an increase to six officers for Friday and Saturday evening and midnight shifts and the inclusion of a new provision allowing minimum staffing to be reduced by the Chief of Police or his designee (See

Policy 308, Section III, B3, Joint Ex. 3).

Testimony and evidence indicates that Pursuant to Article 7, Section 2 of the Agreement Chief Mathis Advised the local of the proposed changes to Policy 308 via memorandum of December 26, 2006 and via conversation with Sergeant King. (Tr. At 44-45; 75). In response via letter of January 10, 2007 Sergeant King informed Chief Mathis that the position of the Local was that minimum staffing should remain as it had been. (Joint Ex. 5). The letter from Sergeant King also indicated that the proposed changes would be submitted to the membership for consideration at the next meeting. (Joint Ex. 5).

Sergeant King testified that the Local objected to the proposed changes because it gave the Chief discretion to lower minimum manning (although the local objected to the proposed changes because it raised the minimum manning level by one (Tr. at 13) and because it could limit officers' ability to schedule and take vacations. (Tr. At 13-14; 23). Chief Mathis implemented the change to Policy 308 after being notified by Sergeant King that the Local did not agree with the change (Joint Ex. 5). The City has noted (and the Union concurs) that the change to Policy 308 (Jt. Ex. 3) was made on or about February 1, 2007 and after the December 7, 2006 memo in which the Local was advised by the Chief of the intent to adhere to the language of the CBA. Counsel also notes that Sergeant King admitted that the change in minimum staffing as set forth in amended Policy 308 was never submitted to a vote of the membership. (Tr. at 63)

Counsel has noted that the City has acknowledged that Since Sergeant King has been President of Local No. 3, and prior to Chief Mathis' employment with the City on October 1, 2006, changes to the policy manual had been discussed, negotiated and approved by both Chiefs and the Union prior to their adoption. (Tr. at 40; IUPA Exhibits 3-7). Sergeant King has noted that since Chief Mathis has been the Chief of Police he has implemented other changes to policy without the approval of the majority vote of the membership of the Local. (Tr. At 42-43; 56' IUPA Ex. 9).

RELEVANT ARTICLES IN THE AGREEMENT

The City has noted that it recognizes the IUPA as the sole bargaining agent for permanent full time commissioned officers employed by the Shawnee Police Department (Article 2, Section 1). The City also notes the provisions of Article 4

(Management Rights and Responsibilities); Article 5 (Maintenance of Standards); Article 7 (Department Rules and Regulations); and Article 14 (Grievance Procedure). Article 7, section 2 is the most germane to the City Position in this case given the City's claim that the provisions contained herein serve to limit the obligation of the City to abide by the provisions of Article 2, Section 2 of the Agreement which stipulates that "The City agrees to bargain in good faith with the I.U.P.A. in all matters relating to wages, hours and other Conditions of employment."

ARTICLE 7 (Departmental Rules and Regulations) stipulates as follows:

Section 1: All departmental rules and regulations of the Policies and procedure Manual of the Shawnee Police Department are incorporated into and made a part of this Agreement with the following exceptions:

a. Those departmental rules and regulations abridged or modified by this agreement.

b. those departmental rules and regulations held to be invalid or unconstitutional by a court or competent jurisdiction.

c. Those departmental rules and regulations which are inconsistent or in conflict with any provision of this Agreement in which case this Agreement shall prevail.

Section 2: When it become necessary to upgrade or modify the Policies and Procedures Manual of the Shawnee Police Department, the four (4) elected officers of the I.U.P.A. shall meet with the administrative Police Department personnel to review and make recommendations concerning the new changes within fourteen (14) days.

CITY ARGUMENT AND RATIONALE

The City has argued in testimony and in post-hearing brief that the Language of Article 7, Section 2 of the CBA is clear and unambiguous and modifies the language of Article 5 and Article 7, Section 1. Article 7, Section 2 contains language mutually agreed upon by the parties and the City believes this language clearly outlines the procedures to be followed when management of the Shawnee Police

Department desires to modify any of the policies and procedures set forth in the Department's Policies and Procedures Manual. The City interpretation is that this article requires the following: 1) Management submits a proposed change to the Executive Board of the IUPA; 2)The Executive Board must meet to review the proposals; and 3) The Executive Board makes recommendations concerning the proposed change(s) within fourteen (14) days.

City Counsel notes that despite the language of Article 7, Section 2, the Union erroneously argues that 1) any proposed change must be submitted to the entire membership of the Local and not only to the Executive Board, for a vote; and 2) it is entitled to a veto of any proposed change, not merely make recommendation on the proposal. The Union position is based on past practice under prior administrations. However, the City Contends that the language of Article 7, Section 2 is clear and unambiguous and only grants Local No. 3 via its Executive Board, the right to make recommendations on proposed policy changes and that the Arbitrator is precluded from considering past practice where policies were not adopted until approved by the Local. The City also argues that this is particularly true since Article 14, Section 3 (C)(6) of the CBA (Joint Exhibit 1) entitled "Grievance procedure" precludes the Arbitrator from varying the terms of the CBA or arbitrating away any term and strictly limits the Arbitrator Authority to the interpretation and applications of the Collective Bargaining Agreement.

In addition, the City contends that local No. 3 had been put on notice (City Exhibit 1) of the intent of management that it intended to adhere to the language of the Collective Bargaining Agreement. Accordingly, the City believes the language of Article 7, Section 2 is clear that it does not grant the Union the power to veto changes to policies and procedures (or as indicated at the hearing and in post hearing brief that the matter need not be presented to the full Union membership for consideration). City Counsel argues that the actions of the City in adopting the modifications to Policy 308, after conferring with Local and receiving its input as required by Article 7, Section 2, was in compliance with the FPAA and the CBA.

CITY AUTHORITIES

The City offered the following argument and authorities in support of its position in this case:

1. The Parties have agreed that the language of Article 7, Section 2 has been a part of the Collective Bargaining Agreement between the parties for many years and this provision provides that when a policy or procedure is proposed to be modified the Executive Board of the IUPA ". . . shall meet with the administrative Police Department personnel to review and make recommendation concerning the new changes within fourteen (14) days." The City notes that in spite of this language the Union has taken the position that the full membership of the Local should vote on the proposed changes and that the full membership has the right to veto any change. This assertion is based on the contention that prior Chiefs of Police have followed a process whereby the Chief would contact the Union President and inquire when the next Union meeting was scheduled so the proposed change(s) could be presented to the Executive Board for review in time for the Board to submit the same to the entire membership to vote to accept or reject same (Tr. at 27; 46-47). Sergeant King testified that this process had been followed under Prior Chiefs of Police, but not under Chief Mathis. The City position is that past practice can not override specific language and that the provisions of Article 7, Section 2 is controlling in this matter.

2. The City acknowledges that the FPAA requires that it negotiate with the Local with respect to "wages, salary, rates of pay, grievances, working conditions and all other terms and conditions of employment." (11 0.S. Section 51-103 (A). The City also concurs that under normal circumstances, management may not make unilateral changes to mandatory topics of bargaining. (FOP, Lodge 193 v. City of Ponca City, PERB case No. 00349). City Counsel noted that in this case, the City and Local 3 bargained for and came to mutually agreed language for the CBA for FY 2005-2006 and 2006-2007 and this included the mutually agreed to Language of Article 7, Section 2 (Joint Exhibit 1) and this included the mutually agreed to language of Article 7, Section 2. (Tr. at 58-59). Accordingly, the City asserts that Article 7, Section 2 allows the City to unilaterally modify policies, after providing the Local the right to review and make recommendation regarding policy change proposals.

The City also asserts that while Sergeant King has argued that the language of Article 7, Section 2 was designed to initiate the process for "negotiation" of change (Tr. at 26), he acknowledged that nothing in the language of Article 7, Section 2 states that the proposed changes must be submitted to Union membership for approval. (Tr. at 57-58; 65). The Arbitrator notes in this regard that there is also nothing in the language of Article 7, Section 2 that clearly and unambiguously states that the City does not need to submit the proposal to Union membership for review,

recommendation or approval or otherwise negotiate the proposed changes with the Union.

3. City Counsel has also claims that when a CBA addresses an issue, an alleged past practice may only be considered in instances where the contract is ambiguous (Midwest Coca-Cola Bottling Co., 99 L.A. 859, 863 (Neigh, 1992); Warner Cabel of Akron, 91 L.A. 48, 51 (Bittel, 1988) because the express terms of the CBA control over any alleged past practice to the contrary. Counsel also notes that in BASF Wyondotte Corp., 84 L.A. 1055, 1057 (Caraway, 1985), the Arbitrator, citing John Deere Des Moines Works, 22 L.A. 628, 631 (Davey, 1954) and Arbitrator Wallen's Article "The Silent Contract v. Express Provisions", in the proceeding of the Fifteenth Annual Meeting, National Academy of Arbitrators, held that:

> Where a conflict exists between the clear and unambiguous Language of the contract and a long standing past practice, the Arbitrator is required to follow the language of the Contract. It is only where the contractual language is unclear, uncertain or ambiguous that resort for guidance or clarification Should be made to past practice.

4. Counsel also cites Elkouri & Elkouri, How Arbitration works, Ch. 12, (6th Ed. 2003); and City of El Reno v. IAFF, Local 2364, FMCS case Bi. 95-19118 (Woodward, 1995) where a case arising under the FPAA, in which the Arbitrator held that arbitrable law is clear that the specific terms of the CBA, when in Conflict with Past Practice, will prevail. Counsel argues that in the instant case the CBA prevents an Arbitrator from altering or amending the language of the Contract (See Article 14, Section 3 ©)(6)-Joint Ex. 1) and that an established past practice will not support an Arbitrator failing to enforce clear and unambiguous contractual language. (CFS Continental-los Angeles, 83 L.A. 458, 460-461 (Sabo, 1984); Michigan Department of Social Services, 82 L.A. 114, 116 (Fieger, 1983). Counsel contends that Article 7, Section 2 unambiguously grants only the Executive Board of the Union the right to review and make recommendations concerning proposed changes. Counsel contends that had the full Union membership desired to have the right to bargain and vote on proposed changes in policy it should have bargained for such language in the CBA and failing to do so the Agreed to language only grants the Executive Board the right to review and make recommendations on proposed changes.

5. City Counsel notes that in IUPA, Local No. 3 v. City of Shawnee, FMCS No. 0307-22-51881-8 (Molina, 2003), involving the same parties as in this case, the Arbitrator held"

> In determining the meaning of various provisions, in the absence of specified conditions, the interpreter must assume that those enacting the provisions intended for them to have the same meaning as attributed to them in the ordinary and usual parlance. (Hammlock v. United States, 203 OK 77, 78 P. 3d 93 citing Lofland Brothers Equipment v. White, 1984 OK 69, 689 P. 2d 311).

6. Most recently, Arbitrator Samuel Wang, in the matter of IUPA, Local No. 3 v. City of Shawnee, FMCS # 07-54276-8, adhered to and enforced clear and unambiguous language of the Collective Bargaining Agreement. This Arbitration involved Article 9, Section 7 of the CBA, concerning bulletin boards. The Arbitrator held that the City had the right to enforce the language of the CBA despite finding that the evidence of past practice wherein the parties deviated from the language of the CBA regarding posting of Union notices. Counsel contends that Arbitrator Wang's finding was consistent with arbitrable law in holding that Arbitrators must give support to the clear language of the Agreement, 'even though the results may be contrary to the conduct of the parties." Counsel notes that in the instant case, the parties have stipulated that in the past, under previous Chiefs of Police, Changes in policy were not implemented unless agreed to by both the City and the Union. The City contends that this fact is not sufficient justification for the Union position that the City has waived its right to enforce the clear provision of Article 7, Section 2 of the Agreement.

CITY'S CONCLUDING POSITION

The City of Shawnee requests that the grievance be denied based on the testimony and evidence in this case. Specifically, the City's position is that the language of Article 7, Section 2 of the CBA takes precedent over past practice consideration(s) or the requirement(s) stipulated in Article 2, Sections 1 and 2 relating to the obligation that the City bargain in good faith with the Union in all matters relating to wages, hours and other conditions of employment. The City contends that Article 7, Section 2 of the CBA grants the City a waiver of the requirement to

negotiate with the Union any modification or change in policies and procedures and provides only that the Union's four (4) member Executive Board "shall meet with the administrative police department personnel to review and make recommendations concerning the new changes within fourteen (14) day.

ARBITRATORS DISCUSSION, CONSIDERATION AND FINDING(S)

The City has argued that the fact that prior Chiefs of Police had not elected to implement changes not agreed to by the Local membership does not provide sufficient support for the grievance. Counsel cites the finding in BASF Wynondotte Corp., 84 L. at 1057-58 where the Arbitrator noted that "While.... it is difficult to accept the overturn of a fifteen (15) year practice, the Arbitrator is required to do so in light of the clear and certain language ..." of the CBA. Counsel holds that the same result is required here by the clear and unambiguous language of Article 7, Section 2 which only grants the Executive Board of the IUPA the right to make recommendations on policy changes rather than granting the Board or the full membership the right to negotiate with the City and vote on the proposed changes. The Arbitrator must note in this regard that if this were the case there would be a need to modify the language of Article 2, Section 1 which stipulates in relevant part that " The City recognizes the I.U.P.A. as the sole bargaining agent for permanent full-time commissioned officers employed by the Shawnee Police Department . . . for the purpose of negotiating wages, hours and other conditions of employment" and Article 2, Section 2 which states in relevant part that the I.U.P.A agrees to bargain in good faith with the City Manager or his designee in all matters relating to wages, hours and other conditions of employment. THE CITY AGREES TO BARGAIN IN GOOD FAITH WITH THE I.U.P.A IN ALL MATTERS RELATING TO WAGES, HOURS AND CONDITIONS OF EMPLOYMENT." (Highlighting added).

Put simply, if the City's interpretation of Article 7, Section 2 of the CBA is to rule there is no need for Article 2, Sections 1 and 2 as it relates to the obligation to bargain in good faith with respect to all matters relating to conditions of employment where policy changes impact such conditions. In the considered judgement of the Arbitrator changes in minimum staffing clearly impact conditions of employment. In addition, for reasons to be noted in finding(s) the Arbitrator cannot concur with the City that the language of Article 7, Section 2 of the CBA is clear and unambiguous

and therefore Arbitral authority and findings relative to the need to give priority to clear and unambiguous language (even in the face of contrary past practice) is not applicable here. Rather, such Arbitral Authority applies in the reverse given the lack of clear and unambiguous language. Arbitral authority clearly holds that where there is unclear and ambiguous language in the Collective Bargaining Agreement past practice considerations are clearly appropriate, relevant and necessary in assessing and rendering finding(s).

Article 7, Section 2 of the CBA indicates only that "When it becomes necessary to upgrade or modify the Policies and Procedures Manual of the Shawnee Police Department, the four 4) four elected officers of the I.U.P.A shall meet with administrative police personnel to review and make recommendations concerning the new changes within fourteen (14) days." Article 7, Section 2 DOES NOT STIPULATE THAT FOLLOWING SUCH REVIEW AND RECOMMENDATION THE CITY MAY IMPLEMENT PROPOSED CHANGES (S) IN POLICY AND PROCEDURES UNILATERALLY WITHOUT BARGAINING WITH THE UNION. Had such a clause been a part of Article 7, Section 2 it would have represented a clear and unambiguous waiver of the City's obligation to bargain in good faith with the Union on all policy and procedure matters whether or not they impact conditions of employment. In the absence of such stipulation Article 7, Section 2 does not clearly and unambiguously grant the City a waiver of the expressed obligation to Bargain in good faith all matters relating to, or impacting, conditions of employment expressly stipulated in Article 2, Sections 1 and 2 of the Agreement. . In addition, given the ambiguity and lack of clear waiver of the requirement to bargain such matters with the Union Article 7, Section 2 cannot negate or take precedent over past practice consideration.

The City appropriately notes that the CBA was adopted under Oklahoma law where all parts of the contract are to be construed together as to give effect to every part, each clause helping to interpret the other. (15 O.S. 2002 Section 157). In this case an Arbitrator and the Courts are to construe all provisions of a contract as a whole so as to give effect to each part. City Counsel has argued that if the Arbitrator were to adopt the Union position it would render meaningless the bargained for and agreed to language of Article 7, Section 2 of the Agreement. The Arbitrator disagrees. The language of Article 7, Section 2 of the Agreement would still have relevance to the extent that it specifies the process for initiating discussion and negotiation with the Union on proposed changes or modifications of policies and

procedures.

City Counsel has argued that while the City agrees that policies and procedures are incorporated into the CBA via Article 5, Section 1 and the provisions of the FPAA, the parties mutually agreed to the process by which those policies and procedures could be changed and the Arbitrator must apply all provisions of the Agreement, including the language of Article 7, Section 2. The City also contends that the relevance of past practice evidence was removed after the City notified the Union via its December 7, 2006 memorandum (City Exhibit 1) that any alleged past practice in conflict with the CBA was repudiated. However, the Arbitrator notes that the December 7, 2006 memorandum from Chief Mathis does not so indicate. THERE IS NO MENTION IN THIS LETTER THAT PAST PRACTICES ARE REPUDIATED. The letter only indicates that the provisions of the CBA and SOP's will be followed as written.(City Exhibit 1). Clearly this memorandum does not specifically address the applicability of past practice or what specific past practices would be discontinued, Nor does the letter indicate what specific provisions were at issue or state a deadline when the new provisions would be implemented as Arbitrator Reeves has stipulated should occur. (See Page 20 of this finding and ACME, Local 2004 v. City of Oklahoma City, FMCS # 001230-03997-8).

City Counsel has also argued that a party desiring to terminate a past practice can do so by indicating that it no longer intends to follow that practice noting that when a party gives such notice the other side has the burden of attempting to incorporate past practice into the new Collective Bargaining Agreement. (Armstrong World Industries, 91, L.A. 1028, 1031(Westin, 1988). However, the Arbitrator finds The Chiefs' letter of December 7, 2006 noticing the Union of the intent to apply the provisions of the CBA and SOP's as written to be extremely vague and lacking in clarity and specification.

Had the Chief clearly and unequivocally informed the Union of his specific interpretation of Article 7, Section 2 (granting the City a waiver of the obligation to bargain with the Union regarding changes in policies and procedures) the Union could have responded during negotiations on the new Collective Bargaining Agreement in an attempt to incorporate past practice into the CBA for FY 2007-2008. Lacking such a specific notice by the City the Union cannot be held liable for not taking the initiative to address the applicability of Article 7,Section 2 of the Agreement or other provisions that could potentially be in conflict with past practice.

The Arbitrator also notes that such consideration could only have taken place during negotiations relative to the new Agreement which occurred prior to the Chief's proposed changes in minimum manning and his implementation of the changes to Policy 308 on February 6, 2007.

In response to Chief Mathis' implementation of Changes to Policy 308 On February 6, 2007 , Sergeant King filed a formal written grievance on behalf of the Union via letter of February 8, 2007 to Chief Mathis noting that "as previously advised, your proposed changes were to be submitted to the Union membership at our next meeting for consideration." (Jt. Ex. 6)

Chief Mathis responded to Sergeant King on February 26, 2007 (Jt. Ex 6, p. 2) affirming the Chief's position that Article 7, Section 2 of the Agreement provided the authority to make the unilateral change in Policy 308. The Chief reiterated his position that Article 7, Section 2 "clearly and unambiguously states that the Executive Board of the Local may make recommendations regarding the proposed changes. It does not grant the Executive Board veto power over any changes. Further this Section provides that it is the Executive Board which makes any recommendations. It does not provide for a vote of the entire membership. In addition, any recommendations are to be submitted within fourteen (14) days, not an indefinite period of time."

The Chief also noted that "The Grievance also states that policies and procedures are part of the CBA and, as such are subject to approval by the Local. Although you cite no authority for this proposition, I am assuming you were making reference to Article 5 of the CBA entitled "Maintenance Standards." Article 5 provides that:

> All rights, privileges, and benefits of the employees covered by this Agreement or existing prior to this Agreement shall be retained in Full force and effect, with the exception of those rights, privileges, or benefits abridged or modified by this agreement.

Chief Mathis further states that "It is the position of my Office that Article 7, Section 2 is a modification of Article 5 as it clearly anticipates that policies and procedures may be changed by management, after notification to the Executive Board of the Local providing the Executive Board with the opportunity to make

recommendations on those changes. If the Administration was not vested with the right to change policies and procedures during the term of the CBA there would be no need for Article 7, Section 2." The Arbitrator respectfully disagrees with this Assessment. In the considered judgement of the Arbitrator, Article 7, Section 2 of the Agreement stipulates only a procedure and time-lime for beginning review and recommendation the City could unilaterally change or modify policies or procedures or unilaterally implement new procedures.

In the considered judgement of the Arbitrator Article 7, Section 2 of the Agreement does not represent a clear and unambiguous abridgement or waiver of the rights and obligations stipulated in Article 2, Sections 1 and 2 of the Agreement relative to changes or modifications in policies and procedures affecting terms and conditions of employment or the provision in Article 5 relative to privileges or benefits abridged or modified by the agreement. Article 7, Section 2 does not contain language that clearly and unambiguously grants the City a waver of rights and obligations embodied in Article 2, Sections 1 and 2 or those privileges and benefits covered by the Agreement as noted in Article 5 of the Agreement.

Counsel noted that in ASCME, Local 2004 v. The City of Oklahoma City, FMCS # 001230-03997-8, a case arising under FPAA, Arbitrator Reeves noted that when management wishes to stop a past practice which is contrary to the clear language of the CBA, the procedure involves three steps: 1) distribution of written notification; 2) announcement of the deadline when the new procedures will be implemented; and 3) enforcement of the new procedures. Counsel contends that in this case Chief Mathis gave clear and explicit written notice (City Ex. 1) that, consistent with state law, it was the intent of the administration that the provisions of the CBA would be adhered to and would be applied as written. Subsequently, via letter of December 26, 2006 to Union President Ken King Chief Mathis provided notice of proposed changes to minimum manning along with the new stipulation that the "The minimum staffing levels may be reduced by the Chief of Police or his designee"

The Chief also indicated in his letter of December 26, 2006 that he looked forward to meeting with Sergeant King to review and discuss the proposed policy change. The letter made no mention of meeting with the Executive Board or the Union membership to negotiate such changes. In fact, the January 10, 2007 letter from Ken King to Chief Mathis indicates that pursuant to discussions on Monday January 8,

2007 the Local had reviewed the proposed changes to minimum staffing and that it was the position of the Local that minimum staffing provisions be maintained pending an increase in overall staffing levels that would allow for a change in minimum staffing. The Letter also indicated that the City may want to explore other options, including the hiring of a Lake Ranger to replace Ken Collins, and re-instituting the reserve officer program. Ken King also indicated that the Local has recognized for years that the City has understaffed the police department and has encouraged the City to hire more officers. Finally, the letter indicated that "We are not opposed to increasing officer staffing or minimum staffing. However, our concern with increasing minimum staffing without hiring more officers is the negative impact on officer' work schedules including use of vacation and comp time leave. As we discussed, your proposal will be submitted to the membership for consideration at our next meeting." This letter clearly indicates the intent to present the matter to the Union membership at the next meeting for consideration and relates specific concerns that may need to be addressed. On February 6, 2007 Chief Mathis unilaterally implemented the proposed changes to Policy 308 in the absence of negotiation with the Union.

In response to the December 7, 2006 memorandum from Chief Mathis Sergeant King responded on behalf of the Union noting that the memorandum was distributed to all officers and that signatures (as requested) only indicates receipt of the memorandum and does not bind the individual officer or the Local. In addition the Sergeant King stated in relevant part that:

> "Further, Consistent with state law, it is the position of the Local that you are bound by the interpretations and practices that were in place prior to your arrival. It is the intent of the Local to hold City to Same. The Local has not, does not, and will not waive any rights, nor does the Local agree to any modifications/changes of the CBA, policies or practice. Any attempt by you to implement change to existing contract language, policy language, interpretation of said language, or past practice, without negotiations with the Local will result in a grievance, and possibly the filing of an Unfair Labor Practice charge. As always, the Local is willing to discuss and consider proposed changes. Be advised that the Local is under no obligation to agree to any such change. To be certain, the Local will not accept unilateral changes."

The Union position on the matter was clearly expressed here putting the Chief on Notice that while it was willing to discuss and consider proposed changes such changes must be negotiated with the Local. The letter also put the Chief on notice that the City is bound by the Collective Bargaining Agreement and interpretations and practices in place prior to his arrival. Given the finding that Article 7, Section 2 of the Agreement does not grant a clear and unambiguous waiver to the City to make unilateral changes in policy and procedures without negotiation with the Union. For reasons noted herein the Arbitrator concurs with Sergeant King that unilateral action by the City represented a violation of the CBA.

ARBITRATORS SUMMARY FINDING(S)

In consideration of all relevant testimony and evidence in this case the Arbitrator notes the following:

1. The City is Obligated under the provisions of Article 2, Sections 1 and 2 of the CBA to Bargain in good faith the I.U.P.A. in all matters relating to wages, hours and other terms and conditions of employment.

2. The City's unilateral change in Policy 308 involving an increase in minimum manning and implementation clearly impacts conditions of employment including scheduling, the utilization of vacation and leave time and work schedules of officers. The impact on leave requests is clearly indicated in the Chief's changes to Policy 308 guidelines for Leave where "Leave requests shall be approved provided that the established minimum manning staffing requirements will be maintained." (Jt. Ex. 3, III. PROCEDURE, B-3-Requesting leave)

In addition, the provision allowing the Chief or his designee to reduce minimum manning could also impact wages, benefits and other terms and conditions of employment. The Arbitrator concurs with the Union that the Unilateral change to Policy 308 granting the Chief the discretion to reduce minimum staffing serves to affirm that the City did not have the unilateral right to increase minimum manning levels. The Arbitrator concurs that if the City believed it had such a right it would not have seen a need to include in the revised policy the provision granting the Chief the authority to reduce minimum staffing. In any case, it is clear to the Arbitrator that the City was attempting to achieve through unilateral action what it was obligated to seek through bargaining..

3. The Arbitrator cannot support the City position that Article 7, Section 2 represents an abridgement or waiver of the obligation to bargain with the Union on matters relating to conditions of employment. Article 7, Section 2 fails to provide necessary clarity and specificity in support of the City Position that it grants management the unilateral right to implement changes in policies and procedures which impact conditions of employment without bargaining in good faith with the Union. Arbitral authority is clear that "Management Rights" do not absolve an employer of the obligation to bargain with the Union absent a clear and unequivocal showing of a waiver whereby the Union knowingly and voluntarily relinquishes that right. The party that asserts waiver of the obligation to bargain must also establish it via clear and convincing contractual language and show that by a preponderance of the evidence that the Union clearly and knowingly voluntarily waived to duty to bargain over mandatory issues. In the Judgement of the Arbitrator these standards have not been met in this case. There are no stipulations in the "Management Rights" clause (Article 4) or Article 7, Section 2 of the Agreement which grants the City the unilateral right to change policy or procedures or any clear and unmistakable waiver of the duty to bargain changes in policy or procedures relating to minimum staffing. The "Management Rights" clause reserves only the right to plan, direct and control operations "not covered by the Agreement" and minimum staffing levels, as set forth in Policy 308, are covered by the Agreement.

The Language of Article 7, Section 2 only specifies that when changes or modifications of policies and procedures are deemed necessary the Union's 4 member Executive Board " . . . shall meet with administrative police department personnel to review and make recommendation concerning such changes within fourteen (14) days." IT DOES NOT STIPULATE THAT FOLLOWING SUCH REVIEW AND RECOMMENDATION(S) THE CITY IS ABSOLVED OF ITS OBLIGATION TO BARGAIN WITH THE UNION MEMBERSHIP WITH RESPECT TO THE PROPOSALS AND RECOMMENDATIONS SUBMITTED.

4. The Argument that Past practice relevance and consideration (wherein past Chiefs bargained changes with the Union in all matters involving wages, hours and other conditions of employment) is rendered mute given the notification of Union membership (by the Chief Mathis) that the specific language of the CBA would be abided by and the contention that language of Article 7, Section 2 supplants and takes precedent over past practice is not supported by the Arbitrator for reasons noted herein. In the considered judgement of the Arbitrator Article 7, Section 2 does not

provide clear and unambiguous stipulation that management may unilaterally implement changes in policy and procedures without bargaining with the Union and does not, therefore, take precedent over past practice considerations in this regard. In fact, as noted herein, neither Chief Mathis or City management made specific reference to abandoning past practice(s) in the notice to the Union that the specific language of the CBA would be adhered to in the future.

5. Chief Mathis may have honestly believed that Article 7, Section 2 of the Agreement provides sufficient and clear support for a unilateral change in policies and procedures in the absence of negotiation and bargaining with the Union. However, the Arbitrator finds the language of Article 7, Section 2 seriously deficient in providing such support. The language of Article 7, Section 2 does not clearly and unambiguously grant such a waiver and cannot, therefore, serve to justify unilateral changes in the absence of good faith bargaining or serve to negate past practice considerations.

AWARD

In consideration of all the testimony and evidence in this case, the stipulations and limitations of the Collective Bargaining Agreement and past practice by management in consulting with and bargaining with the Union the Arbitrator must find in support of the Grievance files by the Union. In the considered judgement of the Arbitrator Article 7, Section 2 of the CBA does not clearly and explicitly grant the City the right to unilaterally change or modify existing policies and procedures affecting wages, hours or other conditions of employment without bargaining in good faith with the Union. In the judgement of the Arbitrator the City has not met its burden of proof to demonstrate that Article 7, Section 2 of the Agreement provides the City with the Unilateral right to implement changes or modifications in policies and procedures which impact conditions of employment without "good faith" bargaining with the Union.

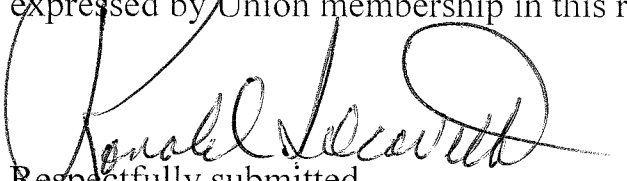
In view of the lack of a clear and unambiguous waver or abridgement of the requirement to bargain in good faith with the Union in matters involving wages, hours and other conditions of employment past practice must take precedent. The Union has met the burden of proof that past-practice existed and the City has so acknowledged. Therefore, the Arbitrator finds that the City is obligated to bargain with the Union with respect to the desired change(s) in minimum staffing and the proposed authority to

reduce minimum manning.

In addition, the City must negotiate clarification of the language of Article 7, Section 2 if it is to support a waiver, or any modification, of the obligation of the City to confer and bargain with the Union in matters involving changes in policies and procedures. The starting point in such negotiation would be language that would grant the City the right of the City to make unilateral changes in policy and procedure in matters that do not affect specific conditions of employment. Otherwise modification in the language of Article 2, Sections 1 and 2 and Article 5 of the Agreement would be required.

THE ARBITRATOR FINDS THE CITY'S UNILATERAL CHANGES TO POLICY 308 TO BE IN VIOLATION OF THE OF THE FPAA AND THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES. FOR REASONS NOTED THE ARBITRATOR FINDS THE CITY'S UNILATERAL IMPLEMENTATION OF CHANGES TO POLICY 308 IN VIOLATION OF THE CONTRACTUAL OBLIGATION TO CONFER AND BARGAIN IN GOOD FAITH WITH THE UNION IN MATTERS RELATIVE TO WAGES, HOURS OR OTHER CONDITIONS OF EMPLOYMENT. GIVEN THE LACK OF A CLEAR AND UNAMBIGUOUS WAIVER OF THE CONTRACTUAL OBLIGATION TO BARGAIN IN MATTERS RELATING TO CHANGES IN POLICIES AND PROCEDURES THAT IMPACT WORKING CONDITIONS OR OTHER CONDITIONS OF EMPLOYMENT PAST PRACTICE MUST PREVAIL.

Accordingly the Arbitrator directs the City to rescind the unilateral changes in Policy 308 and initiate formal bargaining with the Union with respect to all desired changes, giving due consideration to the proposals, recommendations and concerns expressed by Union membership in this regard.



Respectfully submitted,
Ronald G. Iacovetta
Arbitator (FMCS 3342)