BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fort Hays State University Chapter of the American Association of University Professors, Petitioner,	)	
v.	)	Case No: 75-CAE-12-2001
Fort Hays State University, Respondent	)	

INITIAL ORDER

NOW on this 10th day of March, 2004, the above-captioned Prohibited Practice Charge comes on for decision pursuant to K.S.A. 75-4334 and K.S.A. 77-514(a) before presiding officer Douglas A. Hager, designee of the Public Employee Relations Board (hereinafter "PERB").

APPEARANCES

Petitioner Fort Hays State University Chapter of the American Association of University Professors appeared through counsel, Lawrence Rebman, Attorney at Law. Respondent, Fort Hays State University, appeared through counsel, Scott M. Hesse, Assistant Attorney General.

75-CAE-12-2001-I

PROCEEDINGS

On June 25, 2001, Petitioner Fort Hays State University Chapter of the American Association of University Professors, (hereinafter "Petitioner" or "FHSU/AAUP"), filed a prohibited practice complaint with the Public Employee Relations Board against employer, Fort Hays State University (hereinafter "Employer" or "Respondent"). Petitioner's complaint alleged that the employer engaged in prohibited practices in violation of K.S.A. 75-4333(b)(1), (2), (3), (5) and (6) by failing and refusing to accord Petitioner its status as representative of one of its bargaining unit members, a Professor Frank Gaskill, failing and refusing to provide Petitioner with information necessary to carry out its responsibilities as Professor Gaskill's representative and unilaterally changing terms and conditions of employment as applied to Dr. Gaskill without first meeting its statutory obligation to bargain in good faith with Petitioner regarding said terms and conditions of employment. Complaint Against Employer, Case No. 75-CAE-12-2001, filed June 25, 2001. Petitioner alleged that the Employer's conduct constitutes interference, restraint and coercion of public employees in the exercise of rights granted by the Public Employer-Employee Relations Act, (hereinafter "the Act" or "PEERA"), domination and interference in the administration of an employee organization, discrimination with regard to conditions of employment, refusal to meet and confer in good faith with representatives of a recognized employee organization as required by the Act and denial of rights accompanying the employee organization's certification and formal recognition. *Id.* Petitioner requests that the PERB find that the Employer has

violated the Act, reinstate Dr. Gaskill to his position and make him whole for any losses suffered as a result of the Employer's unlawful conduct, and direct the Employer to post a notice advising bargaining unit members that it will no longer interfere with, restrain or coerce public employees in the exercise of rights granted by the Act, dominate or interfere with the administration of the employee organization, encourage or discourage membership in an employee organization by discrimination with regard to conditions of employment, fail to provide information needed by the bargaining representative in the performance of its duty of fair representation, fail to allow the bargaining representative to perform its duty of representation to its members, deny rights accompanying certification and formal recognition to the bargaining representative and, finally, advising the unit members that it will no longer refuse to allow officials of the bargaining representative to properly and formally represent individuals in any grievance procedure. *Id.*

The Employer responded to Petitioner's complaint by generally denying that any of its actions were in violation of PEERA. Respondent Employer's Answer to Complaint Against Employer and Respondent Employer's Motion to Dismiss and Respondent Employer's Motion for a Bill of Particulars, Case No. 75-CAE-12-2001, filed July 20, 2001. The Employer also moved for dismissal, urging that the complaint was insufficient on its face to allow the Employer to evaluate the claim or, in the alternative, sought an order requiring Petitioner to provide a more specific factual basis for the complaint. *Id.*

As is customary in handling labor relations complaints, this office scheduled a telephonic conference call, for September 5, 2001, to discuss this dispute generally and to consider the means most appropriate for its resolution. During this initial call, Petitioner emphasized that its statutory right to represent the Petitioner in Respondent's hearing

process, including its right to have access to information necessary to such representation, was denied. Respondent in turn urged that Petitioner had no right to represent Dr. Gaskill in its hearing process, reasoning that under Kansas law, *Weingarten*[1] rights do not apply. Respondent also noted that faculty personnel records are confidential and that it was under no duty to grant Petitioner access to Dr. Gaskill's personnel records in the context of Petitioner's attempts to represent Gaskill in a grievance process under the Employer's policies. Respondent also urged that its motion to dismiss be granted, alleging that in the absence of more detailed factual allegations, it was without sufficient information to properly respond to the complaint.

The presiding officer took Respondent's motion to dismiss and its motion for a bill of particulars under advisement, and requested that Petitioner provide a more detailed statement of the facts which it alleged to form the basis for its complaint. In addition, the presiding officer directed that Petitioner provide a written response to Employer's motion to dismiss. A briefing schedule was set for the parties to present their respective arguments and legal authority regarding two issues. The first issue was Respondent's contention that it was under no duty to provide Petitioner, in the context of representing one of its member in a grievance, the confidential personnel file of said bargaining unit member. The second issue to be addressed by the parties was Respondent's contention that *Weingarten* rights do not apply under Kansas law and that, therefore, Respondent did not commit a prohibited practice under the facts alleged in this matter.

Following two subsequent changes, by agreement of the parties, to the previously-established deadlines for submission of written arguments, the presiding officer took up

[1] *National Labor Relations Board v. Weingarten*, 402 U.S. 251 (1975).

Respondent's motion to dismiss by way of a status conference call held on December 6, 2001. At that time, the presiding officer advised the parties that he was denying Respondent's motion to dismiss and its motion for a bill of particulars, ruling that Respondent had been put on notice of facts sufficient, if proven, to sustain a charge, or multiple charges, of prohibited practice under Kansas law and that the parties should use the discovery process, if need be, to illuminate any areas of confusion. The presiding officer also advised the parties that the *Weingarten* case and its reasoning was inapplicable to the facts alleged to exist in this dispute. Respondent advised that it would need to seek the assistance of outside counsel and the presiding officer set the date and time for a prehearing conference at which time discussion would be had of all appropriate prehearing issues.

William Scott Hesse, Assistant Attorney General, subsequently filed an entry of appearance as counsel for Respondent in this matter. Prehearing conference was held on March 25, 2002. During the prehearing conference, a formal hearing was scheduled to commence on June 20, 2002.

On June 13, 2002, Respondent filed a Motion to Dismiss alleging that Petitioner was attempting to relitigate issues already determined in an Ellis County District Court breach of contract action in *Gaskill v. Fort Hays State University,* Case No. 02-89007-A (Kansas Court of Appeals). Dismissal was appropriate, according to Respondent, because "[i]ssue preclusion, sometimes referred to as collateral estoppel, prevents relitigation, in a different claim, of issues conclusively determined in a prior action." Memorandum in Support of Motion to Dismiss, Case No. 75-CAE-12-2001, filed June 13, 2002. In view that formal hearing was scheduled to begin in seven days, and in view

that Petitioner did not have sufficient time to respond to the motion in advance of the scheduled hearing date, the presiding officer took the motion under advisement pending Petitioner's response. This matter came on for hearing on June 20, 2002.

At the close of hearing on June 20, 2002, another day of hearing was scheduled for July 22, 2002 to take the testimony of additional witnesses. Subsequently, this July hearing date was continued at Petitioner's request. *See* Petitioner's Motion for Continuance, July 19, 2002. In addition, Petitioner sought, and was granted, additional time to respond to Respondent's June 13, 2002 Motion to Dismiss. Petitioner subsequently filed its response to Respondent's Motion to Dismiss, asserting essentially that Respondent had failed to establish the elements necessary to support its Motion. Petitioner's Response to Motion to Dismiss, filed August 7, 2002. This matter was delayed for several more months while awaiting a decision from the Court of Appeals in Gaskill's appeal from an order of the Ellis County District Court. During this time frame, in March, 2003, counsel for Petitioner entered his appearance as counsel as a sole practitioner following separation from his prior employer. Entry of Appearance, filed March 27, 2003.

Following issuance of the Court of Appeals decision in *Gaskill v. Fort Hays State University*, No. 89007, Respondent renewed its request that this matter be dismissed. *See* Respondent's letter, filed April 7, 2003. Petitioner's April 11, 2003 response reiterated its earlier opposition to the Motion, asserting that the doctrine of *res judicata* would only serve as a bar if the current controversy involves "the same facts, same parties and same issues as a prior controversy that has been decided on the merits." Petitioner's letter, filed April 11, 2003. Because Gaskill's Ellis County District Court breach of contract claim

was dismissed for lack of jurisdiction and was thus not an adjudication on the merits, and because the parties and the cause of action in this matter are different from that in the district court action, the doctrine of *res judicata* would not bar the instant matter from this forum's administrative litigation and resolution. *Id.*

Subsequently, during a status conference call held by the presiding officer on April 30, 2003, the parties were advised of the presiding officer's decision to deny Respondent's Motion to Dismiss. In view that the recent Court of Appeals' opinion made it clear that Gaskill's district court action had been dismissed for lack of jurisdiction and therefore did not constitute an adjudication on the merits, and in view that the parties and issues were not one and the same, the doctrine of *res judicata* does not operate as a bar to resolution of this matter in this forum. An additional day of hearing was scheduled for June 12, 2003 in which to complete the record.

The matter came on for an additional day of hearing on June 12, 2003 at which time the record was completed. After receiving copies of the hearing transcript and the numerous exhibits that had been introduced into evidence, the parties then submitted post-hearing legal arguments. This matter now being fully submitted, the presiding officer issues this initial order.

ISSUES OF LAW

The prohibited practice complaint that initiated this matter alleged violations of several prohibited practice provisions of the Kansas Public Employer-Employee Relations Act. *See* Complaint Against Employer, Case No. 75-CAE-12-2001, June 25,

2001. However, as these matters came to hearing the Petitioner narrowed its focus. *See* Petitioner's Statement of Issues of Law in Dispute, 75-CAE-12-2001, filed June 10, 2002. As is often the case, the Respondent's characterization of the issues was markedly different from that of Petitioner. *See* Respondent's Issues of Law in Dispute, 75-CAE-12-2001, filed June 6, 2002. Based upon the entire record in this matter, it is the presiding officer's determination that the issue of law for resolution in this matter can be stated as follows: Did the Employer Fort Hays State University engage in a prohibited practice/practices within the meaning of K.S.A. 75-4333(b) by its response to the grievance filed in May, 2001 by employee bargaining unit member Dr. Frank Gaskill, and, if it did so, what is an appropriate exercise of the Board's authority, pursuant to K.S.A. 75-4323(e)(3), to effectuate the purposes and provisions of the Act?

FINDINGS OF FACT

1. Respondent is a public employer within the meaning of the PEERA.

2. On May 5, 2000, The Public Employee Relations Board issued an order captioned as "Certification of Representative and Order to Meet and Confer". This certification order certified Petitioner FHSU/AAUP as the exclusive representative for faculty bargaining unit members at Fort Hays State University. (Petitioner's Exhibit 1; Tr., pp. 23-24). The faculty bargaining unit was defined by the certification order to include all full-time non-temporary university employees with appointments as professor, associate professor, assistant professor, instructor, program specialist, research scientist, curator, lecturer, librarian and academic director. (Petitioner's Exhibit 1).

3. The certification order also directed the Employer to meet and confer with Petitioner with respect to terms and conditions of employment and in the administration of grievances. (Petitioner's Exhibit 1).

4. At all times relevant to this proceeding, Employer and Petitioner did not have a Memorandum of Agreement and the unit members' terms and conditions of employment were governed by the September 1, 1997, revision of the Faculty Handbook. (Petitioner's Exhibit 3; Tr., p. 299).

5. Dr. Frank Gaskill was hired as a faculty member at Employer Fort Hays State University beginning with academic year 2000-2001. (Tr., pp. 102, 115). Dr. Gaskill received a probationary appointment as an associate professor and began working at FHSU on or about August 15, 2000. (Tr., pp. 106-107). As a part of his employment agreement with FHSU, Dr. Gaskill was granted four years of credit toward tenure. (Petitioner's Exhibit 5; Tr., p. 104). Dr. Gaskill's probationary appointment stated that "it is further agreed and understood that the final tenure review and decision will occur no later than the 2001-2002 academic year unless notice of non-reappointment is provided in accordance with university policy." (Petitioner's Exhibit 5). According to the University's Faculty Handbook, a probationary appointment carries with it an expectation of renewal. (Petitioner's Exhibit 4, p. 19). If the appointment is not to be renewed, the faculty member is entitled to be informed of this in writing by not later than March 1 of the first academic year of service. (*Id.*).

6. As an associate professor and faculty member, Dr. Gaskill was included in the bargaining unit represented by the FHSU/AAUP. (Tr., p. 300).

7. Prior to being hired, Dr. Gaskill was not informed that he would be required to submit a "tenure file" during his first semester at FHSU. (Tr., p. 107). Within two to three weeks of his arrival at FHSU, however, Dr. Gaskill was required to submit a tenure file documenting his adherence to the standards by which tenure is granted at FHSU. (Tr., pp. 107, 115-120). Subsequently, Dr. Gaskill submitted a tenure file and began the Employer's tenure review process. (Tr., pp. 107-123).

8. Although Dr. Gaskill was recommended favorably by both his department's and his college's tenure review process, and although the University Tenure Committee was aware of the limited amount of time Dr. Gaskill had to assemble a tenure file, it nevertheless recommended by a vote of 2-2-1 that Dr. Gaskill not be continued on the tenure track for the following academic year. (Tr., pp. 108-110; Petitioner's Exhibits 7, 8). The University Tenure Committee suggested that Dr. Gaskill consider requesting the Provost to "stop the 'tenure clock'" for one year to allow him sufficient time to develop his tenure file in the Employer's required format. (Petitioner's Exhibits 8, 9, 10; Tr., pp. 111-113).

9. Pursuant to the University Tenure Committee's suggestion, Dr. Gaskill requested by letter dated January 12, 2001 that the Provost "stop the tenure clock" to allow him additional time to assemble his tenure file in an acceptable form. (Petitioner's Exhibit 9).

10. By letter dated January 30, 2001, Provost Gould granted Petitioner's request to "stop the tenure clock" to allow additional time to prepare a tenure file in a form commensurate with University guidelines and indicated that the following year, academic year 2001-2002, would be Gaskill's fifth year of the seven-year sequence toward tenure. (Petitioner's Exhibit 10; Tr., pp. 113-114).

11. On or about May 2, 2001, Dr. Gaskill was orally advised by Professor Richard M. Peters, Dean of the College of Business and Leadership, that his employment contract would not be renewed because of bad student evaluations. (Tr., p. 124).

12. By letter dated May 2, 2001, Dean Richard M. Peters notified Dr. Gaskill that the decision had been made "not to extend an offer of employment for the 2001-2002 academic year". Dean Peters' letter explained that "[t]his decision was made after consultation" with the chairman of the Business Administration Department due to "our concern as to the quality of your performance over the past semester." (Petitioner's Exhibit 11; *see also* Tr., pp. 123-126).

13. The Faculty Handbook provides a General Faculty Hearing and Appeal Procedure for redress of grievances involving termination of employment. (Petitioner's Exhibit 3, p. 23). This grievance procedure provides two options for resolving grievances: an informal grievance procedure and a formal appeal hearing procedure. (*Id.*, p. 24). According to this policy, a grievant may be accompanied to a formal appeal hearing by an attorney at law or by a personal advisor, but the attorney or advisor may not speak on behalf of the grievant. (*Id.*, p. 25).

14. The Faculty Handbook details the steps necessary to initiate the formal appeal hearing procedure. (Petitioner's Exhibit 3, pp. 24-25).

15. Dr. Gaskill began the informal grievance procedure on May 2, 2001, when he met with Dr. James Heian, Chair of the Business Administration Department and Dr. Peters, Dean of the College of Business and Leadership, to discuss his termination. (Tr., pp. 125 -126).

16. This informal meeting failed to resolve Dr. Gaskill's grievance. (*Id.*).

17. Immediately after the meeting with Drs. Heian and Peters, Dr. Gaskill proceeded to meet informally with University President Edward Hammond to discuss his grievance. (Tr., p. 126).

18. This informal meeting failed to resolve Dr. Gaskill's grievance. (Tr., p. 126).

19. On or about May 5, 2001, Dr. Gaskill asked FHSU/AAUP Vice President Dr. Richard Hughen and one of its members, a Dr. Shala Bannister, to represent him in a grievance meeting with University Provost Gould. (Tr., pp. 127-129). Dr. Gaskill wanted the Provost to understand that the Employer had not adhered to the Faculty Handbook's March 1 notification deadline, *see* Finding of Fact Number 5, and that this lack of timely notice would make it very difficult for Dr. Gaskill to get an academic position for the coming school year. (Tr., p. 129).

20. Drs. Hughen and Bannister scheduled a meeting with Provost Gould for May 7, 2001 at 4:15 p.m. to discuss Dr. Gaskill's grievance (Tr., p. 39).

21. Approximately thirty minutes before this grievance meeting was to have begun, Provost Gould cancelled the meeting and referred the matter to Employer's legal counsel, Ms. Kim Christiansen,. (Tr., p. 39).

22. That same day, Christiansen emailed Dr. Gaskill informing him of his right to arrange an appointment with Drs. Peters and Heian to discuss their decision. (Petitioner's Exhibit 12).

23. This email informed Dr. Gaskill that he could be accompanied to the meeting by a FHSU/AAUP representative but the representative could not address others in the meeting or speak on Dr. Gaskill's behalf. (Petitioner's Exhibit 12).

24. Later that same day, May 7, 2001, Dr. Hughen emailed Employer's legal counsel Ms. Christiansen asking by what authority she was restricting Petitioner's ability to represent Dr. Gaskill in the grievance process. (Petitioner's Exhibit 13; Tr., pp. 53-54).

25. Ms. Christiansen replied to Dr. Hughen on May 9, 2001, indicating she would not discuss these concerns with him. (Petitioner's Exhibit 13).

26. At the hearing conducted by this presiding officer, Gaskill expressed a great deal of frustration, characterizing the events of his grievance as "quite a comedy" and as "a runaround and refusal to meet with both myself and with the union". (Tr., p. 132). Believing that he had exhausted all avenues of an informal resolution of his grievance and that he was "at a brick wall", and in response to the University's refusal to meet with his FHSU/AAUP representatives and its referral of the matter to its legal counsel, Dr. Gaskill hand-delivered a written request for a formal appeal hearing pursuant to the Faculty Handbook on May 9, 2001 by sending the request to his department's chairman Dr. Heian, with a copy hand-delivered to the appropriate Dean. (Tr., pp. 131-135, 326-327; Petitioner's Exhibit 14). In his request for a formal appeal hearing, Dr. Gaskill indicated his desire for FHSU/AAUP representation by stating "I have asked FHSU-AAUP to represent me in this grievance process according to PEERA, Statute 75-4328. (Petitioner's Exhibit 14, p. 2). Dr. Gaskill's request for a formal appeal hearing complied with all necessary steps as outlined in the Faculty Handbook. (*See* Finding of Fact Number 14; Tr., pp. 324, 326-327).

27. Dr. Heian sent invitations entitled "Hearing re Dr. Gaskill grievance," to Dr. Gaskill, Dr. Hughen, Dr. Peters, and Ms. Christiansen, setting a hearing for May 15, 2001 at 2:00 p.m. in the Memorial Union State Room. (Respondent's Exhibit X).

28. In an email dated May 14, 2001, with a subject line which stated, in part, "REQUEST FOR RESCHEDULING", Dr. Gaskill advised Dr. Heian that he had retained the services of attorney Gene Anderson, and indicated that Mr. Anderson was unable to appear at the meeting due to a conflict. (Petitioner's Exhibit 16 (emphasis in original)). Dr. Gaskill's decision to retain counsel was in response to Employer's refusal to allow Petitioner to speak for and represent Dr. Gaskill in his grievance with the University. (*See* Petitioner's Exhibit 20 (in a May 21, 2001 email to Dr. Heian, Dr. Gaskill noted that he had retained counsel to safeguard his rights in response to the University's failure and refusal to allow Dr. Hughen to speak for and on behalf of Dr. Gaskill in its hearing process)).

29. This email requested that Ms. Christiansen communicate with Mr. Anderson, "so [that] the departmental level hearing may be scheduled, in coordination with, . . . [FHSU/AAUP Vice President] Richard Hughen's schedule." (Petitioner's Exhibit 16).

30. A copy of this email was sent to Ms. Christiansen, Dr. Hughen, Dr. Peters, Provost Gould, and [FHSU/AAUP President] Dr. Keith Campbell. (Petitioner's Exhibit 16).

31. Ms. Christiansen emailed Mr. Anderson on May 14, 2001 informing him he would not be able to speak on his client's behalf. (Petitioner's Exhibit 17). Ms. Christiansen acknowledged that Dr. Gaskill had asked that she coordinate the hearing to allow FHSU/AAUP's Dr. Hughen to be present and advised that she had not done so. In explanation, Ms. Christiansen stated that she did not feel she could or that the University should deal with an additional representative since Dr. Gaskill had retained legal counsel. (*Id.*).

32. In a May 16, 2001 email, Dr. Gaskill's legal counsel, Gene Anderson, informed Ms. Christiansen that Dr. Gaskill had already gone through several levels of the informal process and that they were "now into the formal process", in view that a written request for formal hearing had been filed, in accordance with the University Faculty Handbook. (Petitioner's Exhibit 18).

33. Ms. Christiansen responded stating that Dr. Gaskill had not yet met with the Dean and Chair, thus his request for formal hearing was premature "since [Dr. Gaskill] has not availed himself of the ability to discuss and potentially resolve the issues through the informal process". (Petitioner's Exhibit 19). Ms. Christiansen's response went on to assert that Dr. Gaskill was no longer a tenure-track professor due to his earlier decision to "stop the tenure clock". (*Id.*). Since "Dr. Gaskill has not been given the property rights associated with tenure", the formal grievance process "does not apply to Dr. Gaskill." (*Id.*).

34. In a May 21, 2001 email to Ms. Christiansen, Dr. Gaskill detailed his attempts to resolve the parties' dispute through the informal grievance process and reiterated his request to initiate a formal grievance proceeding. (Petitioner's Exhibit 20).

35. Between May 15 and May 21, 2001, Petitioner's Vice President, Dr. Hughen, sent five emails to Dr. Heian inquiring about the status of Dr. Gaskill's formal grievance hearing. (Petitioner's Exhibit 6). Dr. Heian did not respond to any of Dr. Hughen's emails. (Tr., pp. 63-64). At the direction of Employer's legal counsel Ms. Christiansen, Dr. Heian did not reschedule the formal grievance hearing which had previously been scheduled for May 15, 2001. (Tr., pp. 329-330).

36. Ms. Christiansen continued to maintain that the informal process was proper even after having notice that Gaskill had previously met with his Dean and Chair on May 2, 2001. (*See* Respondent's Exhibit E ("Once again, the proper process is for Dr. Gaskill to meet with the Dean and Chair to discuss issues.")).

37. Mr. Anderson did not waive Dr. Gaskill's right to a formal hearing. (Tr., pp. 420-421).

38. On May 23, 2001, Ms. Christiansen emailed Dr. Hughen and told him all scheduling and contact by the University are to be made through Dr. Gaskill's counsel, and that he should contact Dr. Gaskill's counsel. (Petitioner's Exhibit 23).

39. Dr. Peters, Dr. Heian, Dr. Gaskill, and Mr. Anderson met on May 30, 2001 regarding the "Department and College of Business and Leadership Decision." (Petitioner's Exhibit 4).

40. The University did not notify or invite FHSU/AAUP to attend. (Petitioner's Exhibit 4, Tr., pp. 63- 64).

41. After the May 30, 2001 meeting, Dr. Gaskill was advised that the department's decision remained unchanged and that he could appeal to Provost Gould. (Petitioner's Exhibit 4).

42. Dr. Gaskill appealed this decision, and on July 3, 2001, Ms. Christiansen sent a letter to Mr. Anderson confirming an appeal hearing for Dr. Gaskill. (Respondent's Exhibit N).

43. Provost Gould held a hearing on July 11, 2001. (Respondent's Exhibit Q).

44. Provost Gould, Ms. Christiansen, Mr. Anderson, and Dr. Gaskill (via telephone from South Carolina) were in attendance. (Respondent's Exhibit Q).

45. Ms. Christiansen gave Dr. Gaskill the option of postponing the hearing so a FHSU/AAUP representative could attend as a neutral observer. (Respondent's Exhibit Q).

46. The FHSU/AAUP was not notified or invited to attend the hearing. (Respondent's Exhibit Q; Tr., pp. 65-67).

47. On September 5, 2001 President Hammond held a hearing to review the decision regarding Dr. Gaskill's contract. (Respondent's Exhibit W).

48. The FHSU/AAUP was not notified or invited to attend the hearing. (Respondent's Exhibit W; Tr., pp. 63-64, 220-221).

49. Following the September 5, 2001 hearing described in Finding of Fact Number 47, President Hammond issued a written letter that affirmed the decision to not offer Dr. Gaskill a contract for academic year 2001-2002 and advised that step 1 of the informal process was complete. (Respondent's Exhibit W). Dr. Gaskill received this notification approximately one month after the 2001-2002 academic term had begun. (Tr., p. 407). Presumably, Respondent's position is that at that point in time, a point in time well past the start of that year's fall academic semester, Dr. Gaskill would have needed to once again request a formal hearing in writing and go through the formal hearing process in order to exhaust his administrative remedies.

50. Following his hearing with Dr. Hammond, Dr. Gaskill filed a breach of contract lawsuit against the University. (Tr., p. 424). FHSU filed a motion to dismiss for lack of jurisdiction for failure to exhaust administrative remedies. (*Id.*). The motion to dismiss was granted by the district court and its decision was upheld on appeal to the Court of Appeals. (*Id.*).

51. As of the time of the hearing of this matter, Dr. Gaskill was unemployed. Although he had accepted another teaching position in South Carolina for academic year 2001-2002, that employment was terminated at the end of that school year by a reduction in force. (Tr., pp. 101-102). Dr. Gaskill's salary for academic year 2001-2002 was $10,147.00 less in South Carolina than it was at FHSU. (Tr., p. 156). Dr. Gaskill's moving expenses to accept a position in South Carolina amounted to $3,620.62. (Tr., p. 157). Dr. Gaskill spent $6,194.00 in job search expenses. (Tr., pp. 156-158). Dr. Gaskill's loss of retirement contributions for academic year 2001-2002 amounted to $1,484.00. Finally, his loss of income for academic years 2002 through 2004 totaled $112,000.00, (Tr., p. 102), and his loss of retirement contributions for academic years 2002-2004 were $8,568.00. These amounts total $142,013.62.

CONCLUSIONS OF LAW/DISCUSSION

1. Respondent in this matter is a public employer as that term is used in the Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.* Petitioner is the recognized employee organization certified by the Public Employee Relations Board as representative of a majority of the bargaining unit's members, in accordance with state labor relations law. K.S.A. 75-4322(j). Bargaining unit member and grievant Dr. Frank Gaskill was at all times relevant to these proceedings, a public employee, as defined by, and subject to, provisions of the PEERA.

2. The Kansas PEERA mandates that "[a] public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances". K.S.A. 75-4328.

3. The Kansas PEERA provides that "where an employee organization has been certified by the Board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determinations of conditions of employment of the public employees as provided in this act". K.S.A. 75-4327.

4. The Kansas PEERA guarantees that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." K.S.A. 75-4324.

5. In order to make "some provision for [the] enforcement" of the aforesaid rights, Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980), the Kansas PEERA provides that it is a "prohibited practice for a public employer or its designated representative willfully to:

> (1) interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;
>
> . . . .

(3) encourage or discourage membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by black listing;

(4) discharge or discriminate against any employee because he or she has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he or she has formed, joined or chosen to be represented by any employee organization;

(5) refuse to meet and confer in good faith with representatives of recognized employee organizations as required under K.S.A. 75-4327;

(6) deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328"

K.S.A. 75-4333(b).

Black's Law Dictionary, 5th ed., provides the following definitions for the word "willful":

> "An act or omission is `willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the intent to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.
>
> "Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."

The Kansas Supreme Court in the case of *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984) defined the term "willful act" present in the Kansas Wage Payment Act, K.S.A. 44-313 *et seq.*, as an act "indicating a design, purpose, or intent on the part of a person to do wrong or cause an injury to another."

6. At all times relevant to this proceeding, Employer and Petitioner did not have a Memorandum of Agreement and the unit members' terms and conditions of employment were governed by the September 1, 1997, revision of the University Faculty Handbook. Finding of Fact Number 4. The appropriate procedure for resolving Dr. Gaskill's grievance was the General Faculty Hearing and Appeal Procedure contained in the Faculty Handbook.

Pursuant to those provisions, Dr. Gaskill sought to have his grievance resolved by informally meeting and discussing the matter with the Dean and Chairman of his academic area. Finding of Fact Number 15. This informal discussion did not resolve the grievance. Finding of Fact Number 16. Dr. Gaskill then sought and discussed the matter with University President Dr. Edward Hammond. Finding of Fact Number 17. This also proved unsatisfactory to Dr. Gaskill. Finding of Fact Number 18.

As was his right under state law, K.S.A. 75-4324, Dr. Gaskill sought the assistance of his certified employee organization representative FHSU/AAUP. Finding of Fact Number 19. Petitioner FHSU/AAUP in turn set up a meeting to discuss Dr. Gaskill's grievance with University Provost Lawrence Gould. Finding of Fact Number 20. Dr. Gould, however, cancelled the meeting and referred the matter to University legal counsel. Finding of Fact Number 21.

Employer counsel advised Dr. Gaskill of his right to meet and discuss the matter with his Chairman and Dean, Finding of Fact Number 22, and of his right to be accompanied to such a meeting by a representative of Petitioner. Finding of Fact Number 23. However, counsel denied the unit representative's statutory right to represent its member in the administration of a grievance by restricting FHSU/AAUP's

role to that of an observer and advisor and advised Petitioner that it would not be allowed to speak on behalf of Dr. Gaskill. Finding of Fact Number 23. Seeking to assert its right to represent a member in a grievance, Petitioner's Vice President posed an inquiry to Employer's counsel regarding the restrictions placed upon it. Finding of Fact Number 24. Employer's counsel refused even to discuss the matter with Petitioner. Finding of Fact Number 25.

Based upon a careful review of the extensive record in this matter, it is the presiding officer's conclusion that these actions denied Petitioner its right to represent an individual member in a grievance and that these actions were willful, that is, they were done with an intent to do wrong or to cause harm to the bargaining unit. This conduct is a violation of K.S.A. 75-4333(b)(6) and constitutes a prohibited practice.

In its defense, Respondent asserts that its counsel's actions were mere attempts to inform the parties of the Faculty Handbook's provisions, not directives designed to thwart Petitioner in its role as representative. The presiding officer, however, finds Respondent's proffered explanation unconvincing. When viewed in the context of all of Respondent's other actions in this matter, Respondent's directive that Petitioner would not be allowed to speak on Gaskill's behalf was no mere attempt to inform about University policy. It constituted a denial of Petitioner's right to represent its member in a grievance proceeding. Moreover, Respondent is well aware that the rights granted by statutory enactment control where they conflict with university policy. The only reasonable inference to be drawn from the actions detailed in Findings of Fact Number 21, 23 and 25 is that Respondent willfully chose to deny or disregard Petitioner's statutory right to represent Dr. Gaskill in his grievance with Respondent.

Respondent also makes much of Dr. Gaskill's subsequent decision to retain counsel and other later actions and omissions. However, events that happened chronologically after those detailed above have little if any bearing on the question whether FHSU/AAUP was denied its right to represent bargaining unit member Dr. Gaskill in his grievance, since the events that occurred after FHSU/AAUP was denied the right to represent Dr. Gaskill followed predictably from that denial: the grievant perceived his union representative to be ineffective in representing him against the employer, so he sought the assistance of counsel. Not surprisingly, the employee organization representative was harmed as a result. Hence, such conduct of denying a duly certified or recognized employee organization representative its right to represent unit members in the administration of grievances is deemed by state law to be a "prohibited practice", our state's counterpart to an "unfair labor practice" under federal law.

7. Even had Dr. Gaskill elected to not initially use Petitioner to represent him in his grievance, as is a unit member's right under PEERA, *see* K.S.A. 75-4324 (providing that public employees have the right to refuse to participate in the activities of employee organizations), the Employer's refusal or failure to give Petitioner adequate, timely notice of scheduled grievance proceedings, even those in which it is not acting as the grievant's representative, constitutes a violation of K.S.A. 75-4333(b)(6). Even after Dr. Gaskill made the decision to retain the assistance of legal counsel, the bargaining unit representative had the right to be present whenever Gaskill's grievance was being heard or administered. The employee organization representative must be given notice and an

opportunity to attend any meeting at which Employer and an aggrieved unit member will attempt to address the grievance.

This right finds its origin in PEERA's mandate that "[a] public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in . . . the settlement of grievances". K.S.A. 75-4328. Even where an individual grievant does not choose to be represented in its grievance by the employee organization representative, it is nonetheless the employee organization's right to be present at the adjustment of the member's grievance in order that it exercise its right to "represent *the employees of the . . . unit*".

To deny Petitioner the right to be present for the adjustment of a member's grievance so that it may monitor such adjustment in the light of its other members' interests would be inconsistent with the express purposes[2] and plain language of the Act and would undermine the entire structure of the labor relations law. Were an employer allowed to settle grievances without the unit representative present, they could too easily favor anti-union or non-union employees, making it clear that the union is not needed and creating rivalry, suspicion and friction among employees.

Therefore, under the facts of this matter, the Employer committed a prohibited practice in violation of K.S.A. 75-4333(b)(6) when it refused, following Dr. Gaskill's retention of legal counsel, to invite or otherwise take affirmative steps to provide timely, adequate notice and reasonable opportunity for Petitioner to be present for same.

[2]K.S.A. 75-4321(b) provides that "it is the purpose of the [PEER] Act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment".

The justifications and explanations offered by Respondent in its defense at hearing, for example that it did not object to Petitioner's presence at any meetings attended by Gaskill and his counsel, that it encouraged Dr. Gaskill's counsel to invite and coordinate scheduling with Petitioner, and that it specifically asked Dr. Gaskill, upon commencement of proceedings at which Petitioner was not present whether he wished to reschedule same to allow Petitioner to attend, do not excuse Respondent from its failure to specifically provide timely notice and a reasonable opportunity for Petitioner to attend each of the grievance proceedings conducted following Gaskill's retention of legal counsel. This is especially so given that Respondent's prior acts of denying Petitioner's statutory right to represent Dr. Gaskill led to Gaskill's decision to retain counsel.

8. As noted above, at all times relevant to this proceeding, Employer and Petitioner did not have a Memorandum of Agreement and the unit members' terms and conditions of employment were governed by the September 1, 1997, revision of the University Faculty Handbook. Finding of Fact Number 4. The appropriate procedure for resolving Dr. Gaskill's grievance was the General Faculty Hearing and Appeal Procedure contained in the Faculty Handbook.

According to the plain language of the Faculty Handbook, it is the aggrieved faculty member who possesses the right to an informal attempt to resolve his grievance. Petitioner's Exhibit 3, pp. 23-24. Likewise, an aggrieved faculty member possesses the right to a formal hearing for the redress of his grievance. *Id.* According to the Faculty Handbook, redress of a grievance through this formal hearing proceeding is commenced by delivering a signed written request for a formal hearing to the appropriate department

chairperson, with a copy to the appropriate dean, within 60 days of written notification of the facts constituting the grievance. Petitioner's Exhibit 3, p. 24.

Following unsuccessful attempts to informally resolve his grievance, and after it had become apparent that Respondent refused to allow Petitioner to represent him, grievant and unit member Dr. Frank Gaskill made the decision to utilize the formal hearing process. Finding of Fact Number 26. He then complied with all the terms of the formal hearing request procedure, *id.*, and yet, at the direction of its legal counsel, an attorney well-versed in the state's labor relations laws, the University refused to allow Dr. Gaskill to proceed to the formal hearing process, instead insisting that the informal process was the appropriate venue for the dispute. Findings of Fact Number 35-36. The informal process resulted in a decision, presumably subject to appeal through Respondent's formal hearing process, by approximately mid-September, 2001 nearly a month after the fall academic semester had begun. Finding of Fact Number 49.

Respondent's assertions that first Petitioner's Bannister and then later Gaskill's legal counsel consented to the informal process are not persuasive in the face of the written and other evidence to the contrary. *See, e.g.*, Petitioner's Exhibit 14 (Dr. Gaskill's May 9, 2001 letter to Dr. Heian, Chairman of the Business Administration Department, requesting a formal hearing); Petitioner's Exhibit 15 (Dr. Gaskill's May 10, 2001 letter to University Affairs Committee Chairman Dr. Martin Shapiro requesting a formal hearing); Petitioner's Exhibit 18 (Anderson's May 16, 2001 letter to Respondent's counsel indicating Gaskill's disagreement with Respondent counsel's assertion that informal process is appropriate and requesting clarification of the status of Gaskill's written request for a formal hearing, in accordance with Respondent's policies);

Petitioner's Exhibit 20 (Dr. Gaskill's May 21, 2001 email to Dr. Heian, Dr. Peters, Respondent's counsel Christiansen, Provost Gould and President Hammond, among others, protesting Respondent's failure to initiate a formal hearing at the Department level and requesting that a formal hearing be commenced at the University level); Petitioner's Exhibit 6 (five emails from FHSU/AAUP Vice President Dr. Richard Hughen to Dr. Heian asking about the status of Dr. Gaskill's request for a formal appeal hearing); Petitioner's Exhibit 24 (FHSU/AAUP Vice President Dr. Richard Hughen's May 23, 2001 email to Respondent's counsel Christiansen asserting its right to represent Dr. Gaskill in a formal hearing requested by Gaskill on May 10, 2001); Tr., p. 67 (Dr. Hughen's testimony that FHSU/AAUP did not waive Dr. Gaskill's right to a formal hearing); Tr., pp. 420-421 (Gene Anderson's testimony that he did not waive Dr. Gaskill's right to a formal hearing).

Based upon the entirety of the record, and having resolved all conflicting testimony by reference to the witnesses' credibility and demeanor under oath, it is the presiding officer's determination and conclusion that Respondent willfully refused to allow Dr. Gaskill to proceed to the formal hearing process. By refusing to allow Gaskill's grievance to proceed to the formal stage, as was his right under applicable terms and conditions of his employment, Respondent unilaterally changed this term and condition of Gaskill's employment without first meeting and conferring with the certified employee organization representative. This action constitutes a prohibited practice in violation of K.S.A. 75-4333(b)(5). Pursuant to K.S.A. 75-4323(e)(1), Employer is directed to post a notice specifically advising all employees in the bargaining unit that it shall not unilaterally change terms and conditions of employment applicable to members

of the unit without first meeting and conferring in good faith over said terms and conditions.

9. K.S.A. 75-4333(b)(1) provides that it is a "prohibited practice for a public employer or its designated representative willfully to interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324. K.S.A. 75-4324 provides that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." In a "comprehensive article examining the nature and operation of PEERA", *State v. Public Employees Relations Bd.*, 894 P.2d 777, 782, 257 Kan. 275 (1995), its author, Raymond Goetz, observed that "[a]ny conduct which would violate [K.S.A. 75-4333(b)] (2) through (8) would also violate [K.S.A. 75-4333(b)] (1)." Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 264 (1980). The presiding officer concludes that Respondent's violations of K.S.A. 75-4333(b)(5) and (6), detailed above at Conclusions of Law Number 6, 7 and 8, also constitute a violation of K.S.A. 75-4333(b)(1).

10. Petitioner requests that PERB find Respondent in violation of certain of PEERA's prohibited practice provisions, order that Respondent cease and desist these violations, post this order, reinstate Dr. Gaskill to the *status quo ante* that existed prior to its violations of his terms and conditions of employment, make Dr. Gaskill whole for the losses he has suffered as a result of their illegal conduct, and make Petitioner whole for the loss of funds spent in this administrative proceeding to secure enforcement of its rights under the law. Petitioner's Proposed Findings of Fact and Conclusions of Law,

dated August 7, 2003, pp. 21, 23; Complaint Against Employer, Case No. 75-CAE-12-2001, filed June 25, 2001. Petitioner asserts that:

> "[a] monetary award is the only appropriate means to convince the University that it must abide by the law . The University is obviously not persuaded by the clear requirements of the PEERA. Instead of attempting to resolve the disputes in the summer of 2001 with the AAUP, the University chose to disregard the AAUP. Accordingly, PERB should exercise its powers as to effectuate the purpose and provisions of PEERA by awarding Dr. Gaskill a monetary award in the amount of $142,013.62 to compensate him for the severe economic harm that he suffered."

Petitioner's Proposed Findings of Fact and Conclusions of Law, pp. 22-23, dated August 7, 2003.

Employer responds that the PERB is without authority to grant the monetary relief requested by Petitioner. *See* Respondent's Proposed Finding of Fact and Conclusions of Law, filed September 12, 2003, pp. 18-19. Respondent's position is not supported by Kansas law.

PEERA mandates that the PERB is to make appropriate findings to remedy and prevent public employers from engaging in prohibited practices. K.S.A. 75-4334(b); K.S.A. 75-4321(b). PEERA grants the Board authority to "[e]stablish procedures for the prevention of [prohibited practices]", and to "[h]old such hearings and make such inquiries as it considers necessary to carry out properly its functions and powers". K.S.A. 75-4323. PEERA also authorizes the Board to "exercise such other powers as appropriate to effectuate the purposes and provisions of this act." K.S.A. 75-4323(e)(3).

Although the presiding officer is unaware of any Kansas case law that squarely answers the question whether it is within the Board's authority to order a monetary or so-called "make whole" remedy, it is clear that the Board has exercised such authority. In point

of fact, in the very first prohibited practice complaint filed with the Board in 1973, the Board found that the Employer had committed prohibited practices and ordered "that full restitution of pay be made to the three public employees suspended [in violation of K.S.A. 75-4333(b)(1) and (3)]." *See* Findings of Fact and Conclusions of Law—Order, Case Number CAE-1-1973, Service Employees International Union, AFL-CIO v. Board of Ellis County Commissioners, p. 10, issued March 2, 1973. In addition, a 1979 Kansas Supreme Court decision involved a PERB decision which had found Respondent City of Wichita to have violated K.S.A. 75-4333(b)(4) and ordered reinstatement of complainant to her job, but without back pay. *See* Behrmann v. Public Employees Relations Board, 225 Kan. 435, 436 (1979). Complainant Behrmann filed a petition for judicial review alleging that the Board's order was arbitrary, capricious and unreasonable and sought modification to include back wages and other benefits. In an interlocutory appeal, the Court reversed the district court's ruling that K.S.A. 75-4334(b) was unconstitutional and remanded the matter for further proceedings, but the question whether denial of back wages was unreasonable was not addressed. *Id.*, pp. 436, 444. The implication is clear, however, that the Board believed it possessed the authority to order back pay, but exercised discretion by not doing so.

Respondent's argument that the Board is without statutory authority to grant the monetary relief requested by Petitioner is similar to an argument made with regard to the authority of the Secretary of the Kansas Department of Human Resources to remedy prohibited practices in teachers' union/school district disputes in *Unified School District No. 279, Jewell County v. Secretary of Kansas Department of Human Resources*, 247 Kan. 519 (1990). In rejecting this argument, the Kansas Supreme Court held:

> "We do not believe the legislature purposefully defined certain acts of prohibited practice, provided procedures to file a complaint of such acts, and granted the Secretary authority to determine whether or not the complained-of action constituted a prohibited practice without also granting the Secretary authority to remedy an infraction."

Id., at 532. Kansas law requires that the Board reject this Respondent's argument also. The Board possesses the authority to grant monetary relief if it concludes that same is an appropriate means "to effectuate the purposes and provisions of the [Public Employer-Employee Relations] Act".

Given the familiarity of this tribunal with the extensive history of labor strife in recent years on Respondent's campus, and given the facts of record in this matter, it is reasonable to infer that an anti-union animus factored into the events leading to this complaint. Accordingly, the remedy requested by the Petitioner, with the exceptions discussed below, is deemed appropriate to the facts of this case. Respondent is ordered to make Dr. Gaskill whole for $142,013.62 in losses sustained as a result of the Respondent's unlawful conduct, that of denying Petitioner its right to represent its members in grievances.

It should be noted that the presiding officer does not reach this conclusion lightly. This tribunal understands from experience that following the changeover from a non-PEERA environment to one in which employees have become organized, have elected a representative and have begun the meet and confer process, there is typically a "learning curve" and a transitional period during which the parties try on their new roles, gaining familiarity with their new relationship and with new statutory requirements and limitations. During this transitional period it is not unusual that one or another of the parties may stumble, violating the Act through unfamiliarity with its provisions or by an

isolated instance of poor judgment. Oftentimes it is common for one or both of the parties to seek assistance, first possibly through consultation with legal counsel and perhaps ultimately from this tribunal by filing complaints, presenting evidence and obtaining guidance or relief in the form of an order such as this one.

Parties from FHSU are not unfamiliar with this process, having constituted nearly half of PERB's docket for much of the past three years. Were there any plausible explanation, under the circumstances of this matter, that would account for the University's failure to have met and conferred with Petitioner, which did not involve violations of PEERA, the presiding officer would welcome it, for it is with great hesitation that the presiding officer directs Respondent to make Petitioner's member whole for his loss of employment income through the current semester. The presiding officer is mindful of the legislature's admonition that the Board intervene in public employer-employee relations "to the minimum extent possible to secure the objectives" of the Act. K.S.A. 75-4323(f).

However, given that Respondent failed willfully to do that which the law plainly requires, by refusing numerous and repeated requests to meet and confer with Petitioner regarding its member's grievance and given that the presiding officer is unable to ascertain a likely outcome had Respondent observed this requirement, he is left with little reasonable alternative but to order that Petitioner's member be made whole for loss of employment income that resulted from Respondent's illegal actions. The presiding officer does not know with any certainty, much less with the degree of certainty needed as the basis for findings and conclusions under the law, what result would have obtained with regard to this dispute had Respondent honored its statutory obligation to meet and

confer with Petitioner with respect to the administration of Dr. Gaskill's grievance. It may be that the parties would have resolved the grievance in a manner resulting in Dr. Gaskill simply agreeing to abide by the University's decision and leave. It may be that the parties would have resolved the grievance by the Employer's payment to Dr. Gaskill of some modest monetary settlement in conjunction with his leaving the University. It may be that the parties would have resolved the grievance with an agreement to extend a terminal contract to Dr. Gaskill for academic year 2001-2002, at which point he would have left. It may be that they would have resolved the grievance with an agreement to simply continue Dr. Gaskill's employment under the same terms as their original employment agreement. However, given that the FHSU/AAUP was denied its statutory right to represent Dr. Gaskill in his grievance with Respondent, we will never know the outcome of that representation, had it been allowed to occur.

Thus, the presiding officer cannot speculate as to the outcome had Petitioner represented Dr. Gaskill in his grievance. To do so, that is to speculate for example that had the parties met and conferred they would have resolved Gaskill's grievance by agreeing to extend to him a terminal contract, and to award a make-whole remedy based upon that hypothetical outcome, would be to give the Employer the benefit of having performed obligations mandated by state law, yet which it willfully failed to undertake. In view that the Employer refused to honor its statutory obligation to meet and confer with Petitioner regarding a unit member's grievance, the only truly effective means for this tribunal "to effectuate the purposes and provisions" of the legislative policy reflected in PEERA is to make the parties whole for losses suffered as a result of Respondent's refusal. In view that Dr. Gaskill no longer lives in Hays, Kansas, and in view of the

acrimonious dissolution of their employment relationship, it would make little sense, however, to order that he be reinstated to his former position. A make-whole remedy limited to recovery of income lost and reimbursement of other expenses incurred, seems most appropriate under the circumstances and will serve to effectuate the purposes and provisions of PEERA with regard to Employer's recognition and assumption of its statutory duties and obligations.

As noted above, Petitioner requests that it be awarded attorney fees. Petitioner's Proposed Findings of Fact and Conclusions of Law, p. 24, dated August 7, 2003. Given the record in this matter, Petitioner's request seems well-justified and one which the presiding officer is inclined to believe would merit further consideration.

However, under the so-called "American Rule," it is well-established practice in this country for parties to a lawsuit to bear their own legal expenses. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). There are few exceptions to this rule, and in nearly every exception legislation must provide express statutory authorization before a successful litigant may recover attorney's fees from its opponent. *Id.*, p. 247 n. 18. Kansas has long followed the American Rule. *State v. Hunziker*, 56 P.3d 202 (Kan. 2002).

The Board recognizes that Petitioner will not truly be "made-whole" in this matter without being reimbursed by Respondent for attorney fees expended securing Petitioner's statutory right to represent members in grievance proceedings. However, the allowance of attorney's fees is a matter of public policy reserved to the Legislature. *DiSpiegelaere v. Killon*, 947 P.2d 1039, 1046 (Kan. App. 1997). And while the Legislature has granted the Board authority to "exercise such other powers, as appropriate, to effectuate the

purposes and provisions of th[e] [A]ct", the wording of this grant of authority is not specific enough to authorize an award of attorney fees such as those incurred by this Petitioner in enforcing its statutory right to represent members in grievance proceedings.[3] Therefore, in view that the Board lacks express statutory authority to award the attorney's fees herein sought, Petitioner's request for same is denied.

THEREFORE, it is hereby ordered that Respondent do the following:

1) Cease and desist from the aforesaid violations of the PEERA;

2) Post a notice specifically advising all employees in the bargaining unit that the employer shall not deny petitioner its right, granted by PEERA, to represent members of the bargaining unit in grievances with the Employer;

3) Post a notice specifically advising all employees in the bargaining unit that the employer shall not unilaterally change terms and conditions of employment applicable to members of the unit without first meeting and conferring in good faith over said terms and conditions;

4) Post a notice specifically advising all employees in the bargaining unit that the employer will no longer interfere with, restrain or coerce public employees in the exercise of rights granted by the Act, and;

5) Make Dr. Frank Gaskill whole for $142,013.62 in losses sustained as a result of the Respondent's unlawful conduct.

[3] The presiding officer recognizes that one of the primary purposes of the American rule is to avoid penalizing the losing party merely because the party chose to defend or prosecute a lawsuit. *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 102 S.Ct. 2112, 2116 (1982). Consistent with this policy, an exception to the American rule cannot be justified solely on the ground that a losing defendant's wrongful conduct forced the plaintiff to resort to litigation. *Id.* However, some courts have ruled that where the attorney fees represent the complainant's damages, they should be treated as an exception to the American Rule and not as attorney's fees *per se*. An example is where an individual union member is forced to retain an attorney for representation in an employer grievance following the union's refusal of its duty of fair representation. See *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (C.A. Cal. 1983).

IT IS SO ORDERED.

DATED, this 31st day of March, 2004.

Douglas A. Hager, Presiding Officer
Office of Labor Relations
1430 SW Topeka Blvd. - 3rd Flr.
Topeka, KS 66612-1853

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. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on April 19th, 2004, addressed to: Public Employee Relations Board & Labor Relations, 1430 SW Topeka Blvd., Topeka, Kansas 66612-1853.

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager, Office of Labor Relations, Kansas Department of Human Resources, hereby certify that on the 1st day of April, 2004, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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