BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of Fire Fighters (IAFF) Local 135 Petitioner vs. City of Wichita, KS , Fire Department, Respondent.	)	Case No. 75-CAE-12-2006

INITIAL ORDER

NOW on this 27th day of August, 2007, the above-captioned Prohibited Practice complaint comes on for decision pursuant to K.S.A. 72-5430 and K.S.A. 77-514(a) before Presiding Officer Douglas A. Hager.

APPEARANCES

Petitioner International Association of Fire Fighters, Local 135, appears by their attorney, Ms. Joni J. Franklin, Franklin Law Office, Wichita, Kansas. Also in attendance from Local 135 were Mr. Douglas E. Pickard, President, Mr. Tim Carr, Secretary/Treasurer, and Mr. Ron Minton, Recording Secretary. Respondent City of Wichita, Kansas, Fire Department, appears by their attorney, Mr. Carl A. Gallagher, McAnany, Van Cleave & Phillips, Kansas City, Kansas. Also in attendance on Respondent's behalf were Mr. Phil Murphy, City of Wichita, and Deputy Fire Chief, Michael L. Rudd.

PROCEEDINGS

On March 20, 2006, the International Association of Fire Fighters, Local 135, (hereinafter "IAFF" or "Petitioner"), filed a prohibited practice complaint against the City of Wichita, Kansas Fire Department (hereinafter "Respondent", or "City"), with the Kansas Department of Labor's Office of Labor Relations. *See* "Complaint Against Employer", filed March 20, 2006. The complaint alleged that the Respondent committed prohibited practices against the Petitioner within the meaning of the Kansas Public Employer-Employee Relations Act, (hereinafter "PEERA" or the "Act"), at K.S.A. 75-4333(b) (1), (2), (4), (5) and (6).

As the basis for the prohibited practice, the complaint alleged that:

> "[o]n or about October 21, 2005, the Union sent a memo to Chief ML Rudd regarding an issue . . . . Specifically, an issue regarding the payment of 12 additional holiday pay hours to a 40 hour per week employee/bargaining unit member (this is not allowed under the memorandum of agreement, in that only 24 hour employees are suppose to receive this additional 12 hours of pay) . . . This payment practice of time off work and the additional 12 hours of holiday pay was limited ONLY to unit member, Captain Aaron . . . Therefore the Union informed the City that such a practice was tantamount to negotiating terms of the contract, such as holiday pay, with certain members of the bargaining unit, Captain Aaron, without the participation and/or consent of the Local and its membership. The City's behavior as described above has resulted in the employer repudiating the certification of representation of the employees, has unilaterally changed the terms of employment for the employees, and has interfered with, restrained, and attempted to coerce the affected employee in the exercise of their rights granted under K.S.A. 75-4324."

Complaint Against Employer, filed March 20, 2006. The IAFF requests that this agency determine that a prohibited practice has been committed, apply the formula for double holiday pay to all unit members in the fashion it was negotiated and paid to Captain Aaron . . . This would mean that both 24 hour and 40 hour employees require a remedy to be made whole, and to be paid in a fashion equal to that of which Captain Aaron was paid." *Id.*

Respondent filed its Answer, with this office on April 12, 2006. See Respondent's Answer, filed on April 12, 2006. Said Response denied that the City engaged in prohibited practices within the meaning of K.S.A. 75-4333(a), (b) (1), (2), (4), (5) and (6), of the Kansas Public Employer Employee Relations Act, (PEERA). Respondent argued that in 2001, the IAFF had approved of the holiday pay plan for Captain Aaron when he was placed on a special assignment. In 2005, when the IAFF informed the City that it objected to the pay plan for Captain Aaron as not being consistent with the Memorandum of Agreement, the City ceased the holiday pay provisions that the IAFF objected to. *Id.*

Respondent asserted waiver by the IAFF as a result of the IAFF's original concurrence and later objection, and denied any unilateral change to the terms of employment, repudiation of certification, "or in any way affect the employee's right to form, join, or participate in an employee organization." *Id.* Respondent also denied discrimination against any employee because they had joined or chosen to be represented by petitioner organization, in violation of K.S.A. 75-333(b)(4). Respondent further asserted that they had not "refused to meet and confer in good faith, as contemplated by K.S.A. 75-4327(b)(5)." *Id.*

Consistent with this position, Respondent asked the Board to find that the City had not committed a prohibited practice and requested that the complaint be dismissed.

This matter came on for hearing on September 14, 2006. A certified transcript of the hearing was prepared, and the parties had the opportunity to submit both pre- and post-hearing legal arguments. This matter is now fully submitted and the Presiding Officer issues this, his initial order.

ISSUE OF LAW

The legal question presented for determination in this matter can be summarized as follows:

"Did Respondent's holiday pay arrangement with Captain Aaron constitute a prohibited practice as contemplated by Kansas law?" This order will address other issues as necessary.

FINDINGS OF FACT

The following stipulations are jointly presented to the presiding officer and are accepted as stipulated facts. The presiding officer further finds that said stipulated facts are independently supported by the record:

1. Petitioner filed the prohibited practice charge at issue which was received by PERB on March 20, 2006.

2. Captain Ron Aaron is, and has been at all relevant times, a member of the bargaining unit.

3. Prior to June 1, 2001, Captain Aaron worked 24 hour shifts.

4. On or about June 1, 2001, Captain Aaron began to work a 40 hour work week in order to coordinate a study on emergency medical services to be provided in the City of Wichita and Sedgwick County.

5. Under the Memorandum of Agreement in effect at all relevant times, bargaining unit members assigned to 40 hour shifts receive pay for holidays. If the 40 hour a week bargaining unit member is also required to work on a holiday, that member also was paid time and one-half for the hours worked, over and above the holiday pay. Article 19, § C.1.

6. Under the memorandum of Agreement in effect at all relevant times, bargaining unit members assigned to 24 hour on, 48 hour off shifts, receive 12 hours of holiday pay, over and above their pay for hours actually worked, whether or not the members actually worked the holiday.

7. Captain Aaron testified in his deposition that the 40 hour week assignment would cost him money because he would not receive the holiday pay that he had received on the 24 hour shift.

8. Respondent agreed to pay Captain Aaron holiday pay as if he were working a 24 hour shift, though Captain Aaron was working a 40 hour week beginning in June 2001, in addition to receiving the holiday off with pay so that Captain Aaron would accept the assignment. Captain Aaron was the only bargaining unit member to receive holiday pay on both the 24 hour shift [basis] and 40 hour shift basis.

9. On or about October 28, 2005, the Respondent received Petitioner's grievance, as permitted under the memorandum of Agreement, concerning Captain Aaron's receipt of holiday pay as if he were a 24 hour shift employee.

10. Upon receipt of the grievance, Respondent ceased paying Captain Aaron holiday pay as if he worked a 24 hour shift.

11. Under the terms of the Memorandum of Agreement, when the Petitioner filed this Charge with PERB, the grievance procedure is held in abeyance. Article 5, §B.

The presiding officer makes the following additional findings of fact:

12. The International Association of Firefighters, (IAFF), is a professional employees' organization that has been duly recognized pursuant to the Public Employer Employee Relations

Act, (PEERA), K.S.A. 72-5413 *et seq.*, as the exclusive bargaining representative of the firefighters of the City of Wichita for the purpose of negotiating unit members' terms and conditions of employment.

13. The petitioner and the respondent entered into a collective bargaining agreement titled *Memorandum of Agreement by and Between the City of Wichita, Kansas and the Local #135 International Association of Firefighters - Wichita, Kansas,* effective from December 20, 2003. (Petitioner's Exhibit 1).

14. The IAFF, Local 135 President in 2000 through October of 2001 was Andy Cole.

15. Chief Rudd was told by Captain Aaron that he, Captain Aaron, had spoken with Andy Cole, IAFF Local 135 President, about the holiday pay, and that Captain Cole agreed that Captain Aaron should not lose any pay.

16. During the time that Andy Cole was President of IAFF, Local 135, he tended to handle some matters informally.

17. Although Andy Cole does not recall discussing the holiday pay issue with Captain Aaron he did state that he does not think that the payment arrangement with Captain Aaron was something that needed to be brought to has attention as President of the Union.

18. At the time Chief Rudd approved the holiday pay schedule for Captain Aaron, he was under the impression that Andy Cole, then-President of the IAFF, had approved of the arrangement.

CONCLUSIONS OF LAW/DISCUSSION

The controlling facts of this case are not seriously disputed. Captain Aaron accepted a special assignment to benefit not only the City of Wichita, but ultimately the firefighters as well. Because of the duties of this assignment, Captain Aaron was required to change his working

schedule from that of a "24-hour employee" to that of a "40-hour employee". This change would have resulted in a reduction of his holiday pay. An arrangement was made regarding Captain Aaron's holiday pay that allowed him to continue receiving the holiday pay he was accustomed to as a 24-hour employee, but that those on a 40-hour employee schedule were not entitled to under the Memorandum of Agreement in effect. At the time the special arrangements for Captain Aaron were entered into, the employer was of the understanding that this arrangement had been discussed with the union president, and there was no objection to the arrangement. Subsequently a new union administration was elected into office. When the new administration learned of Captain Aaron's arrangement, they notified the employer that they were of the opinion that a violation of PEERA had occurred. The employer in turn discontinued the special holiday pay arrangement with Captain Aaron. These proceedings followed.

In 1972, the Kansas legislature enacted the Public Employer-Employee Relations Act (PEERA). PEERA, codified at K.S.A. 75-4321 *et seq.,* is the statutory framework governing public employer-employee labor relations in Kansas, generally.

The Act gives public employees the right to voluntarily form, join, and participate in activities of employee organizations for the purpose of meeting and conferring with public employers regarding grievances and conditions of employment. *See* K.S.A. 75-4324.

The duties and obligations of parties to a PEERA labor relationship are persuasively summarized by the Kansas Supreme Court in *Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association and Public Employee Relations Board.* 233 Kan. 801, 667 P.2d 306 (1983):

> "The Act, as provided in K.S.A. 75-4321(b), imposes upon public employers and recognized public employee organizations the obligation 'to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment.' . . . Professor Raymond Goetz, in his most informative analysis of the Act, *The Kansas Public Employer-Employee Relations Law,* 28 Kan.L.Rev. 243, 282-87 (1980), describes both types of proceedings and concludes that 'the Act in substance provides a "hybrid" combining some characteristics of pure meet and confer with other characteristics of collective bargaining.' We agree."

KBOR v. PSU/KNEA, 233 Kan 801, 804. The Court's explanation continued:

> "'Meet and confer' acts basically give the public employee organizations the right to make unilateral recommendations to the employer, but give the employer a free hand in making the ultimate decision recommending such proposals. The Kansas Public Employer-Employee Relations Act, on the other hand, imposes mandatory obligations upon the public employer and the representatives of public employee organizations not only to meet and confer, but to enter into discussions in good faith *with an affirmative willingness to resolve grievances and disputes* and to promote the improvement of employer-employee relations. (citations omitted). 'Meet and confer in good faith' is defined in K.S.A. 75-4322(m) as follows:
>
> > ' "Meet and confer in good faith" is the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals *to endeavor to reach agreement on conditions of employment.*'
>
> We conclude that the Act is not a strict 'meet and confer' act nor is it a 'collective negotiations' act, but as Professor Goetz has stated, it is a hybrid containing some characteristics of each. However it be designated, the important thing is that the Act imposes upon both employer and employee representatives the obligation *to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes,* and to promote the improvement of public employer-employee relations."

KBOR v. PSU/KNEA, 233 Kan 801, 804-805 (emphasis in original). Approximately 12 years later, the Court had the opportunity to revisit *Pittsburg State* in *State, Department of Administration v. Public Employee Relations Board,* 257 Kan 275; 894 P2d 777 (1995), and reaffirmed the legislative intent of PEERA:

> "Although PEERA has been in effect nearly 23 years, it has been the subject of few appellate court opinions and relatively little legislative revision. Fundamental questions concerning the nature of PEERA and the position it occupies in the scheme of public employer-employee relations in Kansas remain clouded. We have recognized that PEERA has a unique nature as a 'hybrid' labor relations act, falling somewhere between a pure 'meet and confer' act and a classic 'collective bargaining' act. *See* Pittsburg State, 233 Kan. 801, 667 P.2d 306, Syl. ¶ 1.
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> . . . .
>
> Legislation was introduced in 1976 and 1985 which attempted to alter the 'hybrid' nature of PEERA and turn it into a pure 'meet and confer' law. The proposed legislation would have specifically amended provisions to make clear that nothing in a memorandum of agreement could vary, contradict, or take precedence over a civil service regulation. The proposed legislation has not been adopted.
>
> Since 1983, Pittsburg State has furnished explicit authority that PEERA is a hybrid act, resembling both a "meet and confer" law and a "collective bargaining" law. The legislature has had opportunities to pursue the recommendations of the special interim committees appointed in 1976 and 1985, and it has declined to do so."

DOA v. PERB, 257 Kan. 275, 282-284. The Court in DOA went further and stressed that the law does not require the parties to reach agreement, but just try in good faith to reach an agreement;

> "PEERA imposes no obligation on the employer to agree to the employees' demands. However, PEERA *prevents* public employers that come under its provisions from simply acting unilaterally in determining conditions of employment. Although the governing body of the public employer ultimately can dictate any mandatory subject of bargaining, it can do so *only* after the public employer has negotiated in good faith, reached impasse in good faith, and participated in impasse-resolution procedures such as fact-finding and mediation. *See* K.S.A. 75-4332.
>
> . . . .
>
> The employer has no obligation to agree. The employer must, however, 'endeavor to reach agreement.' K.S.A. 75-4322(m). The failure of a public employer to meet and confer in good faith is a prohibited practice under K.S.A. 75-4333(b)(5)."

Id., at 287-288.

The weight of evidence indicates that representatives of the Union and City did not sit down together and discuss or negotiate Captain Aaron's pay. If that were all that was required to

determine whether the City had committed a prohibited practice under PEREA, this decision would be summary in nature. Something more is indeed required.

The statute that Petitioner charges Respondents with violating, K.S.A. 75-4333(b), states in part:

> **75-4333. Prohibited practices; evidence of bad faith.**
> (a) The commission of any prohibited practice, as defined in this section, among other actions, **shall constitute evidence of bad faith** in meet and confer proceedings.
> (b) It shall be 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;
> (2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization;
> (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 blacklisting;
> (4) Discharge or discriminate against an 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 in K.S.A. 75-4327;
> (6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328;
> (7) Deliberately and intentionally avoid mediation, fact-finding, and arbitration endeavors as provided in K.S.A. 75-4332; or
> (8) Institute or attempt to institute a lockout. *(Emphasis added).*

Thus, construction of the term "willfully" becomes key to the resolution of this dispute. "Willfully" has many meanings ranging from simply intentional to intending to do wrong or cause injury. *See* Initial Order on Remand, PSU/KNEA v. KBOR/PSU, 75-CAE-23-1998, pp. 13-21. The common thread to these definitions however is that the act was intended. For PERB to conclude, for example, that a K.S.A. 75-4333(b)(5) prohibited practice was committed in this matter, it must be found that by taking the action that he did, Chief Rudd intended to unilaterally

change the terms of a mandatory topic of meet and confer, circumventing the Act's requirements that the parties meet and confer in good faith.

Certain phraseology inherent to the *Pittsburg State* decision is illustrative of the purposes of the Act, that the parties to a meet and confer relationship must: "enter into discussions with affirmative willingness to resolve grievances and disputes"; enter into discussions in good faith *with an affirmative willingness to resolve grievances and disputes*; *endeavor to reach agreement on conditions of employment.*"; *meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes.* This question must be answered, if there is no apparent dispute regarding terms and conditions of employment, to what degree of formalities must the parties adhere to ensure compliance with the law's mandates. Apparently, when Captain Cole held the position of chief union negotiator, things were far less formal than under the present union leadership. We are concerned with "then", however, rather than "now".

Under the facts of this case, the City, acting through Chief Rudd, was of the belief that the issue of Captain Aaron's special holiday pay arrangements had been brought to the Union's attention. Captain Cole, as the union's president, was believed to be "okay" with it. If Chief Rudd was under the impression that the Union had given its okay, it can hardly be said that the City "intentionally" attempted to avoid the requirements of PEERA or the memorandum of understanding. There is no evidence, compelling or otherwise, to discredit Chief Rudd's testimony that he relied on Captain Aaron's representation that the Union was okay with the special pay arrangement. The only question is whether this was a reasonable reliance under the facts of these proceedings.

At the time in question, Captain Andy Cole was the President of the IAFF, and the unit's bargaining representative. The facts of this case support the contention that negotiations between

the IAFF and the City were pretty informal. Although offered with the benefit of hindsight, Captain Cole does not remember discussing the pay arrangement with Captain Aaron, but does not see why it would have been necessary to discuss this issue at the time. The current leadership of the IAFF indicate that several examples have come to light of what they perceive to be questionable arrangements. In addition, Chief Rudd testified that he had known Captain Aaron for over twenty years and knew of no reason to question Captain Aaron's representations. The evidence clearly and convincingly establishes that at the time in question, Chief Rudd's reliance on Captain Aaron's representation that the Union was okay with the special holiday pay arrangement was a reasonable reliance. When these facts are combined with the fact that the City ceased the special pay arrangements with Captain Aaron when the current union leadership voiced its concerns about them tend to buttress the conclusion that the facts do not support a finding of "willfulness".

The Union, too, must accept some responsibility for the present situation. At the critical point in time, Andy Cole as the president of the Union, had the authority to bargain on behalf of the Union and its membership. The Petitioner has failed to overcome the fact that during this time negotiations apparently were handled in a pretty informal manner. It is apparent through the testimony that the current president, Mr. Pickard, does not agree with how the Union was run by Mr. Cole. This does not mean, however, that Mr. Cole could not bind the Union during his tenure as its chief spokesman.

Chief Rudd at least impliedly would not have approved the pay arrangement were it not for the Union's apparent approval. Otherwise there would have been little if any need for Captain Aaron to bring up the issue. Andy Cole was the union's bargaining representative. The City was under the impression that Andy Cole was aware of the arrangement and approved it.

This is not "intentional" or willful unilateral action. While this may not have been the *best* practice, the City's reliance on the representations of Captain Aaron, it does not equate to a *prohibited* practice, particularly in light of what were apparently pretty informal relations between the IAFF and the City Fire Department at the time.

Because a finding of willfulness is necessary to sustain each and every of Petitioner's several complaints, the evidence fails to support the conclusion that the Employer's action in any way constituted violations of the Act.

Petitioner's arguments fail to persuade that the record sustains the prohibited practices alleged.

IT IS THEREFORE DETERMINED that the actions of Respondent, City of Wichita, Kansas Fire Department did not constitute prohibited practices.

IT IS THEREFORE ORDERED that the prohibited practice complaint against Respondent be dismissed.

IT IS SO ORDERED.

Dated this 27th day of August, 2007.

Douglas A. Hager, Presiding Officer
Public Employee Relations Board
427 SW Topeka Blvd.
Topeka, Kansas 66612
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NOTICE OF RIGHT TO REVIEW

This Initial Order on Remand is your official notice of the presiding officer's decision in this case. This 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 review of this order will expire eighteen (18) 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., September 17th, 2007, addressed to: Public Employee Relations Board & Office of Labor Relations, 427 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

CERTIFICATE OF MAILING

I, Loyce Oliver McKnight, Administrative Officer, for the Office of Labor Relations of the Kansas Department of Labor, hereby certify that on the August 28th day of , 2007, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action through their attorneys of record 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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Loyce Oliver McKnight
Loyce Oliver McKnight, Administrative Officer

And to the members of the PERB on 7th, September, 2007.

Sharon L. Tunstall
Sharon L. Tunstall, Office Manager