BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD OF THE STATE OF KANSAS

Fraternal Order of Police Lodge No. 40,	)	
Petitioner/Complainant,	)	
v.	)	Case Nos. 75-CAE-3-2006 and 75-CAE 10-2006
Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department,	)	
Respondent/Employer.	)	

FINAL ORDER

NOW ON THIS 18th day of November 2009, this case comes regularly before the Public Employee Relations Board (Board) on respondent/employer Unified Government of Wyandotte County/Kansas City Kansas and Wyandotte County Sheriff's Department (Unified Government) request to review the Presiding Officer's initial order. Present are all current board members Ken Gorman, Chairperson; Sally O'Grady; Wayne Maichel; Dr. Burdett Loomis; and Keith Lawing.

Petitioner Fraternal Order of Police Lodge No. 40 (FOP 40) appeared by and through Steve A.J. Bukaty, Steve A.J. Bukaty, Chartered; and the Unified Government appeared by and through Ryan B. Denk, McAnany, Van Cleave & Phillips, P.A. During the June 23, 2009 argument before the Board, Gregory P. Goheen, McAnany, Van Cleave & Phillips, P.A, appeared on behalf of the Unified Government.

The Board's jurisdiction is set forth in the Kansas Public Employer-Employee Relations Act K.S.A. 75-4321 et seq. (PEERA); the Kansas Administrative Procedures

Act, K.S.A. 77-501 et seq., as amended by L. 2009, ch. 109, sec. 2 – 22 (KAPA); and the Board's regulations found at K.A.R 84-1-1 et seq. and K.A.R. 84-2-1 et seq.

K.S.A. 77-527(d) sets out the following standard applicable to the Board's review of the initial order.

> Subject to K.S.A. 77-621, and amendments thereto, in reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.

See K.A.R. 84-2-2(i).

While the Board possesses the authority to review the record, as if it heard the case in the first instance, the Board can adopt all or part of the presiding officer's findings of fact. K.S.A. 77-527(h) requires the Board to "state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion."

PROCEDURAL BACKGROUND

The Presiding Officer issued the *Initial Order of the Presiding Officer* on April 9, 2009.

The Unified Government filed its *Petition for Review of Initial Order* with the Board on April 27, 2009. The Board granted Unified Government's request for review.

The Board set June 12, 2009 as the deadline for the parties to submit written

argument.

On June 23, 2009, counsel for each party presented oral argument to the Board. The Board announced to the parties that it was taking the matter under advisement. At the end of argument, the Board advised counsel that it would take longer than 30 days to issue a final order. The parties offered no objections and stipulated to waive the 30-day requirement under K.S.A. 77-526(g).

STATEMENT OF LEGAL ISSUES

- The Board declines in this case to exercise jurisdiction to consider whether the Unified Government violated K.S.A. 75-4333(b)(1), (2), (3) and (4) by discharging Deputies Chuck Morris and Ron Woolley in retaliation for exercising their right to engage in protected union activity. (See Issue 1, *Initial Order*)
- The mootness doctrine applies to the complaint that the Unified Government violated K.S.A. 75-4333(b)(1), (2), (5) and (6) by refusing to meet and confer with FOP President Morris and Vice-President Kimberly Tibbetts regarding terms and conditions of employment following their termination. (See Issue 2, *Initial Order*)
- The Unified Government did not violate K.S.A. 75-4333(b)(1) and (3) by increasing the discipline of Deputy Les Still, a Wyandotte County Sheriff's Deputy and member of the FOP, during the course of his appeal process in retaliation for his filing a grievance. (See Issue 3, *Initial Order*)
- The Board affirms the Presiding Officer deferral to the arbitration decision whether the Unified Government violated K.S.A. 75-4333(b)(1) and (5) by modifying the work schedule of the bargaining unit, and the Board affirms the

Presiding Officer's conclusion that the Unified Government violated K.S.A. 75-4333(b)(1) and (5) by imposing upon the bargaining unit a Sergeant pre-test. (See Issue 4, *Initial Order*)

- PEERA guarantees public employees Weingarten-type rights. (See Issue 5, *Initial Order*)
- The Unified Government violated Weingarten-type rights by refusing to allow Wyandotte County Sheriff's Deputy Mark Snelson, a union representative, to speak on behalf of the union and Wyandotte County Sheriff's Deputy Regina Strown during a grievance meeting held for Deputy Strown. (See Issue 5, *Initial Order*)
- The Board will not address whether it has the authority to award monetary relief for a violation of K.S.A. 75-4333.

STATEMENT OF FINDINGS OF FACT

In reviewing the record, the Board must give "due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties." K.S.A. 77-527(d). Should the Board identify any differences in the findings of fact it "shall state the facts of record which support any difference in findings of fact." K.S.A. 77-527(h).

The Board by reference adopts—unless otherwise stated in this order—the findings of fact stated on pages 26-53 of the *Initial Order*. About Findings of Fact 85-89, the Board cannot reach the same conclusion as the Presiding Officer that the Unified Government's method of tracking prisoners contributed to Morris and Woolley forgetting

about a prisoner in a holding cell. The record shows that Morris and Woolley forgot about the prisoner and the Board will not speculate about the benefits of a procedure that was not in place. *(Hearing Transcript, pgs. 588-89)*

The Board agrees with the Presiding Officer's conclusion that during Sheriff Leroy Green's administration the department's leadership—including Sheriff Green—portrayed an anti-union animus attitude.

With this said the Board must apply the law to the facts.

CONCLUSIONS OF LAW

The goal of statutory interpretation is to,

> . . . ascertain the legislature's intent behind a particular statutory provision "from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. [Citation omitted.]" *In re Marriage of Ross,* 245 Kan. 591, 594, 783 P.2d 331 (1989); see *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas,* 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003). Thus, in cases involving statutory construction, "courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof *in pari materia.*" *Kansas Commission on Civil Rights v. Howard,* 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975).

Finally, when reviewing certain provisions or amendments to a statute,

> "[i]t is presumed the legislature had and acted with full knowledge and information as to the subject matter of the statute, as to prior and existing law and legislation on the subject of the statute and as to the judicial decisions with respect to such prior and existing law and legislation. [Citations omitted.]" *Rogers v. Shanahan,* 221 Kan. 221, 225, 565 P.2d 1384 (1976).

McIntosh v. Sedgwick County, 282 Kan. 636, 642-43, 147 P.3d 869 (2006).

> The legislature has empowered PERB "to effectuate the purposes and provisions" of PEERA. K.S.A. 75-4323(d)(3). Therefore, to the extent the issues turn on PERB's interpretations of PEERA, such interpretations are entitled to significant deference and, although not binding, should be

> upheld if supported by a rational basis. *State Dept. of SRS v. Public Employee Relations Board,* 249 Kan. 163, 166, 815 P.2d 66 (1991).

State Dep't of Admin. v. Pub. Employees Relations Bd., 257 Kan. 275, 281, 894 P.2d 777 (1995).

Accompanying the Board's statutory authority is the ability, as the reviewing authority, to rely on its cumulative experience and expertise to interpret and apply PEERA. *Bluestem Tel. Co. v. Kansas Corp. Comm'n,* 33 Kan.App.2d 817, 823, 109 P.3d 194 (2005). Lastly, K.S.A. 75-4333(e) guides the Board.

K.S.A. 75-4333(e) provides that, "[i]n the application and construction of this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent." See *Kansas Ass'n of Pub. Employees v. Pub. Serv. Employees Union, Local 1132,* 218 Kan. 509, 517, 544 P.2d 1289 (1976) and *City of Wichita v. Pub. Employee Relations Bd. of Kansas,* 259 Kan. 628, 633-34, 613 P.2d 137 (1996), for differing approaches in applying NLRA cases to decide PEERA issues.

The Board in deciding the Unified Government's request for review is not obligated to follow any previous ruling. Generally speaking,

> [t]here is no rule in Kansas that an administrative agency must explain its actions in refusing to follow a ruling of a predecessor board in a different case or that it must articulate in detail why the earlier ruling is not being followed.

In the Matter of K-Mart Corp., 238 Kan. 393, 396, 710 p.2d 1304 (1985).

Stated another way,

> [a]s long as its findings are supported by evidence and in turn support the conclusion, an administrative tribunal is free to emphasize different approaches in

> individual cases. In a similar vein, it has been said that the doctrines of res judicata and stare decisis are not generally applicable to administrative determinations.

Matter of Univ. of Kansas Faculty, 2 Kan.App.2d 416, 420, 581 P.2d 817 (1978).

There is a caveat to this general rule and that is if the Board deviates from a prior policy, substantial evidence must support the change, but the Board must also explain the policy change. *Southwest Kan. Royalty Owners Ass'n v. Kansas Corp. Comm'n*, 244 Kan. 157, 190, 769 P.2d 1 (1989).

Before addressing the seven issues of this case, the Board re-states what it looks for in determining "willfully" under K.S.A. 75-4333(b). The Board had previously concluded that "to establish a willful practice under K.S.A. 75-4333(b), there must be proof of anti-union animus or a specific intent to violate the Petitioner's statutory rights under PEERA." *Kansas Ass'n of Pub. Employees v. Kansas Bd. of Regents, Kansas Dep't of Admin.,* 75-CAE-3,4,5,6,7 and 8-1996 at pages 9-10. (The Board's complete analysis of "willfully" begins on page 8 of that order.)

The Unified Government and FOP 40 have not convinced the Board to depart from this approach.

Lastly, the Board cannot find legislative or judicial authority to support the application of a judicially created doctrine under the NLRA that will have the effect of removing "willfully" from K.S.A. 75-4333(b). See *Pieren-Abbott v. Kansas Dep't of Revenue,* 279 Kan. 83, 88-9, 106 P.3d 492 (2005) for the rules of statutory interpretation. Consequently, the Board will not adopt the "inherently destructive doctrine" for purposes of interpreting and applying K.S.A. 75-4333.

The Board declines in this case to exercise jurisdiction to consider whether the Unified Government violated K.S.A. 75-4333(b)(1), (2), (3) and (4) by discharging

Deputies Chuck Morris and Ron Woolley in retaliation for exercising their right to engage in protected union activity.

The memorandum of understanding between the Unified Government and FOP 40 contains the following election of remedies language.

> Where a matter within the scope of this grievance procedure is alleged to be both a grievance and a prohibited practice under the jurisdiction of the Public Employee Relations Board, the employee involved may elect to pursue the matter under either the grievance procedure herein provided or by action before the Public Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and waiver of the alternative remedy.

Petitioner's Exhibit #3, pg 13-14.

This language is identical to what the Presiding Officer reviewed in *Pub. Serv. Employees Union Local 1132 v. Unified Gov't of Wyandotte Co./Kansas City, KS,* 75-CAE-7-2003, pg. 7.

PSEU 1132 presents the following questions when applying election of remedies language.

> The question whether Petitioner is deemed to have made an election of remedies under the parties' Memorandum of Agreement implicates a related but distinct issue, that of jurisdiction of the Public Employee Relations Board over a prohibited practice complaint where the underlying factual dispute forming the basis of that complaint could also be resolved by the parties through a grievance procedure. Clearly the Board has jurisdiction to determine whether an employer's actions constitute a prohibited labor practice pursuant to K.S.A. 75-4333.

75-CAE-7-2003, pg. 33.

> . . . the question presented for resolution here is whether having initiated the grievance procedure called for in its own bargained agreement, Petitioner is free to abandon that process and submit its dispute to this tribunal for resolution as a prohibited labor practice when its agreement with the Employer provides that an election of one of the two remedies, private or statutory, constitutes a waiver of the other and an agreement to be bound by choice.

75-CAE-7-2003, pg 34.

The Kansas Supreme Court in *Gorham v. City of Kansas City,* 225 Kan. 369, 376, 590 P.2d 1051 (1979) examines PEERA as the statutory mechanism to cultivate "harmonious and cooperative relationships between government and its employees." K.S.A. 75-4321. The court's view of this purpose follows.

> Once the public employer decides to be covered by the Act, K.S.A. 75-4321(C), and a majority of the employees of the unit elect to be represented by an employee organization, K.S.A. 75-4327(D), the formally recognized employee organization is granted exclusive recognition to represent all of the employees in the unit. K.S.A. 75-4328. A majority of the employees having voted in favor of representation, all are represented whether they be members of the employee organization or not, and whether or not they agree with all of the policies, acts, and contracts of the employee organization. The basic bargaining tool is the Memorandum of Agreement, K.S.A. 75-4330, which may extend in scope to all matters relating to conditions of employment except five areas specifically excluded by that section. Grievance procedures may be included. K.S.A. 75-4330(B).

225 Kan. at 376-77, 590 P.2d 1051.

Although the Board has wide-latitude to exercise its powers through K.S.A. 75-4323(e)(3), the legislature cautioned the Board to limit its intervening in the government and employee relationship "to the minimum extent possible to secure the objectives expressed in K.S.A. 75-4321, and amendments thereto." K.S.A. 75-4323(f).

Leading the Board is also the rationale laid out in *International Assoc. of Firefighters, Local 3309 v. City of Junction City, Kansas (Fire Department),* 75-CAE-4-1994. The Board concluded that

> [f]rom a policy perspective, it must be concluded that PEERA does not require exhaustion of contractual grievance or arbitration procedures in every case before PERB may entertain a prohibited practice complaint, but instead vests PERB with discretion to determine, once a complaint has been filed, whether to defer to the memorandum of agreement grievance procedure or to adjudicate such dispute in furtherance of its statutory

> prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334.

75-CAE-4-1994 at 54-55.

Under some circumstances "inconsistency within or between decisions will render an administrative decision arbitrary. . . ." *Matter of Univ. of Kansas Faculty,* 2 Kan.App.2d at 420-21, 581 P.2d 817.

The Board sees no dispute or inconsistency with the explanations in *IAFF, Local 3309* and *PSEU, Local 1132* of the basis for the Board to defer its jurisdiction and the explanation of Board deferment in the initial order now under review. It simply comes down to whether in this case will the Board decline to exercise its jurisdiction.

For the following reasons, the Board declines to exercise jurisdiction over the issue whether the Unified Government's termination of Morris's and Woolley's employment was a prohibited practice.

Rights Retained by the Unified Government Under the Negotiated Memorandum Agreement

"The construction of a collective bargaining agreement is no different from any other contract . . . . In short, the instrument is to be interpreted from its four corners and all of the language used should be taken into consideration." *Div. No. 1360, Amalgamated Ass'n of Street, Elec. Railway and Motor Coach Employees of America v. Topeka Transp. Co.,* 200 Kan. 29, 34, 434 P.2d 850 (1967).

By the terms of the memorandum agreement Article 8: Discipline, Section 8.1 Authority to Discipline, FOP 40 recognizes that the responsibility for maintaining discipline rests with the Sheriff's Department and therefore disciplining Morris and Woolley "vested exclusively in the Sheriff." *(Petitioner's Exhibit # 3, pg. 11)* The

Sheriff's authority to discipline is limited: "employees, excluding probationary employees, shall only be disciplined or discharged for just cause." *(Petitioner's Exhibit # 3, pg. 11)* For example, Sheriff Leroy Green testified that Morris's discharge was for violation of department policies and procedures. *(Hearing Transcript, pgs. 943, 959, and 1123)* PEERA does not circumvent the public employer's right to "[s]uspend or discharge employees for *proper cause*." (Emphasis added.) K.S.A. 75-4326(c). This is the crux of the controversy: Was the Unified Government's discipline of Morris and Woolley motivated by an anti-union animus or for proper cause?

The Unified Government alleges that proper cause existed to discipline Morris and Woolley for work-related conduct. Grounds for Morris's discipline were abuse of department computers, inappropriate public behavior while in uniform, and for his part in the Patrick Stuart situation. Woolley's supervisors disciplined him for forgetting about Patrick Stuart after leaving him in a holding cell. See *Petitioner's Exhibits #11, #16, and #28* for the discipline imposed by Captain Freeman on Morris and *Petitioner's Exhibit #55* for the discipline imposed by Captain Freeman on Woolley. In both instances, Sheriff Green concurred with the decision to discharge Morris and Woolley.

FOP 40 argues that the discipline was unusually harsh when compared with what management imposed on other deputies and that the Unified Government saw discharging Morris and Woolley as way of weakening FOP 40. (Morris at the time of discharge was the president of FOP 40, and Woolley was the past-president.)

While the history of the relationship between the parties would lend some credibility to FOP 40's arguments and complaints about the anti-union animus amongst Sheriff Department leadership, the Board defers jurisdiction because Morris and Woolley

elected to follow the agreed-to grievance procedure.

Election of Disciplinary Grievance Procedure

The Board finds nothing ambiguous about the election of remedies language found at Article 11: Grievance Procedure, Section 11.1 General. *(Petitioner's Exhibit # 3, pg. 13-14)* The election of remedies provision applies to employees who choose one method of recourse over another. It appears from the language of the election of remedy provision that the waiver takes effect when the employee initiates Step I of the discipline grievance procedure. See Article 11: Grievance Procedure, Section 11.2 Discipline Grievances. *(Petitioner's Exhibit # 3, pg. 14)* The record shows that Morris and Woolley had initiated the disciplinary grievance procedure and requested a grievance board hearing before FOP 40 filed its prohibited practice complaint with PERB on October 4, 2005. On September 21, 2005, Morris notified Undersheriff Rick Mellott that he wished to grieve "the discipline imposed by Capt Freeman." *(Petitioner's Exhibit #12)* Woolley filed an "appeal" with Undersheriff Mellott of Captain Freeman's decision to terminate his employment on September 21, 2005. *(Petitioner's Exhibit #55 and Petitioner's Exhibit #56)*

Undersheriff Mellott reduced two of the punishments accessed against Morris but upheld his termination for leaving a prisoner in a holding cell. *(Petitioner's Exhibit #13)* FOP 40's business agent Richard Gresko on behalf of Morris requested the convening of a grievance board under Step II, Section 11.2 Discipline Grievances to review each of the disciplinary actions against Morris. *(Petitioner's Exhibit #14)* Undersheriff Mellott upheld the termination of Woolley's employment. In accordance with the MOU, the Unified Government convened grievance boards to hear and decide the merits of Morris's

and Woolley's grievances.

The Board is more convinced that the discipline that the grievance boards meted out to Morris and Woolley were compromises amongst the board members. *(Hearing Transcript, pgs. 2239-46, 2690-92, and 2705)* Morris's discipline of a 90-day suspension was more because of the other alleged acts of misconduct, i.e. abuse of department computers and unprofessional conduct in public. *(Hearing Transcript, pgs. 2691-92)* While the grievance boards reversed the discharge of both deputies, the boards—with union members voting in favor —suspended Woolley for 60 days and, as previously noted, gave Morris a 90-day suspension. *(Hearing Transcript, pgs. 2240-43 and 2701-2)*

Rick Whitby, member of the Morris grievance board and FOP member, believed that Morris's conduct deserved some form of discipline, albeit short of discharge. *(Hearing Transcript, pg. 2704)* Woolley in his deposition admitted that because of the Stuart incident it was appropriate for management to discipline him but more in line with a 30-day suspension. (*Hearing Transcript, pgs. 710-11* and *Hearing Exhibit 206, pg. 54)* Woolley offered no opinion as to whether management should have disciplined Morris. (*Hearing Exhibit 206, pg. 54)* Morris, however, believed management's discipline of Woolley was fair for leaving Stuart in the holding cell, but it was unfair for management to discipline him. *(Hearing Exhibit 202, pg. 161)* Stuart testified during his deposition that he soiled himself because the fitted jumper and the shackles did not allow the movement necessary to use the toilet in the holding cell. (*Hearing Exhibit 207, pgs. 17 and 22)* Stuart's testimony contradicts Finding of Fact 68. Even though Stuart did not testify before the Presiding Officer, the Board cannot ignore his sworn testimony. The Board, therefore, cannot with any certainty affirm or reverse Findings of Fact 68;

however, this fact does not assist or distract the Board from resolving the issue before it. The Board will not adopt this finding of fact as its own.

The memorandum agreement leaves the discipline of Morris and Woolley to the discretion of management. If anti-union animus motivated management to terminate Morris and Woolley's employment, the Board could decide whether the Unified Government committed a prohibited practice. However, the Board's review of this question requires it to consider the reason for the termination—which is "the factual dispute forming the basis of that complaint." *PSEU, Local 1132,* 75-CAE-7-2003, pg. 33.

In the present case, FOP 40 filed the prohibited practice complaint. It sought remedies for Morris and Woolley who, FOP 40 alleges were discharged because of their union activities. FOP 40 requested the reinstatement of Morris and Woolley "in their former positions on the Wyandotte County Sheriff's Department with full back pay and benefits." *(Petitioner's Exhibit #1, pg. 3)* The remedies that the FOP 40 requested in its prohibited practice complaint—on behalf of Morris and Woolley—are consistent with those that Morris and Woolley sought through the grievance procedure. *(Hearing Exhibit 202, pgs. 160-1*—Morris agrees that the remedies he seeks are identical. Woolley, as shown by the record and pointed out in this order, sought reversal of the termination, but agreed that he deserved some punishment for the Stuart incident.*)*

While the Unified Government and FOP 40 have pointed out there was room for improvement in how the grievance boards conduct their hearings, the record does not convince the Board that the proceedings were so tainted to cause the Board to conclude that Morris and Woolley were denied due process.

Conduct of Grievance Board

Morris's hearing before the grievance board took place on November 16, 2005 and voted to reinstate Morris with a 90-day suspension. *Initial Order, Findings of Fact 80-82.* Morris had assistance from FOP 40. *(Hearing Transcript, pgs. 865-66* and *Petitioner's Exhibit #14)* FOP 40 filed a second grievance in Morris's behalf, complaining about the conduct of the grievance board hearing. *(Hearing Petitioner's Exhibit #16)*

Woolley's grievance board convened on November 9, 2005. The board overturned Woolley's termination but gave him a 60-day suspension. *(Hearing Transcript, pgs. 742* and *Petitioner's Exhibit #56)*

The basic elements of due process are "notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Dees v. Marion-Florence Unified Sch. Dist., No. 408,* 36 Kan.App.2d 768, 783-84, 149 P.3d 1 (2006), quoting *In re Landrith,* 280 Kan. 619, 640, 124 P.3d 467 (2005). During Morris's hearing before the grievance board neither side offered any witnesses and the FOP 40 representative did not submit documentary evidence. *(Hearing Transcript, pgs. 865-66)*

The disciplinary proceedings gave Morris and Woolley the opportunity to dispute the discipline imposed upon them by management before grievance boards composed of three FOP members and three management members. The discipline grievance procedure takes into consideration that a grievance board could reach a "deadlock" on the discipline. The Board is reluctant to interfere with or "Monday-morning-quarterback" the grievance boards when the FOP members had the power to "deadlock" the boards if they believed that Morris and Woolley's actions did not warrant discipline—comparing

their discipline with Deputy Leslie Stills' *(Finding of Fact 53)*—or that the proceedings were manifestly unfair. Or if, as FOP 40 alleges, that anti-union animus motivated the Unified Government to discipline Morris and Woolley, or at the very least impose a more severe discipline. To the Board it is more likely than not, that the grievance boards after considering Morris and Woolley's actions sought ways to get them back on the job as soon as possible, and not so much because of their status as union members. *(Hearing Transcript, pgs. 2245 and 2700)*

This seems to the Board the purpose of the agreed-to grievance procedure. In addition, Woolley admitted that he deserved some discipline for leaving Patrick Stuart in the holding cell.

The Board will not second-guess the wisdom of the grievance boards. Under the circumstances of this case, the Board does not assume jurisdiction over the question to consider whether the Unified Government violated K.S.A. 75-4333(b)(1), (2), (3) and (4) by discharging Morris and Woolley in retaliation for exercising their right to engage in protected union activity.

FOP 40 argues the Unified Government's action against Morris and Woolley targeted the employee organization and therefore in its own right under PEERA can file a prohibited practice. The Board agrees with FOP 40 that it can file a prohibited practice complaint, but the underlying factual basis for the prohibited practice complaint—the discipline of Morris and Woolley—was presented to a grievance board in accordance with the memorandum agreement.

The grievance boards considered the facts surrounding the discipline of Morris and Woolley and each board found enough evidence to warrant some discipline, albeit

not termination of employment. The Board therefore can find no support in the record for the following statements in the findings of fact.

- "The evidence is overwhelming that the Employer then set out on a course to get rid of President Morris." *(Finding of Fact 41)*
- "The totality of all evidence presented in this matter demonstrates that Mellott's recommendation for FOP President Morris's termination was the culmination of Mellott's nine-month campaign to get rid of him." *(Finding of Fact 90)*

The policy concern for the Board is that it not be the other forum to shop for a remedy, especially, as here, when Morris's and Woolley's discharges were decided by grievance boards as provided by the election of remedy provision. See *PSEU, Local 1132,* 75-CAE-7-2003, pg. 33-42 for the policy reasons supporting the Board's decision in this matter.

The mootness doctrine applies to the complaint that the Unified Government violated K.S.A. 75-4333(b)(1), (2), (5) and (6) by refusing to meet and confer with FOP President Morris and Vice-President Kimberly Tibbetts regarding terms and conditions of employment following their termination.

The Board is disturbed about the Unified Government's behavior toward Morris and Tibbets as members of FOP 40 negotiating team. While the facts of this case can easily lead the Board to draw the conclusion that the action towards these individuals were more likely grounded rooted in anti-union animus, applicable case law compels the Board to apply the mootness doctrine to this issue.

Further, the Board agrees with the Presiding Officer's conclusion that PEERA "does not require that an employee organization's bargaining representative is limited to attorney's, business agents or employees." *Initial Order,* pgs. 84-85.

In *City of Coffeyville v. Int'l Bhd. of Elec. Workers, Local No. 1523,* 270 Kan. 92,

11 P.3d 1164 (2000), the Supreme Court applied the mootness doctrine under very similar circumstances as found in this case. The court refused to weigh in on the question whether the refusal to meet and confer with specific individuals is a justiciable issue under K.S.A. 75-4333 when the parties had resolved the underlying labor dispute, i.e. negotiated terms of an agreement.

The Unified Government and FOP 40 negotiated the agreement and the record lacks evidence suggesting to the Board that the parties wish to renegotiate the agreement.

The Board does not find that the FOP 40 has provided facts to demonstrate that that the "capable of repetition, yet evading review" exception to the mootness doctrine applies. *State v. Dumars,* 37 Kan.App.2d 600, 605, 154 P.3d 1120 (2007), (citing to *Skillet v. Siener,* 30 Kan.App.2d 1041, 1046-47, 53 P.3d 1234 (2002)). See also, *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed.2d 350 (1975).

In following the rationale of *Coffeyville*, the Board applies the mootness doctrine to this issue.

The Unified Government did not violate K.S.A. 75-4333(b)(1) and (3) by increasing the discipline of Deputy Les Still, a Wyandotte County Sheriff's Deputy and member of the FOP, during the course of his appeal process in retaliation for his filing a grievance.

The Board affirms the Presiding Officer's conclusion that the Unified Government did not violate PEERA.

The Board affirms the Presiding Officer deferral to the arbitration decision whether the Unified Government violated K.S.A. 75-4333(b)(1) and (5) by modifying the work schedule of the bargaining unit, and the Board affirms the Presiding Officer's conclusion that the Unified Government violated K.S.A. 75-4333(b)(1) and (5) by imposing upon the bargaining unit a Sergeant pre-test.

The Board affirms the Presiding Officer's conclusion to defer to the arbitrator's decision that the Unified Government's modification of the bargaining unit's work schedule violated the memorandum agreement.

The Board affirms the Presiding Officer's conclusion that the Unified Government failure to meet and confer with FOP 40 before initiating the sergeant pre-test violated PEERA.

PEERA guarantees public employees Weingarten-type rights.

The Board affirms the Presiding Officer's conclusion that PEERA guarantees Weingarten-type rights to public employees. The Board adopts by reference the Presiding Officer's explanation as its own. The Board agrees with the Presiding Officer's that *International Association of Fire Fighters, Local 64 v City of Kansas City, Kansas Fire Department,* 75-CAE-9-1993 (October 28, 1996) "misses the mark." *Initial Order,* pg. 91.

The Unified Government violated Weingarten-type rights by refusing to allow Wyandotte County Sheriff's Deputy Mark Snelson, a union representative, to speak on behalf of the union and Wyandotte County Sheriff's Deputy Regina Strown during a grievance meeting held for Deputy Strown.

The Board affirms the Presiding Officer's factual and legal conclusions that the Unified Government violated Strown's Weingarten-type rights, and, therefore, violated K.S.A. 75-4333(b)(1), (b)(2), (b)(3), (b)(5), and (b)(6). See *Initial Order,* pgs. 87-92.

The Board will not address whether it has the authority to award monetary relief for a violation of K.S.A. 75-4333.

The Board is keenly aware of the issue concerning the Board's authority to award monetary remedy for a violation of K.S.A. 75-4333 and that there remains uncertainty surrounding the legal support for exercising such authority.

The Board petitioned the Kansas Supreme Court to review the Court of Appeals decision of *Fort Hays State University v. Fort Hays State University Chapter, American Association of University Professors and the Kansas Public Employee Relations Board; Fort Hays State University Chapter American Association of University Professors v. Fort Hays State University and the Kansas Public Employee Relations Board,* Appellate Case No. 99,021. In its decision, the Court of Appeals concluded that PEERA does not give the Board authority to award a make whole remedy.

On September 2, 2009, the Kansas Supreme Court granted the Board's petition for review. Because the issue of the Board's authority to fashion a make-whole remedy is now before the Kansas Supreme, it is prudent for the Board to refrain from issuing an order awarding monetary remedy for a violation of K.S.A. 75-4333.

This said, for the present matter the Board finds that the application of the election of remedies doctrine renders this issue moot. The Board reverses the Presiding Officer's award of monetary remedy to Deputies Morris and Woolley.

IT IS THEREFORE ORDERED by the Board that the *Initial Order* is affirmed in part and reversed in part.

THE BOARD ENTERS THIS FINAL ORDER ON THIS 18th DAY OF November 2009.

PUBLIC EMPLOYEE RELATIONS BOARD

By:

Kenneth Gorman, Board Member, Chair Sally O'Grady, Board Member

Keith Lawing, Board Member

Wayne Maichel, Board Member

Dr. Burdett Loomis, Board Member

NOTICE OF RIGHT TO REVIEW

Under the provisions of K.S.A. 77-530(b)(2), this Order converts the Initial Order of the Presiding Officer into a Final Order of the Public Employee Relations Board. To obtain district court review of the agency's decision in this case, an aggrieved party must file a petition for judicial review with the clerk of the appropriate district court within 33 days after service of this Notice. See K.S.A. 77-601 et seq. You must also serve a copy of your petition for judicial review on the Kansas Department of Labor. The agency officer to receive service of a copy of your petition for judicial review on behalf of this agency is: Chief Counsel A.J. Kotich, 401 SW Topeka Blvd., Topeka, KS 66603.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2009 true and correct copies of the above and foregoing Final Order was served upon the parties to the case by depositing the copies in the United States mail, first class addressed to:

Steve A.J. Bukaty
Steve A.J. Bukaty, Chartered
8826 Santa Fe Drive, Suite 218
Overland Park, Kansas 66612

Ryan Denk
McAnany, Van Cleve & Phillips, P.A.
707 Minnesota Avenue, Fourth Floor
PO Box 171300
Kansas City, Kansas 66117

And to members of the PERB on this 18th day of November 2009.

Sharon L. Tunstall

Sharon L. Tunstall, Office Manager