BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF) LOCAL 135,

Petitioner,

v.

CITY OF WICHITA, KANSAS FIRE DEPARTMENT

Respondent.

PERB Case No. 75-CAE-5-2013

Office of Administrative Hearings
Case No. 14DL0089 PE

Sedgwick County District Court
Appeal Case No. 2014CV001426

REVIEW OF INITIAL ORDER

MEMORANDUM DECISION AND ORDER - FINAL ORDER FOLLOWING REMAND

NOW on this 8th day of January, 2016, following an Order of Remand from the District Court of Sedgwick County, the above captioned matter is ready for a Final Order on the review of the March 24, 2014, Initial Order issued by the State of Kansas Office of Administrative Hearings, in accordance with K.S.A. 77-526 and K.S.A. 2014 Supp. 77-527.

On October 22, 2015, the designated hearing officer, Bradley R. Burke, presided over oral arguments on the matter and received oral and written arguments as well as exhibits and pleadings. Petitioner, International Association of Firefighters (IAFF) Local 135 appeared by and through counsel Joni J. Franklin, and Respondent, City of Wichita Fire Department, appeared by and through counsel Teresa A. Mata. Also present were IAFF Local 135 President Matt Schulte and IAFF Local 135 Secretary/Treasurer Tim Carr.

THEREUPON, after considering the written briefs of the parties, hearing oral arguments, reviewing the record and being duly advised in the premises, the designated hearing officer makes the following findings of fact and conclusions of law, and orders as follows:

FACTS

The Findings of Fact and Conclusions of Law stated in the Initial Order issued by the Office of Administrative Hearings on March 24, 2014 are adopted and incorporated by this reference.

In addition to the Findings of Fact and Conclusions of Law stated in the Initial Order issued by the Office of Administrative Hearings on March 24, 2014, the designated hearing officer makes the following supplemental Findings of Fact and Conclusions of Law:

Procedural History

Petitioner, International Association of Firefighters (IAFF) Local 135 (hereinafter the Union), filed a Complaint with the State of Kansas Public Employee Relations Board (hereinafter PERB) on January 18, 2013. (R. I, 1058-1061).

Respondent, the City of Wichita Fire Department (hereinafter the City), filed an Answer on March 20, 2013. (R. I, 1052-1056). In the Answer, the City admitted the factual allegations in the Complaint made by the Union, but the City argues that the promotional process changes complained of by the Union are beyond the scope of the Memorandum of Agreement that existed between the parties.

After a prolonged and extensive discovery process, the City filed a Motion for Summary Judgment and supporting Memorandum on February 6, 2014. (R. I, 83-190).

The Union filed a Response and Memorandum to the City's Motion for Summary Judgment on February 24, 2014. (R. I, 32-82).

On February 27, 2014, the Presiding Officer of the Kansas Office of Administrative Hearings issued a notice to the parties stating in relevant part: "After a full review of discovery and all related briefings on the matter, I am granting respondent City of Wichita's motion for summary judgment and will be issuing a written order to that effect within the next 30 days." (R. I, 27-28).

The Initial Order from the Presiding Officer was issued March 24, 2014. (R. I, 7-16). The Union appealed the Initial Order to the PERB on April 4, 2014. (R. I, 1-3).

The PERB reviewed the briefs of the parties that were filed with the Office of Administrative Hearings, and the Initial Order filed by the Office of Administrative Hearings, and issued a Final Order on April 22, 2014, upholding the Initial Order. (R. I, 4-6).

The Union filed a Petition for Judicial Review of the Final Order on May 14, 2014. (R. II, 1-17).

On December 4, 2014, after briefing and arguments, the District Court issued a Journal Entry remanding the matter back to the PERB and instructed the PERB to: "issue and follow a briefing schedule for the parties . . . and to re-issue a decision only after full and due consideration is given to the parties' written arguments [and to] ... consider the petitioner's request for oral arguments and render a response to the same." (R. II, 171-174).

On February 6, 2015, the PERB issued an Order on Remand ordering that: (1) a designated hearing officer conduct a de novo hearing on the Petition for Review of the Initial Order; (2) that the parties be allowed to submit written briefs; (3) that the parties address three specific questions of law that were articulated in the Order on Remand; and (4) that the designated hearing officer notify the parties as to any further proceedings. (R. III, 1-3).

On May 26, 2015, the Secretary of Labor, in accordance with K.S.A. 2014 Supp. 75-4323(e)(2) and K.S.A. 2014 Supp. 77-527(a)(2)(B), designated Bradley R. Burke, Chief Attorney for the Kansas Department of Labor, as the designated hearing officer for this and all other matters arising under the Public Employer-Employee Relations Act.

On June 16, 2015, the designated hearing officer conducted a Scheduling Conference and established a briefing schedule. (R. III, 6-9).

On October 22, 2015, the designated hearing officer presided over oral arguments on the matter and received oral and written arguments as well as exhibits and pleadings. (68-138).

A Final Order Following Remand is now being submitted by the designated hearing officer.

Union's Complaints

The Union alleges in the Complaint filed January 17, 2013, that the City has: "engaged in prohibited practices within the meaning of K.S.A. 75-4333 subsection (a), (b), (1), (2), (3), (4), (5), & (6), of the Public Employer-Employee Relations Act [PEERA]." (R. I, 1059-1061). In addition to the Complaint filed on January 17, 2013, the Union supplemented the Union's allegations in the Petitioner's Response and Memorandum to Respondent's Motion for Summary Judgment (R. I, 32-82). When viewed in the totality, the basis of the Union's complaints in the present case may be summarized as:

(1) The Union alleges that the City violated K.S.A. 75-4333(a), which states that the commission of any prohibited practice shall constitute evidence of bad faith in meet and confer proceedings. To support the allegation, the Union alleges that since March 22, 2012, the City has failed and/or refused to meet or confer in good faith with representatives of the Union in the manner agreed to in Article 23 of the Memorandum of Agreement (MOA) by and between the

City and the Union that was effective December 25, 2010 through December 20, 2013, and that specifically, the City has unilaterally refused to convene a grievance board regarding a grievance filed by the Union on March 22, 2012, regarding an alleged unilateral change in the promotional process and promotional system, which the Union alleges resulted in the City repudiating the certification of representation of the Union;

(2) The Union alleges that the City violated K.S.A. 75-4333(b)(1), which states that interfering with, restraining or coercing public employees in the exercise of their rights granted in K.S.A. 75-4324 (employees' right to form, join and participate in employee organizations), is a prohibited practice. To support the allegation, the Union alleges that the City has interfered with, restrained or coerced public employees in the exercise of their rights by refusing to meet and confer with the Union regarding the City's action of changing testing questions in promotional exams and by not hearing four grievances filed by the Union and by Union members complaining of said changes.

(3) The Union alleges that the City violated K.S.A. 75-4333(b)(2), which states that dominating, interfering or assisting in the formation, existence, or administration of any employee organization by the City is a prohibited practice. To support the allegation, the Union alleges that the City has interfered with the administration of the Union by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

(4) The Union alleges that the City violated K.S.A. 75-4333(b)(3), which states that encouraging or discouraging membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or

by blacklisting is a prohibited practice. To support the allegation, the Union alleges that the City discouraged membership in the Union and discouraged representation by the Union of its members in conditions of employment including grievance and promotional procedures by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

(5) The Union alleges that the City violated K.S.A. 75-4333(b)(4), which states that it is a prohibited practice for the City to 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. To support the allegation, the Union alleges that the City discriminated against and targeted employee Rob Dusenbery because he participated in the grievance procedure and by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes. The Union specifically states that the evidence supporting their claim of discrimination is based on a March 2010 grievance about a perceived refusal to fill positions because Union members were on the promotions list (R. III 177-179, 923-924), and Captain Dusenbery's grievance alleging his "feelings of discrimination" in the promotional process, which was submitted in April 2012. (R. I, 56, 497). The promotional process complained of by Dusenbery was regarding the position of Battalion Chief. (R. I, 185-186 and 497-498). Additionally, Dusenbery filed a complaint with EEOC complaining of discrimination based on the promotional process, and in accordance with preexisting City policy, such grievance was held in abeyance. (R. I, 957).

(6) The Union alleges that the City violated K.S.A. 75-4333(b)(5), which states that it is a prohibited practice for the City to refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327. To support the allegation, the Union alleges that the City refused to meet and confer in good faith with the Union by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

(7) The Union alleges that the City violated K.S.A. 75-4333(b)(6), which states that it is a prohibited practice for the City to deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328. K.S.A. 75-4328 states 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, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition. To support the allegation, the Union alleges that the City denied the right of the Union to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

Relief Sought by Union

The relief sought by the Union in the Complaint includes:

(1) The City should be instructed to discontinue their practice of refusing to impanel grievance boards;

(2) The City should be instructed to return to the promotional processes that were in place prior to the changes;

(3) The City should be instructed to convene a grievance board panel to hear and determine active grievances in accordance with Article 23 of the Memorandum of Agreement that was effective December 25, 2010 through December 20, 2013, and to follow impasse resolution procedures in good faith.

ANALYSIS

The Initial Order granted the City's Motion for Summary Judgment and dismissed the Union's complaint against the City. The propriety of the first hearing officer's dismissal of the Complaint is the matter being determined in this Final Order.

Burden of Proof

The burden of proof required in a prohibited practice case before the PERB has been stated by the PERB to be:

> Although Kansas courts have not addressed the standard of proof necessary to establish a prohibited labor practice, federal courts have made it clear that the burden of proving a charge lies on the party alleging an unfair practice. ""The mere filing of charges by an aggrieved party ... creates no presumption of unfair labor practices under the Act, but it is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence...." *Boeing Airplane Co. v. National Labor Relations Board*, 140 F.2d 423, 433 (10th Cir. 1044). Findings of unfair labor practices must be supported by substantial evidence. *Coppus Engineering Corp. v. National Labor Rel. Bd.*, 240 F.2d 564, 570 (1st Cir 1957).

Kansas Association of Public Employees (KAPE) v. State of Kansas, Adjutant General's Office, PERB case no. 75-CAE-9-1990, 1991 Wl 11694350, at 6; See also, *PSU/KNEA v. Kansas Board*

of Regents/Pittsburg State University, PERB Case no. 75-CAE-23-1998, 1999 WL 34976390, at 3.

In the present case, the facts as presented in the volumes of discovery and pleadings, when taken as a whole, demonstrate that there are no true factual disputes in this matter, instead, there are only conclusory allegations that are not supported by the facts presented, and disputes of interpretation of law. The Union has failed to allege sufficient facts to support the allegations of prohibited practice alleged in the Complaint, so this matter must be dismissed as a matter of law.

Summary Judgment

The Court articulated the well established rule to be applied to a Motion for Summary Judgment in *Stanley Bank v. Parish*, 298 Kan. 755, 317 P.3d 750 (2014):

> Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

Id. at 759. A review of each claim made by the Union, and an application of the facts of the case to each claim resolving all facts and inferences which may reasonably be drawn from the evidence in favor of the Union, shows that there is no genuine issue as to any material fact and that the City is entitled to judgment as a matter of law. The Initial Order granting the City's Motion for Summary Judgment is therefore affirmed.

Failure to State a Claim

The Court has also stated that dismissal of an action for failure to state a claim for which relief can be granted, "is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim [and that] the court is not required to accept conclusory allegations argued by the plaintiff regarding the legal effect of the presumed facts if the allegations do not reasonably follow from the facts." *Bonin v. Vannaman,* 261 Kan. 199, 204, 929 P.2d 754, 761 (1996). In order for a tribunal to dismiss a case for failure of the petitioner to state a claim for which relief may be granted, the following guidance has been provided by the Court:

> The question for determination is whether in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.
>
> In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself.

312 Education. Ass'n v. U.S.D. No. 312, 273 Kan. 875, 881, 47 P.3d 383 (2002). A review of each claim made by the Union, accepting the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom, but excluding conclusory allegations that do not reasonably follow from the facts, and applying the facts of the case in the light most favorable to plaintiff with every doubt resolved in plaintiff's favor, clearly demonstrates that the Union does not have a claim, and the Complaint must be dismissed.

Purpose of PEERA

In addition to the legal standards stated above, an important consideration of this review and decision is the stated purpose of the Public Employer-Employee Relations Act.

> [T]he purpose of [the] act is 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, acting within the framework of law. It is also the purpose of [the] act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies.

K.S.A. 75-4321(b).

Limitations on PERB

Another important consideration is the role of the PERB in reviewing these disputes. It is the direction of the legislature that the PERB: "shall intervene in the public employer-employee relations of political subdivisions *to the minimum extent possible* to secure the objectives expressed in K.S.A. 75-4321, and amendments thereto." [Emphasis added]. K.S.A. 2014 Supp. 75-4323(f). See also, *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 458, 228 P.3d 403, 411 (2010).

PERB's role in a dispute such as the present case is as follows:

> The board shall either dismiss the complaint or determine that a prohibited practice has been or is being committed. If the board finds that the party accused has committed or is committing a prohibited practice, the board shall make findings as authorized by this act and shall file them in the proceedings.

K.S.A. 2014 Supp. 75-4334(b). See also, *Fort Hays State Univ.*, 290 Kan. at 459.

Allegation 1

The Union alleges that the City violated K.S.A. 75-4333(a), which states that the commission of any prohibited practice shall constitute evidence of bad faith in meet and confer proceedings. To support the allegation, the Union alleges that since March 22, 2012, the City has failed and/or refused to meet or confer in good faith with representatives of the Union in the manner agreed to in Article 23 of the Memorandum of Agreement (MOA) by and between the City and the Union that was effective December 25, 2010 through December 20, 2013, and that "specifically, the City has unilaterally refused to convene a grievance board regarding a grievance filed by the Union on March 22, 2012, regarding an alleged unilateral change in the promotional process and promotional system, which the Union alleges results in the City repudiating the certification of representation of the Union."

Assuming that the facts presented by the Union are true, the City's refusal to convene a grievance board regarding a grievance filed by the Union on March 22, 2012, regarding an alleged unilateral change in the promotional process and promotional system, is not a refusal to meet and confer as required by the Memorandum of Agreement that was in place at the time of the alleged violation, or by Kansas law. The City was not required to meet and confer with the Union over the number of questions to be used in the promotional test, the types of questions to be asked and the method and manner of grading the test. In other words, the Union does not have an unlimited role in influencing every aspect of the promotional process, as alleged by the Union in this matter, especially after the Memorandum of Agreement was executed. Additionally, the Union has complained, *inter alia*, of changes to the promotional system for Battalion Chief, which is not a position covered in the Memorandum of Agreement as part of the recognized bargaining unit. The Union has no standing to complain about changes in non-

bargaining unit positions such as the Battalion Chief position, and those complaints are summarily dismissed. The Union has also complained of changes to the promotional system for Captains and Lieutenants, which are members of the bargaining unit, and those complaints will be addressed herein. The changes in the promotional process complained of by the Union involve the City's decision regarding what questions to include in the promotional tests and how those questions were to be graded and scored. The Union alleges that the Memorandum of Agreement requires the City to negotiate those matters. The City disagrees.

In order to determine whether a subject is mandatorily negotiable subject relating to positions covered under a Memorandum of Agreement, the PERB has developed a balancing test to determine whether a particular item is or is not mandatorily negotiable. The test, used by the PERB is:

> 1. A subject is mandatorily negotiable only if it intimately and directly affects the work and welfare of public employees;
> 2. A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution; and
> 3. A subject that affects the work and welfare of public employees is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.

PSU/KNEA v. Kansas Board of Regents/Pittsburg State University, PERB Case no. 75-CAE-23-1998 (February 9, 2007), 2007 WL 5883184, at 4. Another important aspect of the balancing test for this case is the requirement that the PERB intervene in the public employer-employee relations of political subdivisions to the minimum extent possible to secure the objectives expressed in K.S.A. 75-4321, and amendments thereto. K.S.A. 2014 Supp. 75-4323(f).

There is another test used by the Supreme Court in reviewing PERB decisions on whether a subject is mandatorily negotiable, known as the "significantly related" test. *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat'l Educ. Assn.*, 233 Kan. 801, 816, 823,

667 P.2d 306, 317, 322 (1983); see also, *Pittsburg State Univ./Kansas Nat. Educ. Ass'n v. Kansas Bd. of Regents/Pittsburg State Univ.*, 280 Kan. 408, 429, 122 P.3d 336, 349 (2005). The Court described the "significantly related" test as: "in order to determine whether a particular item is or is not mandatorily negotiable, [the PERB] has developed and employs a balancing test: 'If an item is significantly related to an express condition of employment, and if negotiating that item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable.'" *Pittsburg State University*, 233 Kan. at 816. Despite not being the actual test used by PERB, the "significantly related" test must be considered because it has been articulated by the Court and relied upon by the Court in the 1983 and 2005 *Pittsburg State University* decisions. *Pittsburg State University*, 233 Kan. at 816; 280 Kan. at 429.

In the 1983 *Pittsburg State University* case, the Supreme Court agreed with the PERB that *some* "portions" of promotional processes are mandatorily negotiable, including "the criteria, procedures, or methods by which candidates for promotion are identified and the action is completed." *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat'l Educ. Assn.*, 233 Kan. 801, 816, 823, 667 P.2d 306, 317, 322 (1983). Therefore, in the present case, under both the three part balancing test and the "significantly related" test, it is necessary to only to address whether the actual questions to be asked on a promotional test and the method and manner of grading such test are matters that are mandatorily negotiable. It is not necessary to revisit the Court's conclusion in the 1983 *Pittsburg State University* case that some portions in a promotional policy are mandatorily negotiable. *Pittsburg State University,* 233 Kan. at 826. For the purposes of this decision, it is assumed that some portions of a promotional process are still mandatorily negotiable. Neither the Court, nor the PERB has ever held that all portions of a promotions policy are mandatorily negotiable. In fact, the original PERB Order that was the

foundation of the Supreme Court decision in the 1983 *Pittsburg State University* case, specifically states that certain provisions of the proposed promotion procedure in that matter, if implemented, would have required the University to "abdicate portions of" their management rights, which the PERB stated, "in no case would they be mandatory subjects of bargaining." *Pittsburg State University v. Kansas-National Education Association*, PERB Case no. 75-CAEO-1-1982; 1982 WL 915406, at 5. So the key questions in the present case, utilizing the balancing test review and the "significantly related" test, are: which portions of the promotional process are subject to mandatory negotiations, and were those portions in fact negotiated between the parties in the drafting and ratification of the Memorandum of Agreement? To be clear, not every subject that may be related to conditions of employment is required to be negotiated under PEERA, and even if a subject is mandatorily negotiable, not every aspect of that subject is necessarily mandatorily negotiable. See generally, *Pittsburg State University*, 233 Kan. at 823. It is, "important to note that a subject does not become mandatorily negotiable by flimsily tying it to an enumerated subject term and condition. *Id.* at 817.

Significantly Related Test

The Union's argument that the number of questions to be used on a promotional test, the types of questions to be asked and the method and manner of grading the test, has some affect on the work and welfare of public employees and is therefore mandatorily negotiable, is based on the Supreme Court's decision in the 1983 *Pittsburg State University* case, which held that that the portions of a promotion policy which would be subject to mandatory negotiations include the "criteria, procedures or methods," by which candidates for promotion are identified and the action is completed. *Id.* at 823. However, the Union's argument fails under the "significantly related" test used in the *Pittsburg State University* cases because requiring the City to negotiate

the number of questions to be used on a promotional test, the types of questions to be asked and the method and manner of grading the test, would unduly interfere with management rights that are reserved to the employer by law, namely the right to determine the methods, means and personnel by which operations are to be carried on. K.S.A. 75-4326(g). Therefore, under the second prong of the "significantly related" test, such matters are not mandatorily negotiable. *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat'l Educ. Assn.*, 233 Kan. 801, 816, 823, 667 P.2d 306, 317, 322 (1983); *Pittsburg State Univ./Kansas Nat. Educ. Ass'n v. Kansas Bd. of Regents/Pittsburg State Univ.*, 280 Kan. 408, 429, 122 P.3d 336, 349 (2005). Under the "significantly related" test, the Court has stated that only "portions" of a promotion policy are subject to mandatory negotiations, such as the criteria, procedures, or methods. *Pittsburg State University,* 233 Kan. at 823. The conclusion, that only portions of the promotion policy are subject to mandatory negotiations, was also stated in the PERB's Order in *Pittsburg State University v. Kansas-National Education Association*, PERB Case no. 75-CAEO-1-1982; 1982 WL 915406, at 5. Therefore, it is clear that not all portions of a promotional test are mandatorily negotiable. Now, returning to the actual "substantially related" test analysis, there is a distinction between determining who decides whether a test will be utilized in a promotional process, and who decides what questions should be on that test and how those questions should be graded. The distinction is important because under the "substantially related" analysis, the Union's argument that the Union has the right to negotiate the actual number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test fails to pass the second prong of the test because requiring such matters to be negotiated would, "unduly interfere with management rights reserved to the employer by law." Negotiating whether a test will be used in a promotion process may or may not fall under the

definition of the "criteria, procedures, or methods" of a promotional system, which is a matter that does not need to be determined in this case, because requiring the City to negotiate the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading the test, would unduly interfere with management rights reserved to the employer by law, and such matters are therefore not subjects that are mandatorily negotiable under the "substantially related" test. *Pittsburg State University,* 233 Kan. at 816. The conclusion that the right to determine the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading the test management rights is reserved to the employer by law, is closely related to the PERB's conclusion that a state university has the right to retain control and decision making authority in regard to curriculum as a management right:

> While it is extremely important to recognize that a management's rights clause does not preclude all negotiations in regard to those subjects it is equally important to note that a subject does not become mandatorily negotiable by flimsily tying it to an enumerated subject term and condition. For example, in a university setting, an employee organization might insist that they be allowed to negotiate the subject of curriculum based upon the argument that the addition or deletion of a class would have a significant relation to a unit member's salary or hours of work. *Clearly, the employer must retain control and decision making authority in regard to curriculum: (1) under the statutory clause granting the employer the right to determine the methods, means and personnel by which operations are to be carried on, (2) in fulfillment of his obligations to meet the needs of taxpayers, and (3) in consideration of other matters such as accreditation requirements.*

Pittsburg State University v. Kansas-National Education Association, PERB Case no. 75-CAEO-1-1982; 1982 WL 915406, at 3 [Emphasis added.].

Applying the facts of this case to the "substantially related" test, results in the conclusion that the number of questions used in a promotional test, the types of questions to be asked and the method and manner of grading the test are not mandatorily negotiable, meaning that the City

has not committed a prohibited practice by not negotiating those matters with the Union after the Memorandum of Agreement was effective.

Balancing Test

In applying the balancing test to the facts of this case, it is also necessary to conclude that the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading the test, are not subjects that are mandatorily negotiable.

Under the *first* prong of the balancing test, the actual number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test cannot be said to "intimately and directly" affect the work and welfare of public employees. Therefore, under the first prong of the current balancing test, such matters are not mandatorily negotiable. Additionally, even if those matters were to be determined to "intimately and directly" affect the work and welfare of public employees, such matters would still not be mandatorily negotiable because the conclusions reached by the second and third prongs of the balancing test render the subjects management rights that are not subject to mandatory negotiation.

A review of the facts of this case under the *second* prong of the balancing test results in a finding that the actual number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test are not mandatorily negotiable because they are subjects that are completely preempted by statute. The right of the City to: "determine the methods, means and personnel by which operations are to be carried on," is a subject that has been completely preempted by statute. K.S.A. 75-4326(g). In the present case, the facts as applied to the second prong of the balancing test show that the number of questions used in a promotional test, the types of questions to be asked and the method and

manner of grading the test, are included in the "methods and means" by which operations of the department are to be carried on, and as such, those matters are completely preempted by statute as a right of the City pursuant to K.S.A. 75-4326(g). Therefore, the subject is not a matter that is mandatorily negotiable under the balancing test.

Under the second prong of the balancing test, the number of questions used in a promotional test, the types of questions to be asked and the method and manner of grading the test are not mandatorily negotiable, meaning that the City has not committed a prohibited practice by not negotiating those matters with the Union after the Memorandum of Agreement was effective.

A review of the facts of this case under the *third* prong of the current balancing test results in a finding that the actual number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test are not mandatorily negotiable. It is reasonable to conclude that if the City was required to negotiate the number of questions to be used in the promotional test, the types of questions to be asked and the method and manner of grading the test, then the PERB would be excessively intervening in the public employer-employee relations of political subdivisions, which is contrary to K.S.A. 75-4321. Additionally, requiring the City to negotiate such maters would significantly interfere with the exercise of inherent managerial prerogatives, meaning that the subject is not mandatorily negotiable under the third prong of the balancing test used by PERB. Specifically, requiring the City to negotiate the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test, would require the City to circumscribe its existing right to determine the methods, means, and personnel by which operations are to be carried on, which is contrary to K.S.A. 75-4326. The City, not the Union, is

responsible for maintaining the "efficiency of governmental operation" and determining the methods and means by which operations are to be carried on, and the personnel that will carry on those operations. K.S.A. 75-4326. The City's obligation to the public to provide a well-trained and equipped fire department with personnel that are highly qualified depends largely on the City's ability to freely exercise its discretion in selecting the training curriculum, exam questions and the manner of scoring those questions, when exercising its management rights to maintain efficient government operations and to determine the methods, means and personnel by which operations are to be carried on. Based on the foregoing, it is reasonable and necessary to conclude that requiring the City to negotiate such matters with the Union after the Memorandum of Agreement has been executed, would significantly interfere with the exercise of inherent managerial prerogatives and is therefore not a subject that is mandatorily negotiable. Therefore under the third prong of the balancing test, those matters are not mandatorily negotiable meaning that the City has not committed a prohibited practice by not negotiating those matters with the Union after the Memorandum of Agreement was effective.

Having determined that the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading the test are not mandatorily negotiable under PEERA, it is clear that the City did not commit a prohibited practice in violation K.S.A. 75-4333(a), as alleged by the Union. The City was not required to meet or confer in good faith with representatives of the Union or convene a grievance board regarding a grievance filed by the Union on March 22, 2012, over a change in the promotional process and promotional system for Captains and Lieutenants, because those matters, specifically the actual number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading such test, are not mandatorily negotiable.

Additionally, the recognized bargaining unit in Article 1(B) of the Memorandum of Agreement between the Union and the City does not include the Battalion Chief position, which is the basis of many of the specifically identified changes in the promotional processes complained of by the Union. (R. I, 40-41, 60, 166-167, 497-498, 500, 522, 857-914 and 960). Since the Battalion Chief position is not included in the defined bargaining unit in the Memorandum of Agreement, summary judgment is appropriate for all of the Unions complaints in this matter that apply to the Battalion Chief position, even if the allegations by the Union are taken as true.

Furthermore, it is also important to note in this decision that even if the number of questions to be used in a promotional test, the types of questions to be asked and the method and manner of grading the test were to be determined to be mandatorily negotiable under PEERA, those subjects were in fact negotiated and are specifically determined to be management rights under the plain language of Article 27 of the Memorandum of Agreement which states: "It is expressly understood that all matters not included in this Agreement are by intention and design specifically excluded and fall within the powers, duties and responsibilities of the City of Wichita." The Union is now arguing that the plain language of Article 27 of the Memorandum of Agreement be disregarded, and that supplemental information be used to ascertain what the parties truly meant in the written document executed by the parties. However: "It must be remembered that the memorandum of agreement, once ratified, carries with it a certain sanctity." *Pittsburg State University v. Kansas-National Education Association*, PERB Case no. 75-CAEO-1-1982; 1982 WL 915406, at 3. In this case, arguments by the Union that the plain language of Article 27 of the Memorandum of Agreement is insufficient to understand the contractual agreement between the Union and the City, and that additional evidence of past practices and

agreements should be considered in determining whether promotional testing procedures are reserved as management rights, is not persuasive. The long standing parol evidence rule states:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing, where such written contract is free from ambiguity and neither fraud nor mistake is asserted.

Branstetter v. Cox, 209 Kan. 332, 334-35, 496 P.2d 1345, 1347 (1972). Furthermore, to adopt the Union's argument would once again place the PERB in the position of excessively intervening in the public employer-employee relations of political subdivisions, contrary to K.S.A. 75-4321, by adding to the parties' freely entered into and ratified agreement. The contractual language in this case is clear and unambiguous, the actions taken by the City were performed in accordance with the City's rights as set forth in the Memorandum of Agreement, and there is no evidence of fraud or mistake in the agreement that would require anyone to look beyond the plain language of the contract.

The Union also argues that Article 23 of the Memorandum of Agreement requires the City to participate in a grievance procedure if the Union files a grievance based on the City's actions of exercising management rights, specifically, for deciding what questions should be included in promotional tests and how those questions were to be graded and scored, without first negotiating those items with the Union. That argument is inconsistent with the plain language of the Memorandum of Agreement and with PEERA. The relevant portion of Article 23, is section A, which states: "A grievance is defined as any dispute between the unit or members of the unit and Department Director or representatives concerning the terms of this Agreement or working conditions." Although the term "working conditions" is not defined in statute or the Memorandum of Agreement, the decision of which questions should be asked on a

promotional test, the number of questions to be used and how such questions should be graded and scored, are not considered "working conditions" under PEERA. For the present case, it is not necessary to define what is included in the definition of "working conditions," as used in the Memorandum of Agreement. Instead, it is sufficient to conclude that the term "working conditions" as used in the Memorandum of Agreement does not include, which questions should be asked on a promotional test, the number of questions to be used and how such questions should be graded and scored.

The Union argues, nevertheless, that since there is a dispute between the Union and the City regarding the interpretation of what is considered a management right and what can be grieved under the Memorandum of Agreement, the City is required to become involved in a protracted grievance procedure. Such argument is contrary to the plain language of K.S.A. 75-4330(a)(3), which states that the scope of a Memorandum of Agreement under PEERA may extend to all matters relating to conditions of employment, except proposals relating to public employer rights defined in K.S.A. 75-4326, and amendments thereto. As previously stated, K.S.A. 75-4326 defines existing rights of public employers and states that: "Nothing in this act is intended to circumscribe or modify the existing right of a public employer to...determine the methods [and] means ...by which operations are to be carried on." As previously determined, the number of questions to be used on a promotional test, the types of questions to be asked and the method and manner of grading the test are not mandatorily negotiable items and are reserved as management rights, both under Article 27 of the Memorandum of Agreement and under K.S.A. 75-4326(g). Therefore, even if Article 23 of the Memorandum of Agreement was interpreted to require the City to follow a grievance procedure over matters that are management rights, as is

urged by the Union, then Article 23 would be contrary to K.S.A. 75-4330(a)(3), and Article 23 would not be enforceable.

Therefore, having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 2

The Union also alleges that the City violated K.S.A. 75-4333(b)(1), which states that interfering with, restraining or coercing public employees in the exercise of their rights granted in K.S.A. 75-4324 (employees' right to form, join and participate in employee organizations), is a prohibited practice. To support the allegation, the Union alleges that the City has interfered with, restrained or coerced public employees in the exercise of their rights by refusing to meet and confer with the Union regarding the City's action of changing testing questions in promotional exams and by not hearing four grievances filed by the Union and by Union members complaining of said changes.

Having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 3

The Union also alleges that the City violated K.S.A. 75-4333(b)(2), which states that dominating, interfering or assisting in the formation, existence, or administration of any employee organization by the City is a prohibited practice. To support the allegation, the Union alleges that the City has interfered with the administration of the Union by the City's action of changing testing questions on promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

Having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 4

The Union also alleges that the City violated K.S.A. 75-4333(b)(3), which states that encouraging or discouraging membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting is a prohibited practice. To support the allegation, the Union alleges that the City discouraged membership in the Union and discouraged representation by the Union of its members in conditions of employment including grievance and promotional procedures by the City's action of changing testing questions in promotional exams without meeting with and

conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

Having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 5

The Union also alleges that the City violated K.S.A. 75-4333(b)(4), which states that it is a prohibited practice for the City to 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. To support the allegation, the Union alleges that the City discriminated against and targeted employee Rob Dusenbery because he participated in the grievance procedure and by the City's action of changing testing questions in promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes. The Union specifically states that the evidence supporting their claim of discrimination is based on a March 2010 grievance about a perceived refusal to fill positions because Union members were on the promotions list (R. III 177-179, 923-924), and Captain Dusenbery's "feelings of discrimination" in the promotional process which was submitted in April 2012. (R. I, 56, 497). Dusenbery had not been demoted or terminated. His complaint is that he was not promoted to Battalion Chief. (R. I, 185-186 and 497-498).

Dusenbery had filed a complaint with EEOC complaining of discrimination based on the promotional process, and in accordance with preexisting City policy, such grievance was held in abeyance. (R. I, 957). First, the position that Dusenbery was complaining about is that of Battalion Chief, which is not one of the positions covered in the recognized bargaining unit covered by the Memorandum of Agreement. For that matter alone, the Union's complaint regarding Captain Dusenbery must be dismissed. Second, the Memorandum of Agreement in effect at the time of the present complaint was effective December 25, 2010 through December 20, 2013, which renders the March 2010 allegations moot for the purposes of this Complaint. However, notwithstanding the fact that the Battalion Chief position that Dusenbery has complained about is not covered by the Memorandum of Agreement, the facts presented, when viewed in their entirety and applied in the light most favorable to the plaintiff with every doubt resolved in the plaintiff's favor, clearly show that neither Dusenbery nor the Union have a claim, there is no evidence of discrimination as alleged by the Union, and the Complaint must be dismissed. The facts presented regarding any alleged discrimination against Captain Dusenbery, beyond his conclusory "feelings" that he was discriminated against, are that the City praised Captain Dusenbery to the National Emergency Training Center, and Captain Dusenbery has admitted that the two firefighters that were promoted instead of him were well qualified and experienced. (R. I, 186 and 919-920).

Having concluded that City was not required to meet and confer with the Union or Captain Dusenbery over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, and that there has been no evidence of discrimination against Captain Dusenbery because of his

Union membership, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 6

The Union also alleges that the City violated K.S.A. 75-4333(b)(5), which states that it is a prohibited practice for the City to refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327. To support the allegation, the Union alleges that the City refused to meet and confer in good faith with the Union by the City's action of changing testing questions on promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

Having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

Allegation 7

The Union also alleges that the City violated K.S.A. 75-4333(b)(6), which states that it is a prohibited practice for the City to deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328. K.S.A. 75-4328 states 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, and also shall extend the right to unchallenged representation status, consistent

with subsection (d) of K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition. To support the allegation, the Union alleges that the City denied the right of the Union to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances by the City's action of changing testing questions on promotional exams without meeting with and conferring with the Union and by not hearing grievances filed by the Union and by Union members complaining of said changes.

Having concluded that City was not required to meet and confer with the Union over what questions should be included on promotional tests or how those questions are to be graded and scored, and having concluded that the City is not required to participate in a grievance procedure for the exercise of matters that are management rights, the City's actions complained of by the Union are not a prohibited practice, and the Initial Order dismissing the Complaint must be upheld.

CONCLUSION

In accordance with PEERA, a complaint must be dismissed if it is determined that the party accused has not committed or is not committing a prohibited practice. K.S.A. 2014 Supp. 75-4334(b). Since the burden of proving a charge lies on the party alleging an unfair practice and a review of each claim made by the Union, and an application of the facts of the case to each claim resolving all facts and inferences which may reasonably be drawn from the evidence in favor of the Union, shows that there is no genuine issue as to any material fact and that there is no evidence of the City committing a prohibited practice. Therefore, this matter must be dismissed.

IT IS THEREFORE ORDERED that the Office of Administrative Hearing's Initial Order dismissing the Union's Complaint be upheld. The Complaint is dismissed. This Order will become a Final Order and will be effective upon service in accordance with K.S.A. 77-530.

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State of Kansas Public Employee Relations Board Hearing Officer designated by the Secretary of Labor in accordance with K.S.A. 2014 Supp. 75-4323(e)(2) and K.S.A. 2014 Supp. 77-527(a)(2)(B)

NOTICE OF RIGHT TO JUDICIAL REVIEW

The foregoing journal entry is a final order of the Public Employee Relations Board pursuant to K.S.A. 77-527. This order is subject to review by the district court in accordance with the Kansas Judicial Review Act.

Unless a motion for reconsideration is filed pursuant to K.S.A. 77-529, a petition for judicial review must be filed with the appropriate district court within 30 days after the final order has been served upon the parties. If a petition for reconsideration is filed, the right to judicial review shall recommence upon service of a final order disposing of the motion for reconsideration.

Pursuant to K.S.A. 2014 Supp. 77-527(j), K.S.A. 77-613(e), and K.S.A. 77-615(a), any party seeking judicial review must serve a copy of its petition for judicial review upon the Public Employee Relations Board by serving its designated agent at the following address:

Public Employee Relations Board
c/o Bradley R. Burke
Deputy Secretary and Chief Attorney
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, Kansas 66603-3182

CERTIFICATE OF SERVICE

I, the undersigned, in accordance with K.S.A. 2014 Supp. 77-531, do hereby certify that I served a true and correct copy of the above and foregoing *Review of Initial Order Memorandum Decision and Order - Final Order Following Remand* upon the following by depositing the same in the United States mail, postage prepaid to:

Joni J. Franklin
of Franklin Law Office
727 N. Waco, Suite 150
Wichita, Kansas 67203
Counsel for Petitioner, International Association of Firefighters (IAFF) Local 135

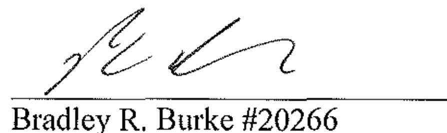
and

Teresa A. Mata
Attorney at Law
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Drive, Suite 300
Kansas City, Kansas 66103
Counsel for Respondent, City of Wichita Fire Department

and

Bob L. Corkins, Director
Kansas Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, Kansas 66612

on this 11th day of January, 2016.



Bradley R. Burke #20266