BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of Fire Fighters (IAFF) Local 2612 Petitioner,	)	
v.	)	OAH No. 17DL0091 PE PERB Case No. 75-CAE-2-2017
Sedgwick County Fire District No. 1 Respondent.	)	

FINAL ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

NOW on the 7th day of December, 2020, Petitioner International Association of Fire Fighters Local 2612's Petition for Review of the Presiding Officer's Initial Order came on for consideration by the Public Employee Relations Board ("PERB"). International Association of Fire Fighters Local 2612, ("Petitioner", "Employee Organization" or "IAFF Local 2612"), appears by legal counsel, Diana J. Nobile, Attorney at Law and Sarah M. Block, Attorney at Law, McGILLIVARY STEELE ELKIN LLP, Washington, D.C., and Matthew R. Huntsman, Attorney at Law, BUKATY AUBRY & HUNTSMAN, CHARTERED, Overland Park, Kansas. Employer Sedgwick County Fire District No. 1, ("Respondent", "Employer" or "Fire District"), appears by Kevin T. Stamper, Assistant County Counselor, Sedgwick County Counselor's Office, Wichita, Kansas.

BACKGROUND

On November 14, 2016, Petitioner filed a Prohibited Practice Complaint pursuant to K.S.A. 75-4333(b) of the Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.*, ("the Act" or "PEERA"), before the PERB alleging that:

> "[d]uring the process of contract negotiations between IAFF Local 2612 and [Respondent], the parties declared impasse . . . after failure to reach an agreement on the issues of compensation, longevity pay and step increases. [After a] fact-finder . . . issued recommendations on pay, which the Fire District rejected . . . [Respondent's governing

> body] unilaterally imposed a 2-year contract . . . to resolve the impasse [covering] January 1, 2016, to December 31, 2017.
>
> However, the contract imposed upon [Petitioner] excluded any previously negotiated and already agreed-upon terms. For example, among other things, the Fire District imposed changes relating to vacation leave, uniforms, pool employees, and performance evaluations, despite the fact that the parties had tentatively agreed to provisions addressing these topics. Under PEERA, "when good faith bargaining has reached impasse and the impasse resolution procedures set forth in K.S.A. 75-4332 have been completed, the employer may take unilateral action on the subjects **upon which agreement could not be reached.**" *Kansas Ass'n of Public Employees v. State of Kansas, Dep't of Admin.*, Case No. 75-CAE-12/13-1991 at 29 (Kansas PERB, July 31, 1992) (emphasis added)."

PERB Complaint Against Employer, Docket No. 75-CAE-2-2017, filed November 14, 2016, p. 3. "[B]y unilaterally imposing a contract which ignore[d] and exclude[d] the terms already negotiated and agreed upon by the parties, [Respondent] failed to bargain with [Petitioner] in good faith in violation of K.S.A. 75-4333(b)(5)." *Id.* As its remedy, Petitioner requested that PERB issue an order requiring the parties to adopt the provisions upon which agreement was reached prior to impasse and that the duration of the imposed contract be limited to a one-year period expiring on December 31, 2016. *Id.*

On November 17, 2016, Respondent filed its Answer to Petitioner's Complaint, generally denying that Respondent had committed the prohibited practice of failure to bargain in good faith by failing to include in its post-impasse unilaterally imposed contract all of the terms and conditions of employment over which the parties were in agreement for a variety of reasons, including that the parties' tentative agreements had not been reduced to a written Memorandum of Understanding, that some of the issues in dispute over which the parties had negotiated in good faith to impasse were not mandatory topics for bargaining, that at least one of the items agreed to during negotiations had been "unexplainably omitted" from the unilateral contract, but presumably not omitted in bad faith, that the unilaterally imposed "change" with regard to scheduling of vacation leave was not a change in fact because the new contract language was entirely consistent

with the parties' past practice, that with regard to terms and conditions concerning volunteer and reserve firefighters although the parties negotiated in good faith through impasse, they never actually reached an agreement, and that unilaterally imposed multi-year contracts, although not authorized by any provision of the Public Employer-Employee Relations Act, are nonetheless permissible under the Act because they do not violate the cash basis law.

On December 5, 2016, Petitioner filed an amended prohibited practice complaint against Respondent, revising only its requested remedy seeking that in addition to the remedies previously outlined, PERB nullify any provisions included in Respondent's unilateral contract that had not been discussed during the parties' negotiations. PERB Amended Complaint Against Employer, Docket No. 75-CAE-2-2017, filed December 5, 2016, p. 1. The Employer did not file an Amended Answer. *See* Letter Response to Petitioner's Amended Prohibited Practice Complaint, filed December 7, 2016.

This case was forwarded to the Office of Administrative Hearings, ("OAH") in early 2017, which assigned a presiding officer to conduct proceedings and issue an Initial Order. Following a prehearing conference, the parties filed cross motions for summary judgment. *See* Petitioner IAFF Local 2612's Motion for Summary Judgment, filed March 17, 2017; Motion for Summary Judgment on Behalf of Respondent, Sedgwick County Fire District No. 1, filed March 17, 2017.

In addition, the parties jointly stipulated to forty undisputed material facts. *See, e.g.*, Petitioner IAFF Local 2612's Motion for Summary Judgment, March 17, 2017, Exhibit A, Joint Stipulation of Material Facts. These stipulated facts are repeated in the Findings of Fact portion of this Final Order from the parties' stipulation.

Responses to the parties' respective motions for summary judgment were timely filed. *See* Respondent's Memorandum in Response to Petitioner's Motion for Summary Judgment, March

31, 2017; Petitioner International Association of Fire Fighters Local 2612's Opposition to Sedgwick County Fire District No. 1's Motion for Summary Judgment, March 31, 2017.

The presiding officer did not act on the parties' respective motions for summary judgment, instead conducting a hearing on April 27, 2017. He issued an Initial Order June 8, 2017 pursuant to K.S.A. 77-526(b). *See* Initial Order, 75-CAE-2-2017, June 8, 2017. In his order, the presiding officer found, for a variety of reasons, that Respondent committed "no violation of K.S.A. 75-4333(b)(1) and (b)(5)" and dismissed the complaint in its entirety. *Id.*, p. 9. Pursuant to K.S.A. 77-527(b), Petitioner timely sought agency head review. *See* Petition for Review of Initial Order, filed June 23, 2017.

The record next reflects PERB's designated hearing officer, Bradley R. Burke, held a case management call on November 15, 2017. Journal Entry of Scheduling Order, November 20, 2017, p. 1. There the parties agreed that the Petition for Review would serve as Petitioner's brief in support of review, and a further briefing schedule was set. *Id.*, pp. 1-2. The parties timely filed their response and reply. *See* Respondent's Response to Petition for Review of Initial Order, filed January 5, 2018; Petitioner's Reply in Support of Petition for Review of Initial Order, filed January 18, 2018. By signed order served March 30, 2018, members of the PERB memorialized their June 22, 2017 decision to assign designated hearing officer Burke, pursuant to K.S.A. 75-4323(e)(2) and K.S.A. 77-527(a)(2)(B), to review the Initial Order and issue a Final Order for the Board. *See* PERB Order, March 30, 2018. Following Mr. Burke's departure from the agency, review was assigned to another designee, and after his departure, to another designee, agency staff attorney Douglas A. Hager, who requested proposed findings and conclusions pursuant to K.S.A. 77-526. *See* Respondent's Proposed Findings of Fact and Conclusions of Law, January 21, 2020; Petitioner's Proposed Findings of Fact and Conclusions of Law, February 6, 2020. Petitioner

submitted its Response to Respondent's Proposed Findings of Fact and Conclusions of Law on February 14, 2020.

This matter is now fully submitted and the Board issues this Final Order addressing all questions of fact and law necessary to the resolution of the parties' prohibited practices dispute. For the reasons set forth more fully below, the Board concludes that Respondent committed prohibited practices in violation of K.S.A. 75-4333(b)(1) and (b)(5) in each instance in which it unilaterally imposed contract terms regarding mandatorily negotiable conditions of employment that were at odds with the tentative agreements reached in meet and confer without having exhausted in good faith the statutory impasse process, including mediation and fact-finding, and post-impasse steps, such as release of the fact-finder's report and final presentations to the governing body, as well as by unilaterally imposing contract terms regarding mandatorily negotiable conditions of employment despite having failed to negotiate those terms.

FINDINGS OF FACT

This Final Order sets out eighty-five findings of fact. Findings of Fact Nos. 1 through 40 are taken from the parties' Joint Stipulation of Material Facts, filed in this matter on March 14, 2017. For purposes of the Kansas Administrative Procedures Act, K.S.A. 77-501 *et seq.*, the five-member Public Employee Relations Board serves as agency head. *See* K.S.A. 75-4323(e)(2) and K.S.A. 75-4334(b). When reviewing an Initial Order, PERB "[exercises] 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". *See* K.S.A. 77-527(d). Thus, this PERB Final Order sets forth additional findings of fact numbered 41 through 85, categorized under subheadings by article number or topic and with corresponding citations to the voluminous record. *See* K.S.A. 77-526(c) (providing that "[a] final order or initial order shall include, separately stated, findings of fact,

conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed". In accordance with K.S.A. 77-527(d), PERB has scrupulously exercised this function, having reviewed the record and considered the parties' arguments, giving due regard to the presiding officer's opportunity to observe and determine the credibility of the witnesses.

1. On January 17, 1979, the Governing Body of Sedgwick County voted to be covered by the provisions of the Kansas Public Employer-Employee Relations Act (PEERA). Ex. G to Petition for Review of Initial Order, PERB Addendum-A, March 14, 2017 Joint Stipulation as to Undisputed Material Facts, ¶ 1, (hereinafter "Joint Stipulation of Material Facts").

2. Sedgwick County Fire District No. 1 (hereinafter, "Fire District") is an agency of Sedgwick County, Kansas providing fire protection and emergency medical service response for approximately 631 square miles of Sedgwick County, Kansas. Joint Stipulation of Material Facts, ¶ 2.

3. The Board of Sedgwick County Commissioners serves as the Governing Body of Sedgwick County Fire District No. 1. Joint Stipulation of Material Facts, ¶ 4.

4. IAFF Local 2612 is a labor association representing uniformed fire fighters employed by Sedgwick County Fire District No. 1. Joint Stipulation of Material Facts, ¶ 5.

5. At all relevant times, David (Dave) Thompson was the President of IAFF Local 2612. Joint Stipulation of Material Facts, ¶ 6.

6. Historically, IAFF Local 2612 and the Fire District negotiated collective bargaining agreements and/or memoranda of understanding. Joint Stipulation of Material Facts, ¶ 7.

7. Typically, the parties engaged in collective bargaining over a number of months, beginning in early spring when the Union and management would come together and notice items that they

would like to negotiate as a part of developing a new contract, as well as provide justification for modifying such articles. Joint Stipulation of Material Facts, ¶ 8.

8. The parties agree to ground rules, which are presented to the bargaining team by the District's lead negotiator during the first negotiation session. Joint Stipulation of Material Facts, ¶ 9.

9. During negotiations, the existing contract acts as the starting point for negotiations over a new contract. Joint Stipulation of Material Facts, ¶ 10, first sentence.

10. If an article is not reopened during negotiations, it will appear in the new contract as written in the existing contract. Joint Stipulation of Material Facts, ¶ 10, second sentence.

11. If an article is reopened, the party who sought to reopen it will propose changes to that article. The other party will consider the changes and will provide a response. The responding party will either agree to the proposal or will request that an alternative proposal be considered. This process continues until the parties reach agreement. Joint Stipulation of Material Facts, ¶ 11.

12. Once the parties tentatively agree on an article, there is no formal memorialization of that tentative agreement. Instead, the members of the bargaining team would make a note of "TA" and the date in their personal notes. Joint Stipulation of Material Facts, ¶ 12.

13. Once there is a tentative agreement, the article is considered "closed." The agreement is "tentative" because it then becomes a part of the final draft of the new contract which is presented to the Governing Body and the Union for ratification. Joint Stipulation of Material Facts, ¶ 13.

14. The Public Safety Director is responsible for presenting the final draft contract to the Governing Body for ratification. Joint Stipulation of Material Facts, ¶ 14.

15. The Governing Body has never refused to approve a final draft contract which has been presented for ratification. Joint Stipulation of Material Facts, ¶ 15.

16. The Governing Body has never proposed any changes or modifications to a final draft contract, including tentative agreements, prior to its ratification. Joint Stipulation of Material Facts, ¶ 16.

17. The parties entered into a Memorandum of Agreement in effect from January 1, 2014 through December 31, 2015 ("2014-2015 MOA"). Joint Stipulation of Material Facts, ¶ 17.

18. Pursuant to the 2014-2015 MOA, on or before April 2015, the parties began the collective bargaining process over a new contract to become effective January 1, 2016. Joint Stipulation of Material Facts, ¶ 18.

19. From April 2015 through September 2015, the parties held approximately six to eight negotiations sessions in the EOC 9-1-1 building. Joint Stipulation of Material Facts, ¶ 19.

20. The Fire District's bargaining team consisted of Public Safety Director Marvin Duncan, HR Division Head Eileen McNichol, Finance Division Head/CFO Chris Chronis, Fire Chief Tavis Leake, Division Chief Carl Cox, and Deputy Chief Larry Tangney. Marvin Duncan served as lead negotiator. Joint Stipulation of Material Facts, ¶ 20.

21. The Union's bargaining team consisted of President Dave Thompson, Jeff Cowley, James Tiffany, and Corey Mattke. Joint Stipulation of Material Facts, ¶ 21.

22. On June 16, 2015, the parties agreed to keep the language of Article 21 regarding Vacation as written in the 2014-2015 MOA. Joint Stipulation of Material Facts, ¶ 22.

23. The parties also negotiated over the items to be provided as a part of the issued uniform for fire fighters, and agreed that only one type of belt need be provided to employees. Joint Stipulation of Material Facts, ¶ 23.

24. On June 4, 2015, the parties agreed to "language clean up" in Articles 45B and 46. Specifically, the parties agreed that the following language[, contained in the 2014-2015 contract,]

would [continue to] be included in the new contract: "If the District's Fire Chief does not agree with the Board's recommendation, the Fire Chief must justify the reasons with his/her direct supervisor for review." Joint Stipulation of Material Facts, ¶ 24. *See also* Ex. D to Petition for Review of Initial Order ("Hearing Tr.") at 41-42.

25. The parties did not negotiate over the inclusion of a new article in the contract, numbered Article 17A, specifically relating to volunteer and reserve fire fighters. Joint Stipulation of Material Facts, ¶ 25.

26. On October 27, 2015, the parties informed the Public Employee Relations Board that they had reached impasse on the topic of compensation. Joint Stipulation of Material Facts, ¶ 26.

27. Compensation was the only topic at issue during the impasse proceedings in 2015-2016. This was confirmed in writing by the Fire District on December 28, 2015. Joint Stipulation of Material Facts, ¶ 27.

28. On March 25-26, 2016, fact finder Colleen White issued recommendations on pay. Joint Stipulation of Material Facts, ¶ 28.

29. On April 7, 2016, Division Chief Carl Cox circulated a chart via e-mail which had been created and forwarded by Marvin Duncan. The chart indicated all of the articles which had been tentatively agreed to during the 2015 negotiations session. In the e-mail, Chief Cox affirmed that "all the TAs are still agreed upon and do not need further discussion." Joint Stipulation of Material Facts, ¶ 29. [For ease of reference, the Board notes that the source of this finding is the April 27, 2017 Hearing, Joint Exhibit D, pp. 1-2.]

30. Sedgwick County Fire District No. 1 rejected the recommendations made by the fact finder and submitted its own recommendations for resolving the contract dispute over compensation to the Governing Body on May 9, 2016. Joint Stipulation of Material Facts, ¶ 30.

31. On May 11, 2016, the Union submitted a proposal to settle all remaining compensation issues outstanding in the contract negotiations. Joint Stipulation of Material Facts, ¶ 31.

32. The Board of County Commissioners held a public hearing on May 11, 2016 to consider both parties' recommendations for settling the impasse as to issues of compensation. Joint Stipulation of Material Facts, ¶ 32.

33. On June 2, 2016, the Union's counsel was informed that counsel for the Fire District met with the County Commission in executive session regarding the Union's May 11, 2016, proposal, and was given no authority to accept the Union's terms. Joint Stipulation of Material Facts, ¶ 33.

34. On June 8, 2016, Sedgwick County Fire District No. 1 imposed a 2-year contract on IAFF Local 2612. This imposed contract was retroactively effective, with a duration of January 1, 2016 through December 31, 2017. Joint Stipulation of Material Facts, ¶ 34. *See also* Ex. B to Petition for Review of Initial Order (Ex. D, Imposed Contract).

35. Article 21 of the imposed contract is different from the June 16, 2015 agreement of the parties to leave the language the same as in the 2014-2015 MOA. *Supra* Finding of Fact No. 22. While the 2014-2015 MOA states that "[s]ubject to the final approval of the Fire District, employees may take earned and accrued vacation during the period from January 1st to December 31st during any time period in which less than three (3) other bargaining unit employees have already selected and the Fire District has scheduled their vacation leave," the imposed contract states that employees may take earned and accrued vacation leave "during any time period in which less than two (2) other employees" have selected and scheduled leave. Joint Stipulation of Material Facts, ¶ 35.

36. Article 31 of the imposed contract does not contain an appendix including a photograph of the approved logo for t-shirts. Joint Stipulation of Material Facts, ¶ 36.

37. Article 31 of the imposed contract is different from the parties' agreement regarding issued uniforms, as it does not include as one of the officially issued uniform items a belt of any kind. Joint Stipulation of Material Facts, ¶ 37.

38. Articles 45B and 46 of the imposed contract are different from the parties' June 4, 2015 agreement to include language regarding the Fire Chief's ability to speak with the public safety director should he disagree with the Board's recommendation on a promotion. *Supra* Finding of Fact No. 24. The imposed contract does not include any such language. Joint Stipulation of Material Facts, ¶ 38.

39. Article 17 of the imposed contract is completely different than Article 17 of the 2014-2015 MOA. The relevant provision in the 2014-2015 Memorandum of Agreement reads as follows:

> *"The Fire District shall have the right to employ a pool of qualified personnel as regular part-time employees to perform work covered by this Agreement. This pool of part-time employees shall be utilized primarily, but not exclusively, to assist in seasonal staffing, staffing shortages, or in cases of hardship. These employees shall not be used with the intent of reducing regular full-time positions. This pool of part-time employees may be used by the Fire District, in its discretion, as a pool from which to hire regular full-time employees. The Fire District shall compensate employees employed under this Article at Step 1A, range 19 of the Compensation Plan. These employees shall receive no other benefits."*

The 2016-2017 unilaterally imposed contract has different language concerning part-time firefighters in Article 17 which reads as follows:

> *"The Fire District shall have the right to employ a pool of qualified personnel as regular part-time employees to perform work covered by this contract. This pool of part-time employees may be used by the Fire District, in its discretion, as a pool from which to hire regular full-time employees. The Fire Chief, or Acting Fire Chief, will determine all compensation rates for said part-time employees. These part-time employees shall receive no other benefits."*

Joint Stipulation of Material Facts, ¶ 39.

40. The imposed contract also contained a new provision — Article 17A — relating to reserve and volunteer fire fighters, despite the fact that the parties never negotiated over the inclusion of this new provision. The language reads as follows:

> *"The Fire District shall have the right to develop, maintain and make use of a volunteer and reserve firefighter force, which shall have the ability to perform work covered by this contract. Members of this volunteer and reserve force shall be fully qualified, as determined by the Fire Chief or Acting Fire Chief. Said members shall be prohibited from receiving any compensation and/or benefits for any and all duties performed."*

Joint Stipulation of Material Facts, ¶ 40.

ARTICLE 17: REGULAR PART-TIME EMPLOYEES

41. Article 17 of the 2014-2015 MOA, *supra* Finding of Fact No. 39, contains the exact same language that has appeared in all of the parties' previous collective bargaining contracts, beginning in 1998. *See* April 27, 2017 Hearing Transcript ("Tr."), pp. 46-48, 51.

42. The Union first proposed including this language in 1998 to protect the jobs and wages of bargaining unit members. Tr. at 46-47. Specifically, the union negotiated this language "for the primary [purpose] of making sure that our jobs, our 2,912 hours of work scheduled as a full-time fire fighter would not be augmented or [displaced] by this pool of [qualified personnel as regular part-time] employees." Tr., p. 48. Instead, "they would basically fill our voids . . . [for] injuries, sick leave, extensive vacation time . . . that kind of thing." Tr., p. 49.

43. When the Fire District proposed language changes to Article 17 during negotiations, the Union was concerned "that the Fire District was going to use part-time employees to replace full-time fire fighters." Tr., pp 120-21.

44. The changes proposed by management were the subject of extensive bargaining during 2015 negotiations. Tr., p. 49.

45. During the parties' meet and confer session on August 18, 2015, the discussion regarding Article 17 "was to leave it as is, the way it was since 1998." Tr., p. 51.

46. The Union responded with a written proposal titled "IAFF Proposal for Sept. 2, 2015". See April 27, 2017 Hearing, Respondent's Exhibit 3, p. 5082. The first item on the IAFF Proposal for Sept. 2, 2015 was "[a]ccept Management dropping proposed changed language to Article 17: Regular Part-Time Employees". *Id.*

47. During the parties' last meet and confer session, held on September 2, 2015, the parties reached agreement regarding Article 17. Tr., pp. 51-52, 88-89. Witnesses from both parties admitted that they reached agreement on Article 17 on this date. Tr., pp. 51-52, 68-69 (Testimony of Dave Thompson); Tr., pp. 88-89 (Testimony of Larry Tangney). To illustrate, when questioned by counsel for Petitioner, Larry Tangney, the Fire District's Deputy Chief of Operations, testified as follows:

> Q: Okay. And article – item one states that, "Management dropping proposed change language to Article 17, permanent – regular part-time employees." Do you see that?
>
> A: Yes.
>
> Q: Okay. And next to it you wrote, "Tentative yes."
>
> A: Yes.
>
> Q: Okay. And is it your recollection that the union accepted this proposal and the parties reached an agreement on that issue on September 2nd, 2015?
>
> A: Yes.

Tr., pp. 88-89. Further, when Respondent's witness, Carl Cox, the Fire District's Operations Chief was asked on cross-examination whether he had "any reason to doubt that . . . management agreed to [leave the language as written]", as is documented at April 27, 2017 Hearing, Joint Exhibit D,

p. 5, Cox replied that "as a management team, we had discussed that the language that was written in the previous contract would meet our needs". Taking all of the documentary evidence submitted and all of the testimony as a whole, the PERB finds that a preponderance of the evidence establishes that the parties reached an agreement for 2016-2017 regarding Article 17 to leave it as written in the 2014-2015 MOA.

48. Respondent's offer to maintain the language of Article 17 in the new contract was not part of a "bundled" offer or "package deal" with the articles covering compensation. Tr., pp. 143-144 (on direct examination, Respondent witness Carl Cox, the Fire District's Operations Chief, testified that "management was ready to give in on that [Article 17] issue" that was not "being subject to as far as a package deal"). *See also*, Tr., pp. 171-176 (Fire District witness Eileen McNichol, Chief Human Resources Officer, acknowledged that management's offer to maintain Article 17 as it was written in the parties' 2014-2015 MOA was not expressly conditioned on an agreement regarding compensation).

49. Management did not declare impasse regarding Article 17. Tr., pp. 38, 133, 192. *See also*, Finding of Fact No. 27.

ARTICLE 17A: VOLUNTEER AND RESERVE FIREFIGHTERS

50. Article 17A, relating to volunteer and reserve fire fighters, in the unilaterally imposed contract, *supra* Finding of Fact No. 40, was not contained in the parties' 2014-2015 MOA, Tr., p. 47, and was not discussed during negotiations for the 2016-2017 contract. Tr., pp. 52, 180. This proposed Article 17A was never presented by either party over the course of negotiations. *Id. See also*, Tr., p. 123 (during direct examination, the Fire District's witness, Operations Division Chief and 2015 management bargaining team member Carl Cox, affirmed that "the issue of volunteer and reserve fire fighters was never discussed at any point during" the parties' contract negotiation.)

51. Since the parties did not negotiate over an agreement for the inclusion of a new article in the contract, numbered Article 17A, specifically relating to volunteer and reserve fire fighters, they could not have reached an agreement to include same in an MOA for 2016-2017.

52. Unilaterally imposed Article 17A[1] changes conditions of employment for the bargaining unit's members. By giving the Fire District the "right to develop, maintain and use a volunteer and reserve force which shall have the ability to perform work covered by" the contract, i.e., the work of the bargaining unit's members, work that was never previously performed by volunteers or reserves, the unilateral change impacts mandatorily negotiable conditions of employment for bargaining unit employees, including, at a minimum, wages and hours of work. Tr., pp. 52-54.

53. Just as it did not declare impasse regarding Article 17, Management did not declare impasse regarding the topic or proposal represented by newly-created Article 17A, contained in unilaterally imposed contract for 2016-2017. Tr., pp. 38, 133. *See also*, Finding of Fact No. 27.

ARTICLE 21: VACATION

54. On June 16, 2015, the parties agreed to keep the language of Article 21 regarding Vacation as written in the 2014-2015 MOA. *Supra*, Finding of Fact No. 22.

55. During negotiations for the 2016-2017 MOA, agreement was reached "to keep the contract the same and allow three bargaining unit members on vacation," Tr., p. 135, [at a time per shift]". Tr., pp. 128-129, 133-135.

56. In the unilaterally adopted contract, the language of Article 21: Vacation was changed. Where Article 21: Vacation, of the parties' 2014-2015 MOA had stated, "[s]ubject to the final

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[1] New Article 17A, contained in the unilaterally imposed contract for 2016-2017, reads as follows: *"The Fire District shall have the right to develop, maintain and make use of a volunteer and reserve firefighter force, which shall have the ability to perform work covered by this contract. Members of this volunteer and reserve force shall be fully qualified, as determined by the Fire Chief or Acting Fire Chief. Said members shall be prohibited from receiving any compensation and/or benefits for any and all duties performed."*

approval of the Fire District, employees may take earned and accrued vacation during the period from January 1st to December 31st during any time period in which less than three (3) other bargaining unit employees have already selected and the Fire District has scheduled their vacation leave," April 27, 2017 Hearing, Joint Exhibit B, p.13, the corresponding provision of the imposed contract for 2016-2017 stated, "[s]ubject to the final approval of the Fire District, employees may take earned and accrued vacation during the period from January 1 to December 31 during any time period in which less than two (2) other employees have already selected and the Fire District has scheduled their vacation leave." April 27, 2017 Hearing, Joint Exhibit C, p.14.

57. Management did not declare impasse regarding Article 21: Vacation. Tr., pp. 38, 133. *See also*, Finding of Fact No. 27.

ARTICLE 31: UNIFORMS AND UNIFORM ALLOWANCE

58. The testimony regarding uniforms was limited, but it centered on t-shirts and the inclusion of a 1.5 inch black belt for the firefighters' uniforms. *See, e.g.*, Tr., pp. 44-46, 129-132.

59. The parties negotiated over the items to be provided as a part of the issued uniform for fire fighters and agreed that only one type of belt need be provided to employees. *Supra*, Finding of Fact No. 23. During negotiations, the parties "had tentatively agreed to eliminate an inch and a quarter black belt and go to an inch and a half black belt". Tr., p. 130.

60. The parties agreed to include an allowance for a black 1.5 inch belt as an official part of the uniform, Tr., p. 129, but the imposed contract failed to include this addition. *See* April 27, 2017 Hearing, Joint Exhibit C, p. 22; Tr., pp. 129-130.

61. Petitioner reopened the issue of t-shirts for negotiation in 2015. Tr., p. 44. The reason for doing so was that "[w]ithin the first 90 days of the new Chief being put in place, he removed the agreement, which was a verbal agreement with the previous administration that the Union could

sell and members of our department can wear specific station [t-shirts] while on duty using clothing allowance to promote stations and their districts as well as *espirit de corps* and moral[e] amongst the department." *Id.* Petitioner "brought that to the negotiations table because that was something our members wanted to return to and have that ability to do." *Id.*

62. Petitioner sells these t-shirts and profits from sales "are funneled back into members of the department, whether they're union or non-union for family emergencies, further education such as hot training that's done locally . . . [as well as] honor guard . . . a multitude of things." Tr., p. 45.

63. Fire District witness, Operations Division Chief and 2015 management bargaining team member Carl Cox, testified that the parties "negotiated . . . to reinstate the [t-shirts], as far as station [t-shirts] created by Local 2612." Tr., p. 130. "That was tentatively agreed to at the table with the provision that President Thompson and Fire Chief Tavis Leake would meet with communications and get an approved design that was acceptable to County Communications as far as the branding of Sedgwick County". *Id.*

64. An approved design was agreed upon. The resulting t-shirts were being worn at the time this dispute was heard. Tr., pp. 130-131. *See also*, Tr., p. 45.

65. The parties' agreement on t-shirts reached during bargaining was not contained in the unilaterally imposed contract. *See* April 27, 2017 Hearing, Joint Exhibit C, pp. 22-23.

66. Management did not declare impasse regarding Article 31: Uniforms and Uniform Allowance. Tr., pp. 38, 133. *See also*, Finding of Fact No. 27.

ARTICLE 45: CANDIDATES FOR PROMOTION TO LIEUTENANT, and ARTICLE 46: CANDIDATES FOR PROMOTION TO CAPTAIN

67. Two of the Articles over which negotiations took place are Articles 45 and 46. "Article 45 covers promotions from firefighter to lieutenant." Tr., p. 39. "Article 46 covers promotions from lieutenant to captain." *Id.*

68. Under Article 45: Candidates for Promotion to Lieutenant, the Union "brought reporting of scores to mirror the matrix . . . in Article 46" up for discussion in 2016-2017 contract talks. Tr., p. 39. "Basically, that matrix delineates all of the points and is published as part of the final scoring so all candidates know what the components of scores are in the specific categories." *Id.* This issue was delineated as Article 45A in the chart used by the parties to track the status of issues in negotiations. *See* April 27, 2017 Hearing, Joint Exhibit D, bottom of p. 4. In the second column of this chart, the issue under discussion is described as "Candidates for Promotion to Lieutenant: Change Reporting of scores to mirror Capt's." *Id.*

69. Petitioner proposed "that the performance evaluation scores [be] eliminated from the matrix . . . . [and after] discussion was had back and forth between labor and management, an agreement was reached to take away the performance evaluation scores from the matrix . . . . [b]ut . . . we agreed with [the Deputy Chief's desire] to be able to use the performance evaluation comments sections as part of the . . . Promotion Board's discussion during that process, and we agreed to that." Tr., pp. 40-41.

70. IAFF Local 2612 President Dave Thompson testified that the parties reached tentative agreement on this issue on June 4, 2015. Tr., p. 41. In direct examination testimony, member of management's bargaining team Deputy Chief of Operations Larry Tangney confirmed that the parties reached agreement on this issue. Tr., pp. 102-103. *See also*, Tr., pp. 155-156 (testimony of Fire District Chief Human Resources Officer, Management bargaining team member Eileen McNichol confirming that agreement was reached on this issue.) When the contract for 2016-2017 was unilaterally imposed, Article 45 did not include the change agreed to by the parties at the bargaining table. *Compare* April 27, 2017 Hearing, Joint Exhibit C, Article 45, *with* April 27, 2017 Hearing, Joint Exhibit B, Article 45.

71. Management raised an issue that applied to both Article 45: Candidates for Promotion to Lieutenant and Article 46: Candidates for Promotions to Captain of the 2014-2015 MOA. *See* April 27, 2017 Hearing, Joint Exhibit D, top of p. 3. This issue concerned procedures in place for Promotions Board recommendations with which "the Fire Chief did not agree". Tr., p. 41.

72. This proposal was characterized as "Language Clean up" in the parties' negotiations status chart. *See* April 27, 2017 Hearing, Joint Exhibit D, top of p. 3.

73. For "Language Clean up" under Article 45: Candidates for Promotion to Lieutenant, the parties' negotiations status chart labels the issue as number 45B. *Id.*

74. For "Language Clean up" under Article 46: Candidates for Promotion to Captain, the parties' negotiations status chart labels the issue as number 46. *Id.*

75. According to testimony by IAFF Local 2612 President Thompson, the Fire Chief wanted to have the following language removed from the parties' 2014-2015 MOA's Articles 45 and 46:

> "If the Fire District's Fire Chief does not agree with the [Promotions] Board's recommendation, the Fire Chief must justify the reasons with his/her direct supervisor for review."

See April 27, 2017 Hearing, Joint Exhibit B, p. 50 (Article 45, for Lieutenant), and p. 55 (Article 46, for Captain).

76. Agreement was reached in negotiations to leave the language, *supra* Finding of Fact No. 75, in both Articles 45 and 46. Joint Stipulation of Material Facts, ¶ 24; Tr., pp. 42, 139.

77. Management did not declare impasse regarding 45A, 45B or 46. Tr., pp. 38, 133. *See also*, Finding of Fact No. 27.

78. Despite the fact that an agreement was reached by the parties during their 2016-2017 contract negotiations to leave the language in question in both Articles 45 and 46, and despite the fact that Management did not declare impasse regarding Articles 45 or 46, after the parties'

contract negotiations proceeded to the mandatory statutory impasse procedures of mediation and fact-finding and a 2016-2017 contract was unilaterally imposed, the language in question that had been included in 2014-2015 MOA's Articles 45 and 46 had been removed and was no longer included in the imposed contract. *See* April 27, 2017 Hearing, Joint Exhibit C, p. 41 (Article 45, for Lieutenant), and p. 46 (Article 46, for Captain).

PROCEEDINGS-RELATED FINDINGS OF FACT

79. On October 27, 2015, the parties informed the Public Employee Relations Board that they had reached impasse on the topic of compensation. *Supra*, Finding of Fact No. 26. Compensation was the only topic at issue during the impasse proceedings in 2015-2016. This was confirmed in writing by the Fire District on December 28, 2015. *Supra*, Finding of Fact No. 27.

80. PERB fact-finder Colleen White issued recommendations on pay on March 25-26, 2016, and Respondent rejected the fact-finder's recommendations, submitting its own recommendations for resolving the contract dispute over compensation to the Governing Body on May 9, 2016. Petitioner submitted its proposal to settle all remaining compensation issues on May 11, 2016 and the Governing body held a public hearing that day to consider both parties' recommendations for settling the impasse. *Supra*, Findings of Fact Nos. 29-32.

81. Petitioner's counsel was informed on June 2, 2016 that Respondent's counsel met with the Governing Body in executive session regarding the Union's May 11, 2016, proposal, and was given no authority to accept the Union's terms. Sedgwick County Fire District No. 1 imposed a 2-year contract on IAFF Local 2612 on June 8, 2016 retroactive to January 1, 2016. *Supra*, Findings of Fact Nos. 33-34.

82. On November 14, 2016, IAFF Local 2612 filed a Prohibited Practice Complaint against the Fire District alleging K.S.A. 75-4333(b)(1) and (b)(5) violations of the Kansas Public

Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.*, by refusing to meet and confer in good faith by unilaterally implementing contractual provisions different than those negotiated by the parties. *See* Complaint Against Employer, November 14, 2016.

83. Because Articles 17, 17A, 21, 31, 45 and 46 of the imposed contract are different from what the parties agreed to in negotiations and/or either were not addressed in negotiations or were not addressed during impasse proceedings, they are at issue in this prohibited practice proceeding.

84. Presiding Officer Bob Corkins' June 8, 2017 Initial Order found no violation of either K.S.A. 75-4333(b)(1) or (b)(5) and dismissed Petitioner's Prohibited Practices Complaint. *See* Initial Order, June 8, 2017, p. 9.

85. The Board takes administrative notice of a fact that has come to light since the proceedings detailed herein, that is, that since the submission of these issues to the Board, Sedgwick County has withdrawn from coverage by PEERA.

ISSUES IN DISPUTE

The primary issue for resolution in this matter is whether the actions of Respondent incorporating contract provisions regarding mandatory topics of the statutory meet and confer process that were different from agreements tentatively reached in bargaining, or that were never negotiated during bargaining, and which were not addressed in the mandatory statutory impasse proceedings, including mediation and fact-finding, were prohibited practices in violation of the Kansas Public Employer-Employee Relations Act as contemplated by K.S.A. 75-4333(b)(1) and (b)(5). While both Petitioner's original and amended Prohibited Practice Complaints urged that Respondent's unilateral imposition of a two-year contract constituted a violation of the PEERA prohibited practices provisions, Petitioner made no further argument concerning this issue, neither in its motion for summary judgment, nor at the April 27, 2017 Hearing before presiding officer

Corkins nor in its Petition for Review before this body and as the PERB considers this issue to have thus been waived, it will not be further addressed.

In addition, the Board raises an issue *sua sponte*, that the matters here in contention are made moot by the withdrawal of Employer Sedgwick County from PEERA. *See* Finding of Fact No. 85. This issue will be addressed first.

LEGAL CONCLUSIONS/DISCUSSION

A. Mootness

Kansas' Supreme Court has instructed that an appeal will be dismissed as moot "only when it clearly and convincingly appears that an actual controversy has ceased and the only judgment that could be entered would be ineffectual for any purpose." *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 815 P.2d 89 (1991). Further, in a labor relations dispute raising questions of mandatory negotiability under PEERA's teacher/school board counterpart, the Professional Negotiations Act, ("PNA"), K.S.A. 72-2218 *et seq*,, the Court concluded that the issue was not moot, stating that "[q]uestions involving whether an item is mandatorily negotiable under the [PNA] and the proper procedure for raising the matter are issues likely to recur throughout the state and evade review." *Junction City Educ. Ass'n v. Board of Educ., Unified School Dist. No. 475, Geary County*, 264 Kan. 212, 215, 955 P.2d 1266 (1998). Here, the Board concludes that questions involving PEERA mandatory negotiability and the interplay between that construct and the issues of proper procedures for utilizing the Act's impasse process, and the taking of unilateral action by an employer governing body clearly involves a question of public interest likely to arise in the future unless settled by a court of last resort. Accordingly, PERB issues this Final Order addressing the parties' disputes.

B. General Introduction to PEERA; Conditions of Employment and Management Rights

The Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.*, ("the Act"), provides public employees the right to form, join and participate in activities of employee organizations for meeting and conferring with public employers regarding grievances and conditions of employment, as well as the right to refrain from doing so. K.S.A. 75-4324. In turn, employee organizations represent bargaining unit members in meet and confer proceedings with employers over conditions of employment. The Act mandates that the employer must engage in the meet and confer process in good faith:

> "Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization."

K.S.A. 75-4327(b). The Act defines "meet and confer in good faith" as "the process whereby the representatives of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment." K.S.A. 75-4322(m).

Conditions of employment, it must be noted, are defined by the Act to mean:

> "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."

K.S.A. 75-4322(t). Although negotiating in good faith over conditions of employment is mandatory, the Act also reserves to employers certain existing rights. *See* K.S.A. 75-4326. These rights are commonly referred to as "management rights" or "managerial prerogatives". *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K–NEA*, 233 Kan. 801, 804–05, 667 P.2d 306 (1983) ("Pittsburg State"). There is an inherent tension between the enumerated rights reserved to employers by the Act and the Act's conditions of employment which are mandatory topics for meet and confer. For example, negotiating over the mandatory meet and confer topic of "wages" presents a clear conflict with K.S.A. 75-4326(d)'s enumerated managerial prerogative of "maintain[ing] the efficiency of governmental operation" and "hours of work" is inconsistent with the employer's right to "direct the work of its employees". Further, K.S.A. 75-4330(a) and the statutory definition of conditions of employment make it clear that the mandatory meet and confer process does not reach matters fixed by the Kansas constitution or statute, nor those preempted by federal law.

Virtually any subject of negotiation that is advanced under an assertion that it is a condition of employment in some way alters or infringes upon managerial prerogative. Further, many subjects are to a greater or lesser degree circumscribed by constitutional, state and federal law. The resolution of this conflict requires a statutory interpretation which harmonizes K.S.A. 75-4327(b) and 75-4322(t), set out above, with K.S.A. 75-4330(a) and K.S.A. 75-4326. To do so, PERB must balance the employees' interest in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and direction of the enterprise. PERB has adopted, and the Kansas Supreme Court has approved, a balancing test for this purpose. *Pittsburg State, supra* at 821 (concluding that "[t]he test which [PERB] has adopted and utilized in these proceedings is necessary to carry out the purposes of the Act; it is grounded

in statute; and it is within the scope of the agency's authority"). PERB's balancing test, approved by the Court for deciding whether a particular proposal is or is not mandatorily negotiable, is as follows:

> "If an item is significantly related to an express condition of employment, and if negotiating the item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable."

Id., at 816. In that matter, the Kansas Supreme Court affirmed PERB's determination that "[t]he criteria, procedures, or methods by which candidates for promotion are identified" is a condition of employment. *Id.*, at 826. Under principles of *stare decisis*, that holding makes the topics herein at issue under Articles 45 and 46 mandatorily negotiable conditions of employment as both the "language clean up" proposal by management and the Union proposal to change the Candidates for Promotion to Lieutenant scoring matrix to mirror that used for promotions to Captain constitute criteria, procedures, or methods by which candidates for promotion are identified prior to finalization of a promotion decision from firefighter to Lieutenant or from Lieutenant to Captain. The Initial Order's conclusions rejecting the mandatory negotiability of these issues are in error, as were certain findings of fact upon which the presiding officer based his legal conclusion. Specifically, the Findings of Fact discussed in the Initial Order's Conclusions of Law at paragraphs 20 and 21 at pp. 5-6 are decidedly against the preponderance of record evidence. *See* Findings of Fact 69, 70, 71, 75, 76 and 78. Accordingly, the Initial Orders findings and conclusions on these issues are set aside. *See* Initial Order, June 8, 2017, pp. 5-7.

After application of the balancing test to the remaining topics negotiated by the parties, the Board herein concludes that each of the topics discussed at meet and confer were statutory conditions of employment, or were significantly related thereto and negotiating those items would not unduly interfere with management rights reserved to the employer by law. Specifically, the

Article 17 issue, use of part-time employees is significantly related to express conditions of employment, including "wages" and "hours of work", and negotiating the issue, which had been a part of the parties' bargained MOA since 1998, will not unduly interfere with management rights reserved to the employer by law; the Article 17A issue was not negotiated by the parties, see Findings of Fact Nos. 50-52. As noted by Petitioner, "[i]t is . . . impossible for [Respondent] to employ additional part-time, volunteer, and reserve employees to do the work of the full-time employees without ***necessarily*** reducing the hours of work, and the wages – overtime or otherwise -- of the full time staff." Petition for Review of Initial Order, June 22, 2017, p. 8 (emphasis in original). The United States Supreme Court, in a decision under the National Labor Relations Act, has held that the use of non-unit employees to perform work of bargaining unit members is a mandatory topic of negotiations. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213-214 (1964). In addressing this issue under the NLRA and other state public employee relations acts, the NLRB and other state's PERB counterparts have likewise concluded that the transferring of bargaining unit work to non-unit employees, for example, to another labor bargaining unit or to independent contractors by subcontracting, is a term and condition of employment and therefore mandatorily negotiable.[2] Initial Order conclusions to the contrary are reversed.

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[2] See, e.g., *Health Care And Retirement Corporation of America D/B/A Hampton House*, 317 NLRB 1005, 1995 WL 389869 (N.L.R.B.) (holding that where an employer promotes employee to supervisory position and the new supervisor continues to perform former bargaining unit work, the work is thereby removed from bargaining unit, giving rise to a change in bargaining unit's terms and conditions of employment and the employer is obligated to bargain with union in good faith; employer may unilaterally change the bargaining unit's work only after a lawful impasse); *Van Buren Public School District v. Wayne County Circuit Judge*, 61 Mich.App. 6, 232 N.W.2d 278, 90 L.R.R.M. (BNA) 2615 (1975) (subcontracting of school bus driving services previously performed by bargaining unit members is covered by the phrase "terms and conditions of employment"; requiring the parties to bargain about the decision whether to subcontract "might reveal aspects of the problem previously ignored or inadequately studied" and would bring a problem of vital concern to both labor and management within the framework established by the legislature as most conducive to labor peace); Decision and Order of Rhode Island State Labor Relations Board, *In the Matter of University of Rhode Island*, Case No. ULP-5238 (August 25, 2000) (where, following retirement of unit member, some of the duties of her former position were unilaterally assigned to non-bargaining unit member, such unilateral assignment to non-unit member and failure to bargain with employee representative constituted an Unfair Labor Practice)(reversed on other grounds at 2001 WL 1558774(R.I.Super.));

The Article 21 issue, involving the process for reserving use of vacation time is significantly related to an express condition of employment, that of "vacation allowances", *id.*, and negotiating over same will not unduly interfere with management rights reserved to the employer, as is evident by the fact that agreement was reached at the table to leave language from the 2014-2015 MOA in the parties' tentative agreement. Finally, both Article 31 proposals, belt allowance and station t-shirts, which are sold by the Union and can be purchased with funds from the unit members' uniform allowance, constitute "wearing apparel" issues, and are express conditions of employment, K.S.A. 75-4322(t). Conclusions to the contrary in the Initial Order under review are reversed.

C. Impasse Proceedings Under the Act

Successful negotiations are memorialized in a memorandum of agreement that "may extend to all matters *relating to* conditions of employment", with specified exceptions. *See* K.S.A. 75-4330 (emphasis added). If such negotiations are unsuccessful, leading to impasse, a term not defined by the Act but which is commonly understood to occur when the two sides negotiating an agreement are unable to reach an agreement, the Act sets forth procedures to assist in either resolving the deadlock or setting the stage for the employer's governing body to act unilaterally. *See* K.S.A. 75-4332(f).

City of Boston v. Labor Relations Commission, 58 Mass.App.Ct. 1102, 787 N.E.2d 1154 (Table), 2003 WL 21057227 (Mass.App.Ct. May 12, 2003) (in this unpublished opinion, the Appeals Court held that the city's unilateral transfer of bargaining unit members' duties to municipal police who were not part of bargaining unit was mandatory subject of bargaining and resulted in adverse impact on patrol officers as they could potentially lose opportunity to work overtime, transfer also resulted in adverse impact on bargaining unit as it lost opportunity to represent additional members and that the labor commission did not exceed its authority by ordering employer to restore *status quo ante*); *Clerical-Technical Union of Michigan State University v. Michigan State University*, 214 Mich.App. 42, 542 N.W.2d 303 (1995) (holding that employer committed unfair labor practice of failure to bargain in good faith where it unilaterally sent notices to employees of changes in job title, grade level and of transfer from one bargaining unit to different bargaining unit).

The Act requires that "if the board determines an impasse exists in meet and confer proceedings between a public employer and a recognized employee organization, the board shall aid the parties in effecting a voluntary resolution of the dispute, and request the appointment of a mediator or mediators". K.S.A. 75-4332(b) (emphasis added). If mediation does not resolve the dispute, fact-finding is the next step in the statutory process to assist in reaching an agreement. *See* K.S.A. 75-4332(d). Fact-finding is defined by the Act to mean "investigation of such a dispute by an individual, panel, or board with the fact-finder submitting a report to the parties describing the issues involved; the report shall contain recommendations for settlement and may be made public." K.S.A. 75-4322(p). The parties engaged in Kansas public sector negotiations, like the overwhelming majority of their counterparts in other states, cannot use private sector impasse resolution mechanisms, as employees do not have the right to "engage in a strike", K.S.A. 75-4333(c)(5), and employers do not have the right to "institute or attempt to institute a lockout", K.S.A. 75-4333(b)(8). Because public sector employers are not compelled to accept the terms of a contract with which they disagree, the resolution of impasse in public sector bargaining has often depended on the political pressures the parties could bring to bear upon one another. Thus, in place of the economic pressure generated by strikes and other economic weapons in the private sector, public sector bargaining statutes use political pressure generated by public scrutiny during the fact-finding process as an important means of encouraging impasse resolution.

In the meet and confer process, the statutory obligation of employer and employee representative to act in good faith does not end when parties declare impasse. In order to exhaust the meet and confer process, before taking unilateral action the employer is obligated to seek resolution of any issues in dispute through the mediation, fact-finding and post fact-finding steps of the statutory impasse procedure. *Dep't of Administration v. Pub. Employees Relations Bd. of*

the Kansas Dep't of Human Resources, 257 Kan. 275, 287, 894 P.2d 777 (1995) (citing K.S.A. 75-4332) ("[a]lthough the governing body of the public employer ultimately can dictate any mandatory subject of bargaining, it can do so only after the public employer has negotiated in good faith, reached impasse in good faith, and participated in impasse-resolution procedures such as fact-finding and mediation."); *see also*, K.S.A. 75-4332(f) (providing that "[i]f the parties have not resolved the impasse by the end of a 40-day period, commencing with the appointment of the fact-finding board, or by a date not later than 14 days prior to the budget submission date, whichever date occurs first: (1) The representative of the public employer involved shall submit to the governing body of the public employer involved a copy of the findings of fact and recommendations of the fact-finding board, together with the representative's recommendations for settling the dispute; (2) the employee organization may submit to such governing body its recommendations for settling the dispute; (3) the governing body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions; and (4) thereafter, the governing body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.") K.S.A. 75-4332(f). It is only after fulfilling this statutory command that an employer governing body is able ultimately to "take such action as it deems to be in the public interest, including the interest of the public employees involved" as contemplated by K.S.A. 75-4332(f). *Id*

D. PEERA Prohibited Practices: K.S.A. 75-4333(b)(5) Refusal to Meet and Confer in Good Faith

The Act's mandate that parties "meet and confer in good faith" in an "endeavor to reach agreement on conditions of employment" is "buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer to willfully 'refuse to meet and confer in good faith with representatives of recognized organizations as required in K.S.A. 75-4327.'" Raymond

Goetz, The Kansas Public Employer-Employee Relations Law, 28 KAN. L. REV. 243, 268 (1980) (hereinafter "Goetz"). Four decades ago, in his thorough, insightful 1980 analysis of the Act and of this agency's implementation of it, University of Kansas Professor Raymond Goetz remarked that the new public employee rights established by the Act,

> "would in effect be meaningless without some provision for their enforcement." For this purpose, section 75-4333(b)(1) through (8) sets forth eight 'prohibited practices' for employers, the first five of which are patterned after the employer unfair labor practices in section 8(a)(1) through (5) of the LMRA. The Kansas Act differs from the LMRA in that the conduct specified constitutes a prohibited practice only if engaged in 'willfully'. The import of this qualification is far from clear".

Goetz, at 263. The Board now turns its attention to this qualification.

E. What Constitutes a Prohibited Practice Engaged in "Willfully"

The Act does not define "willfully." Decisions by the Kansas Supreme Court instruct that the most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009). Thus, in applying the Act, this Board must interpret its provisions by ascertaining legislative intent. "The first step in that analysis is simply to read the statutory language, giving common words their ordinary meanings. If that plain reading reveals what the legislature intended, we need not resort to legal treatises to create a meaning for the statute." *Douglas v. Ad Astra Information Systems, L.L.C.*, 296 Kan. 552, 560, 293 P.3d 723 (2013) (*citation omitted*). Further, "[i]t is presumed the legislature understood the meaning of the words it used and intended to use them . . . in their ordinary and common meaning." *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶¶ 7–8, 834 P.2d 368 (1992); *see also, Midwest Crane & Rigging, LLC v. Kansas Corporation Commission*, Syl. ¶7, 306 Kan. 845, 397 P.3d 1205 (2017) (instructing that "[w]hen a statute does not define a term, the words in a statute are assumed to bear their ordinary,

contemporary, common meaning"). "Dictionary definitions are good sources for the 'ordinary, contemporary, common" meanings of words.' " *Id.*, p. 851.

Both the adjective "willful" and the adverb "willfully" are derivations of the root word "will". "Will" is defined to mean "the mental faculty by which one deliberately chooses or decides upon a course of action; volition". AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Edition 1976), p. 1465. The same source defines "willful" to mean "[s]aid or done in accordance with one's will; deliberate" and provides an alternative meaning, "inclined to impose one's will; unreasoningly obstinate". *Id.*, p. 1466.

BLACK'S LAW DICTIONARY defines the term "willful" as follows:

> "Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.
>
> An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.
>
> Willful is a word of many meanings, its construction often influenced by its context.
>
> . . .
>
> The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. . . .
>
> A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative."

BLACK'S LAW DICTIONARY (5th Ed. 1979, p. 1434).

Goetz also notes that "the term 'willful' is more commonly found in criminal statutes under which criminal intent is an essential element of particular crimes." Goetz, supra, p. 263. He continues, observing that "[u]nder [K.S.A.] 21-3201 proof of willful conduct is required to establish criminal intent and 'willful conduct' is defined as 'conduct that is purposeful and intentional and not accidental.'" *Id.*

The United States Supreme Court observed that, "[i]n common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.' " *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (citing Roget's International Thesaurus § 622.7, p 479; § 653.9, p 501 (4th ed. 1977)). And, the Kansas Supreme Court has noted that "[w]illful and intentional are synonymous." *MGM, Inc. v. Liberty Mut. Ins. Co.*, 253 Kan. 198, 202–03, 855 P.2d 77 (1993). Giving the ordinary word "willfully" its common meaning suggests a legislative intent that the word "willfully" be construed to mean "deliberately" or "intentionally", but it could also be construed in accordance with the alternative common meaning, above, to reflect an act done in a manner that is "unreasoningly obstinate". Kansas appellate Courts have construed the term "willful" in accordance with this sense of the term. *See, e.g., Carter v. Koch Engineering*, 12 Kan.App.2d 74, 735 P.2d 247 (1987) ("[f]or a violation of instructions to be 'willful' under K.S.A. 44–501(d), it must include 'the element of intractableness, the headstrong disposition to act by the rule of contradiction' ") (citing to *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 P. 934 (1920)).

PERB has had a number of occasions over the years to construe the meaning of "willfully" as that term is used in the Act's prohibited practice section. For example, in a prohibited practice charge and counter charge between Junction City Police Officers Association and the City of Junction City, Kansas, PERB construes the term "willfully" with explicit reference to the common

understanding that the word has more than one meaning and concluded that "absence of an evil intent will not necessarily insulate a party from being found to have committed a prohibited practice." Initial Order of the Presiding Officer, *City of Junction City, Kansas v. Junction City Police Officers Association* and *Junction City Police Officers Association v. City of Junction City, Kansas*, Case Nos. 75-CAEO-2-1992 and 75-CAE-4-1992, July 31, 1992, pp. 27, 29. In that matter, the presiding officer ruled and PERB concurred that under PEERA willful conduct "does not require a deliberate intention to injure." *Id.*, p. 4. Rather, the intent in willful conduct under PEERA is "an intent to do an act . . . in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know . . . that such conduct would [likely] result in harm to the rights of another." *Id.*

Given that the legislature is presumed to know the meaning of the common words it uses, one should conclude that the legislature was aware of the many shades and degrees of meaning for the term "willfully". Thus, in ascertaining legislative intent for the requirement that a prohibited practice will not be found unless it was committed "willfully", the Board construes "willfully" in accordance with the ordinary meanings which the term is commonly understood to represent, i.e., that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, that it was undertaken in an unreasoningly obstinate manner or with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent. Here, the Board concludes that by restricting the definition of "willfully" to require "evidence of anti-union animus", the Presiding Officer's Initial Order is in error. *See* Initial Order, June 8, 2017, p. 5.

F. PEERA Prohibited Practices: K.S.A. 75-4333(b)(1) Interfere, Restrain or Coerce Public Employees in the Exercise of Rights Granted in K.S.A. 75-4324

K.S.A. 75-4333(b)(1) provides that it is a "prohibited practice for a public employer or its designated representative willfully to interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324". K.S.A. 75-4324 provides that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." Under PEERA, an "interference", or "(b) (1)", charge can be classified as either derivative or independent. While he did not attribute to them the same classifications by name, noted commentator Raymond Goetz acknowledges the existence of derivative violations of K.S.A. 75-4333(b)(1) as well through violations of any of the other seven prohibited employer practices. An "interference" charge, according to Goetz,

> "really is a 'catchall' because of its broad general language. By its terms, it includes almost anything an employer might do that would tend to interfere with the statutory right to [representation]. The remaining seven employer prohibited practices enumerated in section 75-4333(b)(2) through (8) constitute specific applications of the sweeping prohibition against interference in section 75-4333(b)(1). Any conduct which would violate (2) through (8) would also violate (1)."

Goetz, The Kansas Public Employer-Employee Relations Law, 28 KAN. L. REV. 243, at 264.

PERB has found that a violation of K.S.A. 75-4333(b) (1) exists whenever any of the other prohibited practice violations have been established. *See, e.g., Fraternal Order of Police, Lodge No. 47 v. Leavenworth County Sheriff's Department*, Case No. 75-CAE-3-1999 (Dec. 22, 1999) (finding that violations of (b)(3) and (b)(4) also constituted violation of (b)(1)); *Fort Hays State University Chapter of the American Association of University Professors v. Fort Hays State*

University, Case No. 75-CAE-12-2001 (Mar. 10, 2004) (concluding that violations of (b)(5) and (b)(6) also constituted violations of (b)(1)).

With this understanding of the Act's overall purpose, impasse proceedings, the prohibited practice charges here alleged, and of the meaning of the word "willfully" for purposes of PEERA's unfair practices prohibitions, the Board now turns to analysis of the issues here in dispute. We will first lay out specific governing principles and then summarize our conclusions regarding each Article sequentially by number.

G. Unilateral Action After Exhaustion of Impasse Proceedings Must Derive From Issues Upon Which the impasse Was Conducted

When parties to a public sector meet and confer process reach agreement in bargaining, such agreements resolve the issues addressed by incorporation into the parties' MOA. If the parties do not reach agreement on *all* issues, as was the case here, they are obligated to proceed to impasse. *Dep't of Administration v. Pub. Employees Relations Bd. of the Kansas Dep't of Human Resources*, 257 Kan. at 287. Upon moving from meet and confer to impasse, an employer cannot remain silent on an issue by failing to declare it, deprive the Union of the opportunity to present its perspective to the mediator, the fact-finder, the Governing Body, and to the public when a fact-finding report is released, and then impose a condition of employment at variance from the tentative agreement reached on that issue during meet and confer. In short, exhaustion of impasse proceedings is a precondition to unilateral action by the governing body; actions unilaterally taken after exhaustion of the impasse proceedings must derive from the issues on which impasse is conducted. Failure to observe these fundamentals is indicative of bad faith in bargaining.

In Kansas, the Act provides public employers what appears on cursory review to be untethered latitude to take action following exhaustion of the impasse procedures: "the governing body shall take such action as it deems to be in the public interest, including the interest of the

public employees involved". K.S.A. 75-4332(f). However, this seemingly open-ended grant of authority is based on the express premise, deriving from the Act's definition of fact-finding,[3] that parties to impasse have in fact exhausted the impasse proceedings on *the issues involved* in an effort to settle the dispute. Steps in the statutory impasse procedures include conducting a fact-finding hearing [on *the issues involved*], issuing a fact-finding report making recommendations [on *the issues involved*], conducting a hearing before the governing body at which the parties explain their positions [on *the issues involved*], making recommendations by the parties to the governing body [on *the issues involved*], and making the fact-finder's report [on *the issues involved*] public. *See* K.S.A. 75-4332(b); K.S.A. 75-4332(e); K.S.A. 75-4332(f); and, K.S.A. 75-4322(p).

In the instant matter, the parties had reached tentative agreement during their negotiations regarding all non-compensation issues over which they had engaged in meet and confer. Findings of Fact Nos. 22, 23, 24, 46, 47, 48, 50, 51, 52, 53, 54, 55, 59, 60, 63, 64, 69, 70, 76 and 78. The only issue taken to the statutory impasse process of mediation, fact-finding and post fact-finding actions was compensation. Finding of Fact No. 27. The only issue about which the fact-finder made recommendations was compensation. Finding of Fact No. 28.

The Legislature enacted PEERA expressly "to promote the improvement of employer-employee relations" by "obligat[ing] public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve . . . disputes relating to conditions of employment". In pursuit of these ideals, the Act provides that it is only after adherence to the prescribed statutory impasse resolution procedure that a governing body may take unilateral action.

[3] Recall the statutory definition: " 'Fact-finding' means investigation of such a dispute by an individual, panel, or board with the fact-finder submitting a report to the parties describing *the issues involved*; the report shall contain recommendations for settlement and may be made public" (emphasis added).

If only one issue is in dispute, here compensation, the structured procedures imposed by the Legislature clearly indicate a legislative intent that it is only that issue upon which the governing body may unilaterally act upon exhaustion of the successive steps of the impasse process.

Further, the construction of the statute reached by the presiding officer and urged by Respondent renders the statutory procedures for meet and confer pragmatically useless. Such construction would ultimately require employee bargaining representatives to take all negotiated issues to impasse where any one issue was disputed[4] and would frustrate the purposes of the Act. The Board is mindful that when interpreting the meaning of a statute, there is a presumption that the legislature does not intend to enact useless or meaningless legislation. *Hartford Cas. Ins. Co. v. Credit Union 1 of Kansas*, 268 Kan. 121, 132, 992 P.2d 800 (1999). Affirming the Initial Order here would stand this presumption on its head.

CONCLUSION

With regard to an existing condition of employment, including those memorialized in the parties' MOA, an employer may not unilaterally change such absent exhaustion of bargaining in good faith to impasse and completion of all steps of the statutory impasse process, including mediation and fact-finding. If an existing condition of employment is reopened, negotiated in good faith, and subjected to impasse, including mediation and fact-finding, release of the fact-finder's report addressing the parties' respective contentions and perspectives will assist in reaching resolution, it is presumed, by bringing political pressure to bear on the governing body, ultimately favoring one or the other of the two competing positions, or some middle ground between them. Failure of an employer at impasse after good faith bargaining to make known its

[4] In fact, in the instant matter new Article 17A was unilaterally imposed in the 2016-2017 contract even though it had never been introduced into the parties' meet and confer process and had not been negotiated at all. Joint Stipulation of Material Facts, ¶ 25.

opposition regarding a given issue, present its position, and allow first mediation and then the fact-finding process to examine the parties' competing perspectives, make recommendations, and ultimately make its report public, is inconsistent with the statutory mandate of good faith bargaining and precludes an employer from unilaterally imposing a change to that condition of employment. By the same reasoning, an employer that unilaterally imposes a contract term on a mandatorily negotiable condition of employment without negotiating commits a prohibited practice. The foregoing principles apply with regard to the following Articles/proposals here in dispute before PERB, utilizing the numbering nomenclature used by the parties in their April 27, 2017 Hearing, Joint Exhibit D, pp. 3-6:

1. Article 17: Regular Part-Time Employees -- Negotiations on this issue ended in an agreement to leave language then existing in the parties 2014-2015 MOA unchanged, Finding of Fact No. 47, and the issue was not advanced to impasse, Finding of Fact No. 49. In the unilaterally imposed contract for 2016-2017, Article 17 language was deliberately and significantly altered. Finding of Fact No. 39.
2. Article 17A: Volunteer and Reserve Firefighters – A new Article 17A was inserted in the unilateral contract for 2016-2017, Finding of Fact No. 40, but was never proposed for negotiation, and was not negotiated, Finding of Fact No. 25. Since this Article 17A language was not negotiated, it was not considered at impasse.
3. Article 21: Vacations – Negotiations on this issue ended in an agreement to leave language then existing in the parties 2014-2015 MOA unchanged, Findings of Fact Nos. 22, 54, 55, and the issue was not advanced to the mandatory impasse procedures, Finding of Fact No. 57. In the unilaterally imposed contract for 2016-2017, Article 21 language was intentionally altered. Finding of Fact No. 56.
4. Article 31A: Uniform allowance for belt – Negotiations on this issue ended in agreement to provide a uniform allowance for 1.5 inch black belt, Findings of Fact Nos. 23, 60, the issue was not advanced to impasse, Finding of Fact No. 83, but the unilaterally imposed contract failed to include this agreement, Finding of Fact No. 60.
5. Article 31A: Station t-shirts -- Negotiations on this issue ended in agreement to allow sales of station t-shirts with approved logo, Findings of Fact Nos. 64, 65, the issue was not advanced to impasse, Finding of Fact No. 66, and the unilaterally imposed contract failed to include this agreement, Finding of Fact No. 65.
6. Article 45B: Candidates for Promotion to Lieutenant (language clean up) – Negotiations on this issue ended in an agreement to leave language then existing in the parties 2014-2015 MOA unchanged, Findings of Fact Nos. 24, 76, and the issue was not advanced to the mandatory impasse procedures, Finding of Fact No. 77, and the implicated language was deliberately deleted from the unilaterally imposed contract for 2016-2017, Finding of Fact No. 78..

7. Article 46: Candidates for Promotion to Captain (language clean up) – Negotiations on this issue ended in an agreement to leave language then existing in the parties 2014-2015 MOA unchanged, Findings of Fact Nos. 24, 76, the issue was not advanced to the mandatory impasse procedures, Finding of Fact No. 77, and the implicated language was deliberately deleted from the unilaterally imposed contract for 2016-2017, Finding of Fact No. 78.
8. Article 45A: Candidates for Promotion to Lieutenant (Change Reporting of Scores to Mirror Captains) – Negotiations on this issue ended in an agreement to change reporting of scores to mirror Captain's, Findings of Fact Nos. 69, 70, 76, the issue was not advanced to the mandatory impasse procedures, Finding of Fact No. 77, and the unilaterally imposed contract for 2016-2017 failed to include language reflecting the parties' agreed change, Finding of Fact No. 70.

Based upon this record, the Board finds and concludes that the actions detailed in paragraph one and in paragraphs three through eight, above, constitute prohibited practices in violation of K.S.A. 75-4333(b)(5) and (b)(1). As each of these topics were either express conditions of employment by statute, and mandatorily negotiable as such, or were mandatorily negotiable by application of *Pittsburg State's* balancing test, Respondent was under a duty to meet and confer in good faith throughout the entire process, including mediation, fact-finding and post fact-finding activities. Respondent's failure to declare the issues for impasse while harboring a silent intention to disavow the tentative agreements reached at the bargaining table persuades the Board that Respondent willfully refused to meet and confer in good faith.

For paragraph two, above, the Board reaches the same conclusion, but for a different reason, that being that as to Article 17A, inserted into the 2016-2017 imposed contract, Respondent did not even propose this language during bargaining regarding the mandatory condition of employment it represents and therefore the parties did not meet and confer with regard thereto.

Even if Respondent had proposed this language during bargaining, failure to declare the issue for impasse would preclude its unilateral imposition.

As such, Respondent's actions are willful, they are in contravention of K.S.A. 75-4333(b)(5), and they also constitute derivative violations of K.S.A. 75-4333(b)(1). The Initial Order's findings and conclusions inconsistent with this Final Order are set aside.

IT IS THEREFORE ADJUDGED, that Respondent's actions as detailed above were in violation of K.S.A. 75-4333(b) (5).

IT IS FURTHER ADJUDGED, that by its violation of K.S.A. 75-4333(b)(5), Respondent's actions were also in violation of K.S.A. 75-4333(b)(1).

IT IS THEREFORE ORDERED, that the Presiding Officer's Initial Order dismissing Petitioner's Amended Prohibited Practice Complaint is herein set aside.

IT IS FURTHER ORDERED, that for a period of not less than thirty (30) days, the Respondent shall post a copy of this order in a conspicuous location at each duty station where members of the employee unit represented by International Association of Fire Fighters Local 2612 for the time period for which this complaint arose are assigned to work.

DATED, this 7th day of December, 2020.

Joni J. Franklin, PERB Board Chairperson

Michael Ryan, PERB Board Member

Jonathan Gilbert, PERB Board Member

Rick Wiley, PERB Board Member

Keely J. Schneider, PERB Board Member

NOTICE OF RIGHT TO JUDICIAL REVIEW

The foregoing Final Order constitutes final agency action of the Public Employee Relations Board. This Order is subject to review in District Court in accordance with the Kansas Judicial Review Act, K.S.A. 77-601 et seq.

Unless a motion for reconsideration is filed pursuant to K.S.A. 77-529, a petition for judicial review must be filed in 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. 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 Justin Whitten, Chief Counsel
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, Kansas 66603-3182

CERTIFICATE OF SERVICE

I, the undersigned, in accordance with K.S.A. 77-531, do hereby certify that I served a true and correct copy of the above and foregoing Final Order upon the following by depositing the same in the United State Mail, postage prepaid, to:

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On this 15th day of December, 2020.

Douglas A. Hager, No. 16688
Counsel, Public Employee Relations Board