

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

COMMUNICATION WORKERS
OF AMERICA,

Petitioner,

v.

THE UNIVERSITY OF KANSAS
MEDICAL CENTER

Respondent.

PERB Case No. 75-UDC-3-2016

Office of Administrative Hearings
Case No. 16DL0110 PE

FINAL ORDER

NATURE OF THE CASE

This is a review of a Default Order issued by the Office of Administrative Hearings Administrative Law Judge (ALJ) dismissing the petition in the above captioned case in accordance with K.S.A. 77-520, due to the petitioner's continued refusal to submit a brief as ordered by the ALJ.

Additionally, the petitioner had previously filed a Petition for Review seeking review of a scheduling order issued by the ALJ. That petition for review is denied for reasons set forth below.

The ALJ's default order is affirmed.

ISSUES

- I. Was the ALJ's October 31, 2017, *Order Effecting PERB Remand Directions*, an Initial Order subject to review under the Kansas Administrative Procedure Act.
- II. Did the petitioner's refusal to brief an issue ordered by the ALJ merit default judgment in accordance with K.S.A. 77-520.

FINDINGS OF FACT

1. On November 25, 2015, the petitioner, an employee organization known as Communications Workers of America (CWA), filed a petition with the Kansas Public Employee Relations Board (PERB) seeking unit determination and certification to include five “University of Kansas Medical Center communications specialists.” The petition was accompanied by a sheet signed by four of the five employees in the proposed unit.
2. The respondent, the University of Kansas Medical Center (KUMC), filed an Answer and a “Motion to Dismiss and/or Deny the Petition Based on Overfragmentation and Splintering” on January 6, 2016. The Motion to dismiss argued in part that *Kansas University Police Officers Association v. University of Kansas*, 75-UDC-6-1988, acts as a bar to the current petition under the theories of *res judicata* and collateral estoppel.
3. CWA filed a Response to Respondent’s Motion to Dismiss, on January 14, 2016.
4. On January 26, 2016, the Office of Administrative Hearings (OAH) issued a Notice of Prehearing Conference and scheduled a hearing on February 11, 2016 at 3:30pm.
5. The prehearing was conducted by OAH on February 11, 2016.
6. On February 12, 2016, OAH issued a Prehearing Order. In that order, OAH denied KUMC’s motion to dismiss on the grounds of *res judicata* and collateral estoppel, and ordered the parties to brief why the presiding officer should not move *sua sponte* for summary judgment and issue a ruling on the pleadings.
7. On March 2, 2016, CWA filed a Withdrawal of Request for Evidentiary Hearing, and stated that CWA did not object to the presiding officer moving *sua sponte* for summary judgment and ruling on the pleadings.

8. On March 28, 2016, KUMC filed a Response to Show Cause Directive and stated that KUMC did not object to the presiding officer moving *sua sponte* for summary judgment and ruling on the pleadings.
9. OAH issued a Notice of Forthcoming Decision on March 30, 2016 stating that discovery in the case had ended, no further pleadings would be accepted, no further proceedings would be scheduled, and that an initial order would be issued addressing the dispute within 30 days.
10. On April 28, 2016, OAH issued an Initial Order, with findings of fact and conclusions of law, denying the petition for unit certification.
11. CWA filed a Petition for Review of Initial Order on May 13, 2016.
12. The PERB issued an order on May 13, 2016 assigning a presiding officer to review the matter and to Issue a Final Order on behalf of the PERB.
13. The presiding officer issued a Scheduling Order on July 14, 2016 and set a briefing schedule on the Petition for Review.
14. CWA filed a Brief in Support of Petition for Review, on September 15, 2016.
15. KUMC filed a Brief in Opposition of Petition for Review, on November 28, 2016.
16. CWA filed a Reply to Respondent's Brief in Opposition to Petition for review, on December 20, 2016.
17. Oral arguments were conducted on June 16, 2016.
18. On September 12, 2017, the designated hearing officer remanded this case to the Administrative Law Judge (ALJ), "for an evidentiary hearing to determine what is the appropriate unit for the University of Kansas Medical Center Communications

Specialists, and further proceedings in accordance with that determination.” (September 12, 2017 - *Order of Remand*).

19. On October 31, 2017, the ALJ issued an *Order Effecting PERB Remand Directions*. The Order directed both the CWA and KUMC to each submit a brief that details in part, a proposal for an appropriate unit determination and any alternate proposals. Additionally, the Order stated in part that upon submission of the briefs, the ALJ will issue a notice of prehearing conference to discuss the scope and timetable of further proceedings in the case. The Order concluded with the following notice: “Any party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default pursuant to K.S.A. 77-520 of the Kansas Administrative Procedure Act.”
20. On November 13, 2017, both parties submitted a *Joint Stipulation* agreeing that the Fraternal Order of Police and the Laborers’ International Union of North America represent the only formal two bargaining units at the University of Kansas Medical Center that are recognized by the employer.
21. On November 20, 2017, CWA filed a *Petition for Review of Initial Order*, seeking review of the ALJ’s October 31, 2017, *Order Effecting PERB Remand Directions*.
22. The ALJ’s October 31, 2017, *Order Effecting PERB Remand Directions*, however, was not an Initial Order subject to review under the Kansas Administrative Procedure Act.
23. On November 27, 2017, CWA filed a pleading with the ALJ entitled *Response to Presiding Officer/ALJ’s Order Effecting PERB Remand Directions and Request for Stay*. The CWA requested a stay of the proceedings pending review of CWA’s November 20, 2017 Petition for Review, and stated that “**Petitioner declines to submit a proposal for**

a different bargaining unit or brief detailing supporting facts for any such different bargaining unit.” [Emphasis added].

24. On November 29, 2017, the ALJ issued a *Notice of Proposed Default Order and Proposed Default Order* pursuant to K.S.A. 77-520. The ALJ noted that “any allegation that the PERB remand Order has been contravened by a denial of an evidentiary hearing is a premature accusation.” The ALJ also denied the CWA’s request for a stay of the proceedings and gave CWA another opportunity to avoid default by filing a brief as previously ordered.
25. On December 11, 2017, the CWA filed a motion with the ALJ seeking to vacate the notice of proposed default order and the proposed default order.
26. On December 12, 2017, the ALJ issued a Denial of Petitioner’s Motion to Vacate, noting that the CWA continued to defy the ALJ’s order to submit a brief. The ALJ in part found that: “The Proposed Default Order having now become effective, the petitioner’s right to review in accord with K.S.A. 77-527 as it was previously given notice has now been triggered and is running.”
27. The CWA filed a Petition for Review with the PERB via e-mail on January 2, 2018, seeking review of the default order entered by the ALJ.
28. The designated hearing officer conducted a Scheduling Conference on March 15, 2018.
29. The designated hearing officer issued a Journal Entry and Scheduling Order on April 2, 2018 that set forth a briefing schedule and scheduled oral arguments. Both the briefing deadlines and oral arguments were later extended / continued by agreement of the parties.
30. CWA filed their brief on April 24, 2018.
31. KUMC filed their brief on June 1, 2018.

32. The presiding officer conducted oral arguments on August 21, 2018. CWA appeared by and through counsels David Van Os of San Antonio, TX and Scott Brown of Kansas City, KS, and KUMC appeared by and through counsel Megan Walawender of Lawrence, KS.
33. The designated hearing officer also adopts by reference the findings of fact in the ALJ's November 29, 2017 *Notice of Proposed Default Order and Proposed Default Order* pursuant to K.S.A. 77-520.

CONCLUSIONS OF LAW

- I. The ALJ's October 31, 2017, *Order Effecting PERB Remand Directions*, was not an Initial Order subject to review under the Kansas Administrative Procedure Act.
- II. The petitioner's refusal to brief an issue ordered by the ALJ did merit default judgment in accordance with K.S.A. 77-520.

ANALYSIS

- I. *The ALJ's October 31, 2017, Order Effecting PERB Remand Directions, was not an Initial Order subject to review under the Kansas Administrative Procedure Act.*

On November 20, 2017, the CWA filed a *Petition for Review of Initial Order*, seeking review of the ALJ's October 31, 2017, *Order Effecting PERB Remand Directions*. CWA's November 20, 2017, *Petition for Review of Initial Order* must be denied because the ALJ's Order was not an Initial Order subject to review under the Kansas Administrative Procedure Act. CWA identified the ALJ's October 31, 2017 *Order Effecting PERB Remand Directions* as an "Initial Order" in its pleading, however a plain reading of the ALJ's order shows that the order was a briefing and scheduling order, not an Initial Order as set forth in K.S.A. 77-526 and K.S.A. 2017 Supp. 77-527. Only an Initial Order may be reviewed under K.S.A. 77-527. Mere

scheduling orders and briefing orders are not subject to review under the Kansas Administrative Procedure Act. The November 20, 2017, *Petition for Review of Initial Order* filed by the CWA is therefore denied.

II. *The petitioner's refusal to brief an issue ordered by the ALJ did merit default judgment in accordance with K.S.A. 77-520.*

On October 31, 2017, the ALJ issued a briefing and scheduling order entitled *Order Effecting PERB Remand Directions*. The Order directed both the CWA and KUMC to each submit a brief that details in part, a proposal for an appropriate unit determination and any alternate proposals. Additionally, the Order stated in part that upon submission of the briefs, the ALJ will issue a notice of prehearing conference to discuss the scope and timetable of further proceedings in the case. The Order concluded with the following notice: "Any party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default pursuant to K.S.A. 77-520 of the Kansas Administrative Procedure Act."

On November 13, 2017, both parties submitted a *Joint Stipulation* agreeing that the Fraternal Order of Police and the Laborers' International Union of North America represent the only two formal bargaining units at the University of Kansas Medical Center that are recognized by the employer. However, on November 27, 2017, the CWA then filed a pleading with the ALJ entitled *Response to Presiding Officer/ALJ's Order Effecting PERB Remand Directions and Request for Stay*. The CWA requested a stay of the proceedings pending review of CWA's November 20, 2017 Petition for Review, and stated that "**Petitioner declines to submit a proposal for a different bargaining unit or brief detailing supporting facts for any such different bargaining unit.**" [Emphasis added].

On November 29, 2017, the ALJ issued a *Notice of Proposed Default Order and Proposed Default Order* pursuant to K.S.A. 77-520. The ALJ noted that “any allegation that the PERB remand Order has been contravened by a denial of an evidentiary hearing is a premature accusation.” The ALJ also denied the CWA’s request for a stay of the proceedings and gave CWA another opportunity to avoid default by filing a brief as previously ordered.

On December 11, 2017, the CWA filed a motion with the ALJ seeking to vacate the notice of proposed default order and the proposed default order. On December 12, 2017, the ALJ issued a Denial of Petitioner’s Motion to Vacate, noting that the CWA continued to defy the ALJ’s order to submit a brief. The ALJ in part found that: “The Proposed Default Order having now become effective, the petitioner’s right to review in accord with K.S.A. 77-527 as it was previously given notice has now been triggered and is running.” The CWA then filed the Petition for Review that is currently before the designated hearing officer.

Because the issue of whether default judgment was properly employed by the ALJ in this case, it must be determined whether there is substantial evidence in the record to support the findings of the ALJ. *See* K.S.A. 2017 Supp. 77–621(c)(7), (d) [K.S.A. 2017 Supp. 77-621 is incorporated by K.S.A. 2017 Supp. 77-527(d)]; and *Rhodenbaugh v. Kansas Employment Sec. Bd. of Review*, 52 Kan. App. 2d 621, 631, 372 P.3d 1252, 1259 (2016), *review denied* (June 19, 2017). “Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.” *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 263, 75 P.3d 226 (2003). In the examination, the hearing officer must consider both the evidence supporting the findings and the evidence detracting therefrom. *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 360-362, 212 P.3d 239, 240 (2009).

In this case, the order of default was issued by the ALJ after the petitioner was advised in the November 29, 2017 notice and proposed default order that the petitioner's continued failure to comply with the ALJ's briefing order may result in default judgment entered against the petitioner in accordance with K.S.A. 77-520. Then on December 12, 2017, due to the petitioner's continued refusal to comply with the ALJ's briefing order, the ALJ exercised his discretion under K.S.A. 77-520(d) and dismissed the petitioner's application for an adjudicative proceeding. A review of the record supports the ALJ's decision to deny the stay and to dismissed the petitioner's application for an adjudicative proceeding.

After a review of the pleadings and oral arguments during the August 21, 2018 hearing before the designated hearing officer, it is clear that the petitioner strongly disagreed with the ALJ's decision to order additional briefing in the matter. Notwithstanding the procedural disagreement with the ALJ, the petitioner's continued refusal to comply with the ALJ's briefing order does constitute a failure to participate in some stage of an adjudicative proceeding. K.S.A. 77-520(a) addresses a party's failure to participate in "some stage of an adjudicative proceeding." In the present action, it is clear that briefing an issue ordered by the ALJ is "a stage of an adjudicate proceeding" contemplated within the statute. Therefore there is substantial evidence in the record to find that the ALJ did not error in entering a default order against the petitioner in this matter.

ORDER

Therefore, for the foregoing reasons, the November 20, 2017 Petition for Review filed by the CWA is denied, and the default order issued by the ALJ is affirmed.

NOTICE OF RIGHT TO JUDICIAL REVIEW

This order 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. A motion for reconsideration is not required in order to seek judicial review.

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.

Any party seeking judicial review must serve a copy of its petition for judicial review upon the Public Employee Relations Board by serving its designee at the following address:

Public Employee Relations Board (PERB)
c/o Tim Triggs – Chief Labor Conciliator
401 SW Topeka Blvd.
Topeka, Kansas 66603-3182

IT IS SO ORDERED.



10/9/2018

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Designated Hearing Officer*

Certificate of Service

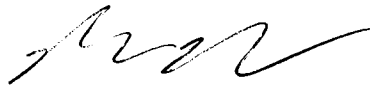
I, the undersigned, do hereby certify that on the 9th day of October 2018, I served a true and correct copy of the above and foregoing *Final Order* upon the following by depositing the same in the United States mail, postage prepaid, addressed to:

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Bradley R. Burke
Designated Hearing Officer - PERB