

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS**

Justin Rapp,

Petitioner,

PERB Case No. 75-CAE-11-2020
OAH No. 20DL0105 PE

v.

City of Wichita,

Employer.

INITIAL ORDER

Statement of Case

The matter comes before the Office of Administrative Hearings (OAH) for an administrative hearing pursuant to K.S.A. 75-4323(e)(2), K.S.A. 75-37,121, and K.S.A. 77-501 et seq.

A formal hearing on this matter was held by video conference on December 8, 2021. Erik Houghton, Deputy City Attorney, and Van Halley, Assistant City Attorney, appeared in person and on behalf of the City of Wichita (Employer). Employer called Deputy Chief Chester Pinkston (Pinkston) to testify on behalf of the Employer.

Petitioner Justin Rapp (Rapp) appeared in person and by his counsel, T. Chet Compton, Fleeson, Gooing, Coulson and Kitch, LLC. Rapp testified on his own behalf.

Evidentiary Rulings

Pursuant to the prehearing order filed on October 22, 2021, Rapp electronically filed proposed Exhibits A through G on November 8, 2021 and provided a copy to the Employer. Rapp moved for the admission into evidence of Exhibits A through G. Employer did not object and Exhibits A through G were admitted into evidence.

The Employer electronically filed proposed Exhibits 1 through 13 on November 8, 2021 and provided a copy to Rapp. The Employer moved for the admission into evidence of Exhibits 1 through 13. Rapp did not object and Exhibits 1 through 13 were admitted into evidence.

Findings of Fact

1. Rapp is a law enforcement officer with the Wichita Police Department. On December 28, 2017, Rapp was involved in an officer-involved shooting that resulted in the death of a civilian.

2. Although there was no allegation of misconduct and therefore no misconduct investigation according to Pinkston, Rapp was not allowed to perform his regular police duties from December 28, 2017 to October 30, 2018. Pinkston testified Rapp was not disciplined for this officer-involved shooting and he received full pay and benefits during the time he was taken from his primary duty.

3. Rapp also was prohibited by Employer from working *any* off-duty police job until after he was returned to full duty. Off-duty police jobs are not paid by the Employer/City of Wichita.

4. On April 12, 2018, District Attorney Marc Bennett issued a report concluding Rapp's action in the officer-involved shooting was legally justifiable and no criminal charges would be filed.

5. On or about May 11, 2018, the Wichita Police Department's internal investigation regarding the use of deadly force found that Rapp acted within the Department's policy on use of deadly force.

6. On October 30, 2018, Rapp was returned to full duty. However, even after Rapp was returned to full duty, Employer specifically forbade Rapp from working at his previous off-duty position at a Walmart located in the general vicinity of the officer-involved shooting on December 28, 2017 (the Walmart).

7. On November 9, 2018, a letter was sent to the City Manager from Rapp's attorney that demanded an explanation for why Rapp was not allowed to return to his previous off-duty position at the Walmart and requested the prohibition be lifted.

8. On or about April 2, 2019, Rapp was allowed to return to his previous off-duty work at the Walmart. Rapp was permitted and had worked another off-duty police job prior to returning to off-duty work at the Walmart.

9. On June 25, 2019, Rapp's attorney sent a letter to Deputy Chief Jose Salcido to initiate the grievance procedure for lost wages from the inability to work off-duty jobs from January 7, 2018,¹ through April 2, 2019. Rapp alleged a breach of Article 13, Section 2(o) of the Memorandum of Agreement between the Employer and the Fraternal Order of Police (F.O.P.), which provides, "If major disciplinary action is imposed on an employee pending the determination of a complaint of misconduct and that complaint subsequently is determined to be unfounded or non-sustained or the employee is exonerated, the disciplinary action shall be revoked and the employee shall receive all rank, pay, and benefits lost as a result of the disciplinary action."

10. Demotion, suspension, or dismissal, is considered "major disciplinary action."²

11. Pinkston testified that he served in the F.O.P. for 22 years but stepped back when he was promoted to management within the Wichita Police Department. He has experience with grievances both on the Union/F.O.P. side and management/Wichita Police Department side. Pinkston testified that Rapp's complaint about lost wages from the inability to work off-duty is not

¹ This is the first day Rapp asserted he was able to return to full duty.

² December 16, 2017 MOA and December 15, 2018 MOA, Article 13, Section 1, paragraph 2(b).

governed by the MOA but by policy. Issues governed by policy are resolved at the sole discretion of the Chief of Police.

12. Pinkston also testified that Rapp was not demoted, suspended, or dismissed for the officer-involved shooting.

13. On July 3, 2019, Employer responded to the June 25, 2019 letter by Rapp's attorney. The Employer stated Rapp's complaint about lost wages from the inability to work off-duty jobs from January 7, 2018, through April 2, 2019 was not grievable; and if it were, the grievance was not timely filed. Finally, the Employer asserted its action was within its right to manage Rapp's return to duty and return to off-duty police work.

14. Rapp filed a civil lawsuit seeking money damages.³

15. On January 24, 2020, the District Court of Sedgwick County, Kansas requested the PERB to determine whether Rapp's claims are grievable under the MOA, and if so, whether the grievance was timely initiated.

16. On February 25, 2020, Rapp filed a Public Employee Relations Board (PERB) complaint against the Employer requesting "[a] declaration that the [Employer's] actions violate its obligations to Rapp and that the [Employer] is liable for the damages it has caused."

17. The relevant Agreements for this cause is the December 16, 2017 through December 15, 2018 Memorandum of Agreement (December 16, 2017 MOA) between the City of Wichita and the F.O.P., and the December 15, 2018 through December 24, 2021 MOA (December 15, 2018 MOA).

18. Under Article 2, Section 1 of both the December 16, 2017 and the December 15, 2018 MOA, titled "Management Rights and Responsibilities", the MOA provided, "The F.O.P. acknowledges that the City and its management have certain exclusive statutory rights and responsibilities which they may not surrender. Except as expressly provided otherwise by this Agreement or by law, the City shall retain its rights to make, amend or execute decisions and policies that are necessary to operate and maintain the City and its programs and to otherwise carry out its lawful rights and responsibilities."

19. Under Article 2, Section 2 of both the December 16, 2017 and the December 15, 2018 MOA, the MOA provided, "Except as expressly provided otherwise by this Agreement or by law nothing contained in this Agreement shall circumscribe or modify the statutory right of the City to: (1) To determine the services and level of services to be offered by the City; (2) To determine the number of employees required; (3) To schedule overtime as determined necessary; (4) To lay off, terminate, or otherwise relieve employees for lack of work or other legitimate reasons; (5) To determine the fact of lack of work, provided that officer safety is not compromised; (6) To discipline for just cause; (7) To direct the work of its employees; (8) To take actions as may be necessary to carry out the mission of the department in emergencies; (9) To hire, promote, demote, transfer, assign and retain employees in positions within the Wichita Police Department; (10) To

³ *Rapp v. City of Wichita*, Sedgwick County District Court Case No. 2019-CV-002183-CE.

maintain the efficiency of governmental operation; (11) To determine the method, means and personnel by which operations are to be carried on.”

20. Under Article 14, Section 1 of both the December 16, 2017, and the December 15, 2018 MOA, the MOA provided, in pertinent part, “A grievance is defined as any dispute involving the application or alleged violation of any provision of this Agreement.” The grievance procedure is provided for in Section 2.

21. Pursuant to an Order Ruling on Legal Issues Before OAH filed on September 9, 2021, ALJ Porter determined the legal issues that may be argued at the hearing were as follows:

- Whether Rapp’s letters to the [Employer] were grievances.
- If the letters were grievances, were they timely filed with the [Employer].
- If the letters are grievances, does the MOA provide specific guidance to PERB’s ruling regarding the parties next steps.

ALJ Porter also determined the legal issues that may not be argued at the hearing were as follows:

- No claims related to breach of contract
- Anything specific to awarding monetary damages

22. The only issue to be determine in this initial order is solely a question of law.

23. That no facts regarding the merits of the above captioned case have been presented to or found by this ALJ.

Analysis and Conclusions of Law

“[I]t is the purpose of [the Public Employer-Employee Relations Act (PEERA)] to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies.”⁴

The PEERA requires the covered employer and the bargaining unit to negotiate about conditions of employment.⁵ “Conditions of employment’ means 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

⁴K.S.A. 75-4321(b).

⁵K.S.A. 75-4327(b).

adjustment or change of such matters which have been fixed by statute or by the constitution of this state.”⁶ Case law has expanded the definition of “conditions of employment” to include items significantly related to an express condition of employment, if negotiating the item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable.⁷

PEERA does not affect, circumscribe, or modify the existing right of a public employer to, (a) Direct the work of its employees; (b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency; (c) Suspend or discharge employees for proper cause; (d) Maintain the efficiency of governmental operation; (e) Relieve employees from duties because of lack of work or for other legitimate reasons; (f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and (g) Determine the methods, means and personnel by which operations are to be carried on.⁸

The Legislature also provided that the scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to the public employer rights defined in K.S.A. 75-4326, among other items.⁹

The gravamen of Rapp’s complaint in his November 9, 2018 letter to the City Manager and his June 25, 2019 letter to the Deputy Chief of Police is that he lost wages, albeit wages not paid by the Employer, because he was either not allowed to work *any* off-duty job or he was not allowed to work *the Walmart* off-duty job. To be grievable, the complaint must be “a dispute involving the application or alleged violation of *any provision of this Agreement*.” It is Rapp’s burden to show how any provision of the relevant MOA’s have been violated or applied invalidly.

Rapp’s November 9, 2018 letter demanded an explanation for why Rapp was not allowed to return to his previous off-duty position at the Walmart and requested the prohibition be lifted. In Rapp’s November 9, 2018 letter, no breach of the relevant MOA is alleged nor is the letter addressed to the Division Commander. There is no indicia of a grievance in this letter. Further, off-duty work is not referenced in the December 16, 2017 MOA and, therefore, there is no “violation of any provision of this Agreement.” Put simply, for a complaint, dispute, or grievance to be grievable, the issue must be specifically referenced in the MOA. Accordingly, the Employer is not obligated to invoke the grievance process to address Rapp’s complaint about lost wages for any off-duty job. Thus, this letter is not a grievance as defined under Article 14, Section 1 of the December 16, 2017 MOA.

In Rapp’s June 25, 2019 letter, he alleges a breach of Article 13, Section 2(o), which provides, “If major disciplinary action is imposed on an employee pending the determination of a complaint of misconduct and that complaint subsequently is determined to be unfounded or non-sustained or the employee is exonerated, the disciplinary action shall be revoked and the employee shall receive all rank, pay, and benefits lost as a result of the disciplinary action.” The letter is

⁶ K.S.A. 75-4322(t).

⁷ *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat’l Educ. Assn.*, 233 Kan. 801, 821, 667 P.2d 306, 320 (1983).

⁸ K.S.A. 75-4326.

⁹ K.S.A. 75-4330.

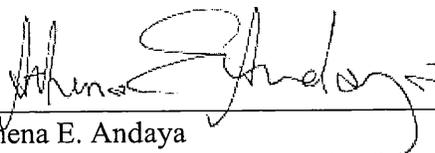
addressed to the Division Commander. However, the uncontroverted testimony of Pinkston proved that there was never an allegation of misconduct against Rapp for his action in the officer-involved shooting, therefore, there was never a misconduct investigation or sanction. Since there was no pending complaint of misconduct and Rapp did not suffer major disciplinary action, i.e., demotion, suspension, or dismissal, he may not rely on this provision of the MOA to invoke the grievance procedure. Further, lost wages for any off-duty job is not addressed in the MOA and, therefore, is not grievable.

The question about timeliness and what comes next are moot since it is the conclusion of this tribunal that Rapp's letters are not grievable under the relevant MOAs.

Conclusion

Rapp's complaint in his November 9, 2018 letter to the City Manager and his June 25, 2019 letter to the Deputy Chief of Police are not grievable under the relevant MOA. The PERB complaint is dismissed.

IT IS SO ORDERED.



Athena E. Andaya
Presiding Officer/Administrative Law Judge
Office of Administrative Hearings

Appeal Rights and Other Administrative Relief

Either side may ask for administrative relief from this order. You may seek three types of relief:

- A stay order, which suspends the application of the order;
- A rehearing of the case; or,
- An administrative review of this order by the Kansas Public Employee Relations Board.

Stay Order. Either side may ask for a stay which suspends the effectiveness of an initial or final order. To do so, you must submit to the presiding officer or agency head a petition asking for the initial or final order be stayed until it is reviewed. You may do this either before or after the date the order takes effect. If a stay order is issued it will expire when you can no longer timely file a petition for judicial review. K.S.A. 77-528.

Rehearing. If either side wants a rehearing, that party must file a petition asking for a rehearing. It must be filed with the Office of Administrative Hearings within 15 days after service of the initial order. The petition must state specifically why that party is asking for a rehearing. You are not required to file a petition for rehearing to obtain an administrative review of the initial or final order. If you file a petition for rehearing, it does not stay any time limits or suspend any further proceedings that may be held. K.A.R. 30-7-77.

Administrative review. Either side may ask for an administrative review of this initial order. To do so, you must file a petition asking that this order be reviewed by the Kansas Public Employee Relations Board. You must file this petition within 15 days from the date this initial order was served. If you fail to timely ask for an administrative review by the Kansas Public Employee Relations Board, you may not be able to obtain judicial review of the case. K.S.A. 77-527.

The petition for review may be mailed or personally delivered to the Kansas Public Employee Relations Board, 401 SW Topeka Blvd., Topeka, KS 66603.

If neither party requests a review by the Kansas Public Employee Relations Board, then pursuant to K.S.A. 77-530, this initial order becomes final and binding on both parties on the 30th day following its service.

CERTIFICATE OF SERVICE

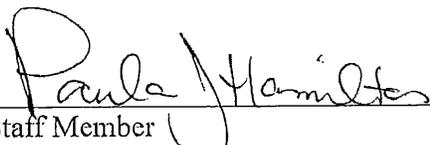
On February 3, 2022, I certify that a copy of the foregoing was placed in the United States first class mail, postage prepaid, addressed to:

T. Chet Compton
Fleeson, Gooing, Coulson & Kitch LLC
1900 Epic Center
301 N. Main
Wichita, KS 67202
Tel: (316) 267-7361
Attorney for Rapp

Erik S. Houghton
Van Halley
City of Wichita
455 N. Main Street, 13th Floor
Wichita, KS 67202
Tel: (316) 268-4681
Attorney for Employer

and, I further certify that I caused a copy of the foregoing to be served electronically through OAH's e-filing system to:

PERB Members
c/o Chief Counsel
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, KS 66603-3182
Tel: (785) 296-5000



Staff Member
Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, KS 66612
Tel: (785) 296-2433