

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS**

Fort Hays State University Chapter of the
American Association of University Professors
(FHSU/AAUP),

Petitioner,

v.

Case No: 75-CAE-12-2001

Fort Hays State University (FSHU),

Respondent.

FINAL ORDER

ON THE 16th day of June, 2004 this case came regularly before the Public Employee Relations Board (the Board), for review of the presiding officer's Initial Order. The Board's jurisdiction is set forth in the Public Employer-Employee Relations Act (PEERA), K.S.A. 77-4321 et seq.; and the Kansas Administrative Procedures Act, K.S.A. 77-501 et seq.. All current Board members, Wayne Maichel, Ken Gorman, Sally O'Grady and Greg Windholz, were in attendance. There was one unfilled Board vacancy.

Petitioner, Fort Hays State University Chapter of the American Association of University Professors (FHSU/AAUP), appeared by and through Lawrence G. Rebman of the law office of Rebman & Associates L.L.C.; and Respondent, Fort Hays State University (FHSU), appeared by and through Wm. Scott Hesse, Assistant Attorney General.¹

¹The Board during its June 16, 2004, granted the Kansas State Lodge of the Fraternal Order of Police and the Kansas State Troopers' motion to file an *Amicus Curiae* brief. The Board during its July 21, 2004, granted the Kansas Department of Administration's motion to file an *Amicus Curiae* brief.

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Whereupon the Board reviewed the record, considered the arguments of counsel, and ruled. The Board voted unanimously to affirm that portion of the presiding officer's initial order which found that a willful prohibited practice had been committed. However the Board voted to overturn the presiding officer's award of monetary damages to Dr. Frank Gaskill the presiding officer's March 31, 2004, initial order. Although the Board determines that it has the statutory authority to award damages, in this case, damages were not proven satisfactorily by the complaining party.

FINDINGS OF FACT

With the exception of Findings of Fact 51, the Board adopts all of the Findings of Fact. In the initial order. In explaining its decision, the Board will refer only to those Findings of Fact which are are pertinent to this final order. The Board includes one additional findings of fact concerning the complaint filed by the employee organization. See Below.

1. Respondent is a public employer within the meaning of the PEERA. *1.0. Findings of Fact 1.*
2. On May 5, 2000, The Public Employee Relations Board issued an order captioned as "Certification of Representative and Order to Meet and Confer". This certification order certified Petitioner FHSU/AAUP as the exclusive representative for faculty bargaining unit members at Fort Hays State University. (Petitioner's Exhibit 1; Tr., pp. 23-24). The faculty bargaining unit was defined by the certification order to include all full-time non-temporary university employees with appointments as professor, associate professor, assistant professor, instructor, program specialist, research scientist, curator, lecturer, librarian and academic director. (Petitioner's

Exhibit 1). *Initial Order Findings of Fact 2.*

3. The certification order also directed the Employer to meet and confer with Petitioner with respect to terms and conditions of employment and in the administration of grievances. (Petitioner's Exhibit 1). *Initial Order Findings of Fact 3.*
4. Dr. Frank Gaskill was hired as a faculty member at Employer Fort Hays State University beginning with academic year 2000-2001. (Tr., pp. 102, 115). Dr. Gaskill received a probationary appointment as an associate professor and began working at FHSU on or about August 15, 2000. (Tr., pp. 106-107). As a part of his employment agreement with FHSU, Dr. Gaskill was granted four years of credit toward tenure. (Petitioner's Exhibit 5; Tr., p. 104). Dr. Gaskill's probationary appointment stated that "it is further agreed and understood that the final tenure review and decision will occur no later than the 2001-2002 academic year unless notice of non-reappointment is provided in accordance with university policy." (Petitioner's Exhibit 5). According to the University's Faculty Handbook, a probationary appointment carries with it an expectation of renewal. (Petitioner's Exhibit 4, p. 19). If the appointment is not to be renewed, the faculty member is entitled to be informed of this in writing by not later than March 1 of the first academic year of service. (*Id.*). *Initial Order Findings of Fact 5.*
5. As an associate professor and faculty member, Dr. Gaskill was included in the bargaining unit represented by the FHSU/AAUP. (Tr., p. 300). *Initial Order Findings of Fact 6.*
6. On or about May 2, 2001, Dr. Gaskill was orally advised by Professor Richard M.

Peters, Dean of the College of Business and Leadership, that his employment contract would not be renewed because of bad student evaluations. (Tr., p. 124). *Initial Order Findings of Fact 11.*

7. By letter dated May 2, 2001, Dean Richard M. Peters notified Dr. Gaskill that the decision had been made "not to extend an offer of employment for the 2001-2002 academic year". Dean Peters' letter explained that "[t]his decision was made after consultation" with the chairman of the Business Administration Department due to "our concern as to the quality of your performance over the past semester." (Petitioner's Exhibit 11; *see also* Tr., pp. 123-126). *Initial Order Findings of Fact 12.*
8. The Faculty Handbook provides a General Faculty Hearing and Appeal Procedure for redress of grievances involving termination of employment. (Petitioner's Exhibit 3, p. 23). This grievance procedure provides two options for resolving grievances: an informal grievance procedure and a formal appeal hearing procedure. (*Id.*, p. 24). According to this policy, a grievant may be accompanied to a formal appeal hearing by an attorney at law or by a personal advisor, but the attorney or advisor may not speak on behalf of the grievant. (*Id.*, p. 25). *Initial Order Findings of Fact 13.*
9. Dr. Gaskill began the informal grievance procedure on May 2, 2001, when he met with Dr. James Heian, Chair of the Business Administration Department and Dr. Peters, Dean of the College of Business and Leadership, to discuss his termination. (Tr., pp. 125 -126). *Initial Order Findings of Fact 15.*
10. This informal meeting failed to resolve Dr. Gaskill's grievance. (*Id.*) *Initial Order*

Findings of Fact 16.

11. Immediately after the meeting with Drs. Heian and Peters, Dr. Gaskill proceeded to meet informally with University President Edward Hammond to discuss his grievance. (Tr., p. 126). *Initial Order Findings of Fact 17.*
12. This informal meeting failed to resolve Dr. Gaskill's grievance. (*Id.*). *Initial Order Findings of Fact 18.*
13. On or about May 5, 2001, Dr. Gaskill asked FHSU/AAUP Vice President Dr. Richard Hughen and one of its members, a Dr. Shala Bannister, to represent him in a grievance meeting with University Provost Gould. (Tr., pp. 127-129). Dr. Gaskill wanted the Provost to understand that the Employer had not adhered to the Faculty Handbook's March 1 notification deadline, *see* Finding of Fact Number 5, and that this lack of timely notice would make it very difficult for Dr. Gaskill to get an academic position for the coming school year. (Tr., p. 129). *Initial Order Findings of Fact 19.*
14. Drs. Hughen and Bannister scheduled a meeting with Provost Gould for May 7, 2001 at 4:15 p.m. to discuss Dr. Gaskill's grievance (Tr., p. 39). *Initial Order Findings of Fact 20.*
15. Approximately thirty minutes before this grievance meeting was to have begun, Provost Gould cancelled the meeting and referred the matter to Employer's legal counsel, Ms. Kim Christiansen,. (Tr., p. 39). *Initial Order Findings of Fact 21.*
16. That same day, Christiansen emailed Dr. Gaskill informing him of his right to arrange an appointment with Drs. Peters and Heian to discuss their decision.

(Petitioner's Exhibit 12). *Initial Order Findings of Fact 22.*

17. This email informed Dr. Gaskill that he could be accompanied to the meeting by a FHSU/AAUP representative but the representative could not address others in the meeting or speak on Dr. Gaskill's behalf. (Petitioner's Exhibit 12). *Initial Order Findings of Fact 23.*
18. Later that same day, May 7, 2001, Dr. Hughen emailed Employer's legal counsel Ms. Christiansen asking by what authority she was restricting Petitioner's ability to represent Dr. Gaskill in the grievance process. (Petitioner's Exhibit 13; Tr., pp. 53-54). *Initial Order Findings of Fact 24.*
19. Christiansen replied to Dr. Hughen on May 9, 2001, indicating she would not discuss these concerns with him. (Petitioner's Exhibit 13). *Initial Order Findings of Fact 25.*
20. At the hearing conducted by this presiding officer, Gaskill expressed a great deal of frustration, characterizing the events of his grievance as "quite a comedy" and as "a runaround and refusal to meet with both myself and with the union". (Tr., p. 132). Believing that he had exhausted all avenues of an informal resolution of his grievance and that he was "at a brick wall", and in response to the University's refusal to meet with his FHSU/AAUP representatives and its referral of the matter to its legal counsel, Dr. Gaskill hand-delivered a written request for a formal appeal hearing pursuant to the Faculty Handbook on May 9, 2001 by sending the request to his department's chairman Dr. Heian, with a copy hand-delivered to the appropriate Dean. (Tr., pp. 131-135, 326-327; Petitioner's Exhibit 14). In his request for a

formal appeal hearing, Dr. Gaskill indicated his desire for FHSU/AAUP representation by stating "I have asked FHSU-AAUP to represent me in this grievance process according to PEERA, Statute 75-4328. (Petitioner's Exhibit 14, p. 2). Dr. Gaskill's request for a formal appeal hearing complied with all necessary steps as outlined in the Faculty Handbook. (See Finding of Fact Number 14; Tr., pp. 324, 326-327). *Initial Order Findings of Fact 26.*

21. Dr. Heian sent invitations entitled "Hearing re Dr. Gaskill grievance," to Dr. Gaskill, Dr. Hughen, Dr. Peters, and Ms. Christiansen, setting a hearing for May 15, 2001 at 2:00 p.m. in the Memorial Union State Room. (Respondent's Exhibit X). *Initial Order Findings of Fact 27.*
21. In an email dated May 14, 2001, with a subject line which stated, in part, "REQUEST FOR RESCHEDULING", Dr. Gaskill advised Dr. Heian that he had retained the services of attorney Gene Anderson, and indicated that Mr. Anderson was unable to appear at the meeting due to a conflict. (Petitioner's Exhibit 16 (emphasis in original)). Dr. Gaskill's decision to retain counsel was in response to Employer's refusal to allow Petitioner to speak for and represent Dr. Gaskill in his grievance with the University. (See Petitioner's Exhibit 20 (in a May 21, 2001 email to Dr. Heian, Dr. Gaskill noted that he had retained counsel to safeguard his rights in response to the University's failure and refusal to allow Dr. Hughen to speak for and on behalf of Dr. Gaskill in its hearing process)). *Initial Order Findings of Fact 28.*
22. This email requested that Ms. Christiansen communicate with Mr. Anderson, "so [that] the departmental level hearing may be scheduled, in coordination with, . . .

[FHSU/AAUP Vice President] Richard Hughen's schedule." (Petitioner's Exhibit 16). *Initial Order Findings of Fact 29.*

23. A copy of this email was sent to Ms. Christiansen, Dr. Hughen, Dr. Peters, Provost Gould, and [FHSU/AAUP President] Dr. Keith Campbell. (Petitioner's Exhibit 16). *Initial Order Findings of Fact 30.*

24. Ms. Christiansen emailed Mr. Anderson on May 14, 2001 informing him he would not be able to speak on his client's behalf. (Petitioner's Exhibit 17). Ms. Christiansen acknowledged that Dr. Gaskill had asked that she coordinate the hearing to allow FHSU/AAUP's Dr. Hughen to be present and advised that she had not done so. In explanation, Ms. Christiansen stated that she did not feel she could or that the University should deal with an additional representative since Dr. Gaskill had retained legal counsel. (*Id.*). *Initial Order Findings of Fact 31.*

25. Between May 15 and May 21, 2001, Petitioner's Vice President, Dr. Hughen, sent five emails to Dr. Heian inquiring about the status of Dr. Gaskill's formal grievance hearing. (Petitioner's Exhibit 6). Dr. Heian did not respond to any of Dr. Hughen's emails. (Tr., pp. 63-64). At the direction of Employer's legal counsel Ms. Christiansen, Dr. Heian did not reschedule the formal grievance hearing which had previously been scheduled for May 15, 2001. (Tr., pp. 329-330). *Initial Order Findings of Fact 35.*

26. On May 23, 2001, Ms. Christiansen emailed Dr. Hughen and told him all scheduling and contact by the University are to be made through Dr. Gaskill's counsel, and that he should contact Dr. Gaskill's counsel. (Petitioner's Exhibit 23). *Initial Order*

Findings of Fact 38.

27. Dr. Peters, Dr. Heian, Dr. Gaskill, and Mr. Anderson met on May 30, 2001 regarding the "Department and College of Business and Leadership Decision." (Petitioner's Exhibit 4). *Initial Order Findings of Fact 39.*
28. The University did not notify or invite FHSU/AAUP to attend. (Petitioner's Exhibit 4, Tr., pp. 63- 64). *Initial Order Findings of Fact 40.*
29. After the May 30, 2001 meeting, Dr. Gaskill was advised that the department's decision remained unchanged and that he could appeal to Provost Gould. (Petitioner's Exhibit 4). *Initial Order Findings of Fact 41.*
30. Dr. Gaskill appealed this decision, and on July 3, 2001, Ms. Christiansen sent a letter to Mr. Anderson confirming an appeal hearing for Dr. Gaskill. (Respondent's Exhibit N). *Initial Order Findings of Fact 42.*
31. Provost Gould held a hearing on July 11, 2001. (Respondent's Exhibit Q). *Initial Order Findings of Fact 43.*
32. Provost Gould, Ms. Christiansen, Mr. Anderson, and Dr. Gaskill (via telephone from South Carolina) were in attendance. (Respondent's Exhibit Q). *Initial Order Findings of Fact 44.*
33. Ms. Christiansen gave Dr. Gaskill the option of postponing the hearing so a FHSU/AAUP representative could attend as a neutral observer. (Respondent's Exhibit Q). *Initial Order Findings of Fact 45.*
34. The FHSU/AAUP was not notified or invited to attend the hearing. (Respondent's Exhibit Q; Tr., pp. 65-67). *Initial Order Findings of Fact 46.*

35. On September 5, 2001 President Hammond held a hearing to review the decision regarding Dr. Gaskill's contract. (Respondent's Exhibit W). *Initial Order Findings of Fact 47.*
36. The FHSU/AAUP was not notified or invited to attend the hearing. (Respondent's Exhibit W; Tr., pp. 63-64, 220-221). *Initial Order Findings of Fact 48.*
37. Following the September 5, 2001 hearing described in Finding of Fact Number 47, President Hammond issued a written letter that affirmed the decision to not offer Dr. Gaskill a contract for academic year 2001-2002 and advised that step 1 of the informal process was complete. (Respondent's Exhibit W). Dr. Gaskill received this notification approximately one month after the 2001-2002 academic term had begun. (Tr., p. 407). Presumably, Respondent's position is that at that point in time, a point in time well past the start of that year's fall academic semester, Dr. Gaskill would have needed to once again request a formal hearing in writing and go through the formal hearing process in order to exhaust his administrative remedies. *Initial Order Findings of Fact 49.*
38. Following his hearing with Dr. Hammond, Dr. Gaskill filed a breach of contract lawsuit against the University. (Tr., p. 424). FHSU filed a motion to dismiss for lack of jurisdiction for failure to exhaust administrative remedies. (*Id.*). The motion to dismiss was granted by the district court and its decision was upheld on appeal to the Court of Appeals. (*Id.*). *Initial Order Findings of Fact 50.*
39. On June 25, 2001, the Petitioner written complaint against the Respondent was filed with the Board. In its complaint the Petitioner alleges that the Respondent committed

a prohibited practice. The Petitioner requested specific relief in its complaint as a result of the Respondent's action. The case was assigned case number 75-CAE-12-2001.

ISSUES OF LAW

1. Does the Board have jurisdiction over this controversy? K.S.A. 75-4323 and K.S.A. 75-4334.
2. Does the public employer commit a prohibited practice if it fails or refuses to allow a recognized employee organization to participate in each phase of a grievance proceeding? K.S.A. 75-4327, K.S.A. 75-4328, and K.S.A. 75-4333.
3. Is it within the Board's statutory authority to award damages to a complainant after the Board finds that the respondent committed a prohibited practice? K.S.A. 75-4323 and K.S.A. 75-4334.

DISCUSSION

The Board's interpretation of PEERA follows the following principles set out in *Todd v. Kelly*, 251 Kan. 512, 515, 837 P.2d 381 (1992).

"As a general rule, statutes are construed to avoid unreasonable results. *Wells v. Anderson*, 8 Kan. App.2d 431, 659 P.2d 833 *rev. denied* 233 Kan. 1093 (1993). There is a presumption that the legislature does not intend to enact useless or meaningless legislation." *In re Adoption of Baby L.*, 231 Kan. 199, ¶ 7, 643 P.2d 168 (1982)." *City of Olathe v. Board of Zoning Appeals*, 10 Kan. App.2d 218, 221, 696 P.2d 409 (1985).

1. The Board has jurisdiction over this controversy.

The Board's jurisdiction over this controversy is set forth in PEERA. Specifically, the Board

is "empowered to effectuate the purposes and provisions" of PEERA. K.S.A. 75-4323 (e)(3). *State Department of Administration v. Public Employees Relation Board*, 257 Kan. 281, 894 P.2d 777 (1995). This final order is partially a review and partially a determination of the law. Therefore, because the hearing officer's findings of fact, with exception of findings of fact 51, are supported by substantial competent evidence when the record is viewed as a whole, the Board adopts the hearing officer's findings of fact.

Because the Board is making a legal determination concerning the relationship between the Petitioner and the Respondent, the Board possesses the authority to interpret PEERA and apply that interpretation to the facts of this case. In doing so, the Board interpretation of PEERA enjoys "significant deference, and although not binding (on a court reviewing the Board's action pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Action, 77-601 et seq.), should be upheld if supported by rationale basis." *Ibid*. See also, *Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association*, 233 Kan. 809, 667 P.2d 306 (1983), for a discussion on the doctrine of operative interpretation which the Kansas Supreme Court applies to Board interpretations of PEERA.

2. The public employer commits a prohibited practice under K.S.A. 75-4333 (b)(1),(5) and (6), if it fails or refuses to allow a recognized employee organization to participate in each phase of a grievance proceeding.

The Board concurs with the presiding officer's legal conclusion that the Respondent's "conduct of denying a duly certified or recognized employee organization representative its right to represent unit members in the administration of grievances is deemed by state law to be a "prohibited practice", our state's counterpart to an "unfair labor practice" under federal law." *Initial*

Order, page 23. This legal conclusion is supported by substantial competent evidence when the record is viewed as a whole.

The Respondent's actions clearly show that it had intentionally and wilfully prevented the Petitioner from exercising the rights given to it under K.S.A. 75-4327. Following are examples of Respondent's conduct that demonstrate its violation of K.S.A. 75-4328. (1) Respondent unilaterally limited the role of the Petitioner's representative in a grievance proceeding to that of an observer. (2) Respondent refused to discuss with the Petitioner the Respondent's decision to limit the Petitioner's role. (3) Respondent refused to communicate with the Petitioner after the employee retained legal counsel. (4) Respondent, without authority, blocked out the Petitioner from the grievance proceedings because the Respondent decided that Dr. Gaskill "fired" the Petitioner.

Regardless of Dr. Gaskill's hiring of Gene Anderson as his legal counsel, to represent him in his personal action against the Respondent, the obligation of the Respondent to the Petitioner is statutory. K.S.A. 75-4328 makes it mandatory for the Respondent "to extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and **in the settlement of grievances ...**" (Emphasis provided.) The transcript of the hearing before the presiding officer does not support the Respondent's argument that the Petitioner was fired. The following exchange occurred during Lawrence Rebman's direct examination of Gene Anderson.

Q. At any point in time did you indicate to Ms. Christiansen
(Respondent's chief counsel) that AAUP would not represent
Dr. Gaskill?

A. No.

Q. Did you tell Ms. Christiansen at any point in time that she was
Not to communicate with the AAUP about the representation of
Doctor Frank Gaskill?

A. No. *Hearing Transcript page 420.*

This case raises another issue that Board finds it necessary to address. It is the sense of Board, that under PEERA the recognized public employee organization has the statutory duty in behalf of the bargaining unit to participate in all phases of a grievance proceeding initiated by a public employee who is included in the bargaining unit.

Under PEERA, "employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealings with that public agency over conditions of employment and grievances." K.S.A. 75-4322 (i).

Recognition of the employee organization and the constitution of its membership, or the appropriate unit represented by the employment organization, are determined in accordance with K.S.A. 75-4327 and the applicable rules and regulations found at K.A.R. 84-2-1 to K.A.R. 84-2-15.

There is no controversy in this case whether Petitioner has been certified as the recognized employee organization, or whether associate professors are included in the faculty bargaining unit.

Initial Order Findings of Fact 2.

PEERA clearly states that a certified or recognized employee organization has specific duties (K.S.A. 75-4322 (i) and K.S.A. 75-4328) and must be allowed by the public employer to fulfill those duties purposes. K.S.A. 75-4327 and K.S.A. 75-4333 (2). Under PEERA the public

employee organization does not escape scrutiny in how it administers its activities as the representative of the bargaining unit in meeting and conferring in behalf of the bargaining unit and with the public employee, and represents public employees in grievance proceedings. The employee organization represents all employees of the bargaining unit (K.S.A. 75-4327 (b)) and can not pick and choose which members it will represent. The conduct of grievance proceedings can have a direct impact on the relationship between the members of the bargaining unit and the public employer. K.S.A. 75-4321 As the recognized representative of the bargaining unit the employee organization has a statutory duty to assure that its individual members are not subject to violations of the memorandum of agreement or any other policy that establishes the work relationship

The employee organization's duty is not dependent upon the individual member's preference or desire. Although an individual member has the right under K.S.A. 75-4324 to turn down the employee organization's offer to represent them in a grievance proceedings, the individual member can not fire the employee organization from representing the bargaining unit as a whole in a grievance proceeding.

Taking PEERA as a whole, it would be meaningless for a public employee organization to refuse to participate in behalf of the bargaining unit in all stages of a bargaining unit member's grievance proceeding.

Whether the employee organization commits a prohibited practice under K.S.A. 75-4333 is not relevant to his case. However, the Board will use the aforementioned standard when assessing a prohibited practice complaint filed against an employee organization for failing to participate in a grievance proceeding initiated by a member of the bargaining unit. The Board will review each complaint on its own merits.

The Respondent's actions clearly show that it had intentionally and wilfully prevented the Petitioner organization from exercising the rights given to it under K.S.A. 75-4327. Therefore, the Respondent committed a prohibited practice.

3. The Board possesses the statutory authority to award damages to a complainant after the Board finds that the respondent committed a prohibited practice.

The Board agrees with the presiding officer's analysis of PEERA, and his application of previous Board decisions² and *Berhmann v. Public Employee Relations Board*, 225 Kan. 435 (1979) and *Unified School District No. 270, Jewell County v. Secretary fo Kansas Department of Human Resources*, 247 Kan. 519, 802 P.2d 516 (1990) in reaching the legal conclusion that the Board has the authority to grant monetary damages to an aggrieved party. The Board does not find it necessary to repeat the presiding officer's analysis and conclusion. For the presiding officer's analysis of the law see pages 28 to 31 of the *Initial Order*.

While K.S.A. 75-4333 (e) states that "no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent," the Board finds that the following quote clearly enunciates the Board's interpretation of its authority under K.S.A. 4323 (e)(3) to "Make, amend and rescind such rules and regulations, and exercises such powers, as appropriate to effectuate the purposes and provisions of this act."³

²*Service Employees International Union, AFL-CIO vs. Board of Ellis County Commissioners*, Case No. CAE 1-1973; and *Fraternal Order of Police, Lodge #47 vs. Leavenworth County Sheriff's Department*, Case No. 75-CAE-3-1999.

³The Kansas Supreme Court in *Kansas Association of Public Employees v. Public Service Employees Union, Local 1132*, 218 Kan. 509, 517, 544 P.2d 1389 (1976) recognized that federal law is not controlling or establishes precedent in PERRA cases. However, the Court did not shy away from recognizing that a labor "rule announced in federal cases should not be

The primary responsibility for the formulation of a remedy rests with the Board (National Labor Relations Board), and this court will not strike down a proposed remedy, unless it can be said to be oppressive and not designed to effectuate the policies of the Act (National Labor Relations Act). *N.L.R.B. v. General Drivers, Chauffeurs, Helpers, Etc.*, 264 F.2d 21 (10th Cir.). It is the function of the Board, not the judiciary, to determine how the effect of an unfair labor practice may be expunged.” *National Labor Relations Board v. King Radio Corporation*, 416 F.2d 569, 573 (1969).

The Board affirms the presiding officer’s decision that the Board does not have the authority to award attorney fees to a complaining party. Kansas law is clear that this state follows the “American Rule.” This remedy is not available to the Board absent the specific statutory authority to grant attorney fees. *Summit Valley Industries, Inc. V. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 717, 721, 102 S.Ct. 2112 (1982) and *State v. Hunziker*, 274 Kan. 655, 664-665, 56 P.3d 202 (2002). Because PEERA does not grant authority to award attorney fees the Board lacks the authority to do so. *Despiegelare v. Killion*, 24 Kan. App.2d 542, 552, 947 P.2d 1039 (1997).

The Board reverses the presiding officer’s decision awarding monetary damages to Dr. Frank Gaskill.

The original parties to this prohibited practice case are the FHSU/AAUP and FSHU. In its complaint, the Petitioner alleges that the Respondent committed a prohibited practice, not against Dr. Gaskill, but against its role as the employee organization during Dr. Gaskill’s grievance proceeding. While the Petitioner sought Dr. Gaskill’s reinstatement, the fact that Dr. Gaskill obtained employment after the complaint was filed and because he had expressed a desire not to

applicable” to a PEERA representation case.

return to FHSU, this remedy is moot.

Dr. Gaskill filed a lawsuit against the Respondent for breach of contract. Unfortunately, for Dr. Gaskill the Kansas Court of Appeals upheld the district court's dismissal of his action for failure to exhaust administrative remedies. Dr. Gaskill's breach of contract lawsuit against the Respondent is not before the Board. Consequently, the Board will not award monetary damages to Dr. Gaskill will not award monetary damages to Dr. Gaskill.

Conclusion

The Board affirms the presiding officer's ruling that the Respondent committed a prohibited practice. The Board reverses the presiding officer award of monetary damages to Dr. Frank Gaskill. The Board affirms the presiding officer's order commanding the Respondent to the perform specific acts as set out in paragraphs 1), 2), 3), and 4) on page 35 of the *Initial Order*.


The Board votes unanimously to these findings for the following policy considerations:

- (1) The prevention of strife and unrest caused by the denial of public employees in communicating with recognized employee organizations,
- (2) The Board's awarding monetary damages to an aggrieved complainant is compatible to the Board's authority to "exercise such other powers, as appropriate to effectuate the purposes and provision" of PEERA, and
- (3) Violations of K.S.A. 75-4328 have a chilling effect on the relationship between public employers and public employees. This is in direct contravention of the public policy announced by PEERA.

Final Order Entered on this 18th day of August, 2004.

PUBLIC EMPLOYEE RELATIONS BOARD

By:




Greg Windholz, Chairperson, PERB



Sally O'Grady, Board Member



Wayne Maichel, Board Member



Ken Gorman, Board Member

Notice of Right to Seek Judicial Review

The foregoing journal entry is a final order of the Public Employee Relations Board pursuant to K.S.A. 77-527. This order is subject to review by the district court in accordance with the Act for Judicial Review and Civil Enforcement of State Agency Actions (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 with the appropriate district court within 30 days after the final order has been served upon the parties. Since this Final Order is being served upon the parties by mail, the parties are allowed a total of 33 days from the date on the certificate of mailing below to file their petition for judicial review in the appropriate district court. See K.S.A. 77-613(b) and (e).

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:


A.J. Kotich, Chief Counsel
Kansas Department of Labor - Legal Services
401 Topeka Blvd.
Topeka, KS 66603-3182

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager of the Public Employee Relations Board, do hereby certify that on this 18th day of August, 2004, true and correct copies of the above and foregoing Final Order were served upon the parties by depositing the copies in the U.S. Mail, First Class, addressed to:

Lawrence G. Rebman,, Attorney
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