BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of
Firefighters (IAFF) Local 135,

Petitioner,

v.

OAH No. 14DL0089 PE
Case No. 75-CAE-5-2013

City of Wichita, Kansas
Fire Department,

Respondent.

INITIAL ORDER

Petitioner, International Association of Firefighters (IAFF) Local 135, brings this action alleging the Respondent, City of Wichita, Kansas, Fire Department, has engaged in prohibited practices within the meaning of K.S.A. 75-4333(a), (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(6) of the Public Employer-Employee Relations Act (hereinafter, "PEERA").

This matter comes before the Office of Administrative Hearings pursuant to K.S.A. 77-501 *et seq.* The Petitioner appears by and through its counsel, Joni J. Franklin. Respondent appears by and through its counsel, Carl A. Gallagher.

Findings of Fact

1. On December 26, 2013, the Presiding Officer issued a prehearing order scheduling this case for formal hearing on March 4, 2014, allowing parties until February 10, 2014, to file any dispositive motions, and allowing until February 24, 2014, for the party opposing any such motion to file a response.

2. On February 3, 2014, Respondent filed a motion and memorandum in support of summary judgment.

3. On February 24, 2014, Petitioner filed its response and memorandum in opposition to the motion for summary judgment.

4. The matter is now ready for consideration.

Discussion and Conclusions of Law

1. In considering a motion for summary judgment, it is necessary to give the non-moving party the benefit of all inferences that may be drawn from the admitted facts under consideration. *Hein v. Lacy*, 228 Kan. 249, 256, 616 P.2d 277 (1980). In order to preclude summary judgment, the facts subject to dispute must be material to the conclusive issues in the case. *Kansas Heart Hospital, L.L.C. v. Idbeis*, 286 Kan. 183, 193, 184 P.3d 866 (2008). If there are reasonable doubts as to the existence of material facts, summary judgment will not lie. *Timi v. Prescott State Bank*, 220 Kan. 377, 386, 553 P.2d 315 (1976). Summary judgment must be denied where reasonable minds could differ as to the conclusions to be drawn from the evidence. *Jarboe v. Board of County Comr's of Sedgwick County*, 262 Kan. 615, 621-22, 938 P.2d 1293 (1997).

2. The terms of the Memorandum of Agreement in effect (hereinafter, "MOA") between Petitioner and Respondent covering actions cited by the immediate PEERA claims are undisputed. This MOA's period of effect was December 25, 2010, until December 20, 2013.

3. Both parties acknowledge that the MOA does not contain any provision that explicitly regards the process by which employees are considered for purposes of promotional opportunities.

4. Some particularly relevant provisions of the MOA to this analysis include:

   a. Article 5, subsection C: "The City agrees that it shall not directly or indirectly discourage or deprive or coerce any employee in the enjoyment of any rights conferred by the laws of Kansas and the United States; that it shall not discriminate against any employee with the respect to hours, wages, or any other term or condition of employment including promotions by reason of membership in the employee organization, or participation in any of these activities; collective negotiations with the City, or institution of any grievance, complaint or proceeding under this agreement with respect to any terms or condition of employment."

   b. Article 23, subsection A: "A grievance is defined as any dispute between the unit or members of the unit and Department Director or representatives concerning the terms of this Agreement or working conditions."

   c. Article 24, subsection M: "The Union shall be provided with written notification of all changes in the Wichita Fire Department policy before said policies go into effect where practical."

   d. Article 27: "It is expressly understood that all matters not included in this Agreement are by intention and design specifically excluded and fall within the powers, duties and responsibilities of the City of Wichita."

5. In support of its contention that Respondent has violated K.S.A. 75-4333(a), (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(6), the Petitioner's filed complaint explicitly alleges the following:

> Since on or about March 22, 2012, and continuing through today's date, the above referenced employer has failed/refused to meet or confer in good faith, with representatives of the IAFF Local #135, in the manner stipulated to in Article 23 of the Memorandum of Agreement by and between the City of Wichita and the IAFF Local #135 effective 12/25/10-12/20/13. Specifically, said employer has unilaterally refused to convene a grievance board regarding a grievance filed the IAFF membership as a whole filed on or about March 22, 2012 regarding the unilateral change in the promotional process and corrupted promotional system. Said refusal to abide by Article 23 of the agreement which calls for a grievance board to be convened as to "any dispute between the unit or members of the unit and Department director or representative concerning the terms of this Agreement or working conditions," and offers no mechanism for the employer to unilaterally deny a grievance board hearing to any employee or on any dispute, has resulted in the employer repudiating the certification of representation of the employee, has unilaterally changed the terms of employment for the employee, and has interfered with, restrained, and attempted to coerce the affected employee in the exercise of their rights granted under K.S.A. 75-4324. The Union has made repeated attempts to have the grievance board convened, and was denied by the City in writing on at least the following occasions, 8/23/12, 8/29/12, 9/4/12, 10/26/12, 10/29/12, and 11/2/12. This is not the first time that the City has unilaterally refused to impanel a grievance board on an active grievance, and continues with these attempts in both past and present grievances. It is also of concern to the Union that such unilateral refusals to impanel grievance boards have come after three consecutive losses by the City in the last three grievance matters heard.
>
> In addition, the grievance itself contained protests regarding the discriminatory nature of the unilateral changes made by the City to the promotional system, which was also addressed in the Memorandum of Agreement in effect at the time of the grievance. The changes included a faulty written testing system, and major failures in the Support Services Division. This included written tests improperly graded, and/or test scores assigned to the wrong individual employees. The weight of the promotional system was also shifted by the Fire Chief, and was in opposition in the City's own promotional policies, and within its own department for lower ranks. The Union believes that through its actions, and the actions of individual members, in bringing this grievance that they have suffered discrimination in their ability to be promoted under the new unilaterally changed system and to function as an effective collective bargaining unit.

6. Petitioner's filed response to the motion for summary judgment elaborates on these allegations. Reorganizing Petitioner's claims according to the actions that allegedly represent PEERA violations results in the following summary:

   a. Changes to the Respondent's policies regarding the promotional process is alleged to violate K.S.A. 75-4333(a), (b)(1), (b)(2), and (b)(6).

   b. The alleged violation by Respondent of its own policies is alleged to violate K.S.A. 75-4333(b)(3) and (b)(5).

   c. The Respondent's alleged failure to provide prior notice of its policy changes is alleged to violate K.S.A. 75-4333(b)(2), (b)(3), and (b)(5).

   d. The Respondent's dismissal of four pending grievances that regarded the promotional process is alleged to violate K.S.A. 75-4333(a), (b)(1), (b)(2), (b)(3), (b)(5) and (b)(6).

   e. Allegations by one of the employees who filed a grievance that was later dismissed, together with past allegations against Respondent that might show a repeated pattern of conduct, allegedly constitute discrimination that violates K.S.A. 75-4333(b)(4).

7. Central to the Petitioner's case in presenting a prima facie basis for many of these alleged PEERA violations is its contention that the Respondent's promotional processes are "conditions of employment" within the meaning of K.S.A. 75-4322(t). Although nothing regarding employee promotions or promotional processes are included within this definition of "conditions of employment", the Kansas Supreme Court has ruled that this statute's listing of "conditions" is not an exclusive list. *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat'l Educ. Assn.*, 233 Kan. 801, 818-819 (1983).

8. In its holding, *Kansas Board of Regents* endorsed a balancing test used by the Public Employee Relations Board of Kansas (PERB) to determine on a case by case basis whether a given topic of concern in employer-employee relations is a "condition of employment" for which mandatory negotiations shall be held as specified by K.S.A. 75-4327(b). The Court articulated that balancing test as: "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." *Kansas Board of Regents* at 816.

9. The management rights involved in this balancing test, often referred to in relevant PERB case law as "inherent managerial prerogatives", finds its basis in K.S.A. 75-4326, an integral section of PEERA, which specifies: "Nothing in this act is intended to circumscribe or modify the existing right of a public employer to: ...(b) Hire, promote, demote, transfer, assign and retain employees in positions within the public

agency; ...and, (g) Determine the methods, means and personnel by which operations are to be carried on."

10. This balancing test has been refined in subsequent rulings by PERB to specify the analysis of these factors:

    a. A subject is mandatorily negotiable only if it is significantly related to express conditions of employment.
    b. A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
    c. A subject that is significantly related to an express condition of employment is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives. *E.g., IAFF Local No. 179 v. City of Hutchinson, Kansas, Fire Dept.*, PERB Case No. 75-CAE-1-2011, p.11 (May 4, 2012).

11. In *IAFF Local No. 179,* PERB applied this balancing test in ruling, under that case's specific facts, that the process for determining an employee's fitness for return to duty is a "condition of employment" that entails mandatory meet and confer. The decision distinguished the fitness evaluation *process* embodied in formal employer policy, from the "practice of accepting a fitness for duty certification" which was found to be an inherent managerial prerogative. *Id.* at 15. "To the extent that subjects do not involve substantive governmental discretion and responsibility, but merely the procedural aspects of reaching and effectuating such determinations, they concern conditions of employment ordinarily subject to negotiation." *Id.*

12. In the case at hand, Petitioner similarly contends that Respondent's *process* for evaluating employee candidates for promotion is a "condition of employment" while the Respondent's ultimate promotion *decisions* that stem from this process are not.

13. The employer's <u>process</u> in *IAFF Local No. 179* was the topic being evaluated by PERB with its balancing test. In holding that this process was a topic for mandatory negotiations because it would not significantly interfere with the managerial prerogative of certifying an employee's fitness, PERB did not make a universal declaration that "process" policies will always be topics of mandated meet and confer. Rather, PERB held that the fitness for duty process was, under the facts of that case, a condition of employment. To reinforce this point, PERB's holding stated that such procedural subjects are "*ordinarily* subject to negotiation." *IAFF Local No. 179* at 15 [emphasis added]. Although PERB, in that decision, proceeded to analyze whether the employer's unilateral changes to its fitness for duty process constituted a "willful" refusal to meet and confer as required by K.S.A. 75-4327(b), the tribunal had already concluded that the fitness for duty *process* was a "condition of employment" and confined it's remaining K.S.A. 75-4327 analysis to an extensive discussion of the meaning of "willful". *See, id.*, at 16-20.

14. Petitioner also relies on *PSU/KNEA v. Kansas Board of Regents/PSU*, PERB Case No. 75-CAE-23-1998, p.8 (Feb. 2007) for authority that "procedures and methods for identifying candidates for promotion" is a condition of employment. That reference, however, is merely *dicta*; the employment topic at issue before PERB in that case was a matter concerning intellectual property rights. *See, id.*

15. Far more relevant to the immediate dispute is the Supreme Court's ruling in *Kansas Board of Regents, supra,* in which promotional processes were a material issue. There, the Court endorsed PERB's balancing test and upheld PERB's application of it to the specific facts in declaring:

> [W]e agree with PERB that the right to determine that a promotion is in order is a management prerogative, reserved to management by K.S.A. 75–4326(b). The criteria, procedures, or methods by which candidates for promotion are identified, however, are items of immense interest to faculty, and not only have an effect upon salary but upon the motivation of the individual teaching employee. We agree with PERB that this limited portion of the Promotions item is mandatorily negotiable. *Kansas Bd. of Regents,* 233 Kan. at 826.

16. In ruling that the promotions process is a condition of employment, the Court's reliance on PERB's balancing test directs our analysis in the instant dispute. The Court did not find that promotional procedures in *all* employment settings governed by PEERA will *always* be a condition of employment *per se*. Rather, that determination will always require at least two steps: first, the inquiry is whether the employment topic is "significantly related" to any of the express conditions of employment in K.S.A. 75-4322(t); then, if it passes that threshold, the inquiry is whether the matter is one for which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives. Only if a topic meets both stages of this inquiry is it then deemed a "condition of employment" – and even then, only if the topic has not been completely preempted by statute or constitution.

17. Respondent's process for promotions is significantly related to explicit conditions of employment enumerated by K.S.A. 75-4322(t) such as salaries, wages, and retirement benefits, therefore the first inquiry of the balancing test is satisfied.

18. Respondent's summary judgment motion and memorandum cite the plain language of the employer rights assured by K.S.A. 75-4326(b), the absence of promotions in the plain language of K.S.A. 75-4322(t), the absence of promotional processes within the MOA, and the MOA's explicit provision that any omissions from its terms is intentional – all of such arguments being very relevant in evaluating the second phase of the balancing test.

19. For the second phase of the test, Petitioner concedes that promotion *decisions* are managerial prerogatives, but argues that the promotional *processes* are not. As noted *supra*, the law does not automatically exclude promotional processes from the scope

of managerial prerogatives. Although PERB has at times modified such prerogatives with the term "inherent", the Presiding Officer finds no controlling precedent on the use of that adjective in this context and, instead, relies upon the Supreme Court's articulation of "management rights reserved to the employer by law". *Kansas Board of Regents* at 816.

20. Based on the plain language of PEERA, the topic of promotions is a managerial prerogative, both by its inclusion in K.S.A. 75-4326(b) and by its omission from K.S.A. 75-4322(t). Additionally, other plain terms of PEERA include managerial rights regarding personnel processes, *e.g.*, K.S.A. 75-4321(a)(3) by declaring "the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government", and K.S.A. 75-4326(g) with its assurance of employers' right to "determine the methods, means and personnel by which operations are to be carried on." Promotions, after all, are part of the normal, uninterrupted operations managed by employers. Given PEERA's explicit language on these points, state statutes display no presumption that promotion processes are "conditions of employment". To the contrary, "management rights reserved to the employer by law" appear to favor a finding that promotion processes are not subject to mandatory negotiation.

21. A fundamental purpose of PEERA is "to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law." K.S.A. 75-4321(b). This does not happen predominantly as a consequence of prohibited practice violations, but rather in the course of negotiating each new MOA or, where warranted, by invoking PEERA's impasse process outlined in K.S.A. 75-4332.

22. Under the facts of the immediate case, Petitioner has affirmatively agreed to exclude promotion processes from the MOA, thereby conceding that topic to the realm of Respondent's managerial prerogative. Subjecting Respondent's promotion process to mandatory negotiation would reverse a deliberate consequence of the MOA to which the Petitioner has agreed. The parties here have consummated a mutual acknowledgment of Respondent's authority over promotion processes and to reverse this arms-length agreement would therefore be a significant interference with the exercise of Respondent's managerial rights. Therefore, Petitioner does not meet the second phase of PERB's balancing test and the promotion processes in this case are not "conditions of employment".

23. Other PEERA claims by Petitioner hinge upon the Respondent's unilateral changes to its promotion processes, at times alleging that the policy change itself is a prohibited practice, at other times alleging a PEERA violation because the policy change was made without prior notice given to Petitioner. However, specific provisions of the MOA negate the foundation of these charges. First, the analysis *supra* regarding Respondent's managerial prerogative establishes that promotion process changes are

entirely within Respondent's recognized authority and discretion. Second, the MOA's provision for prior notice in Article 24(M) specifies that it shall be sent "where practical". Although Petitioner contends there were times that promotion process changes were not preceded by notice, and perhaps could expand greatly on this contention at an evidentiary hearing, the contractual caveat "where practical" necessarily denotes a degree of discretion on Respondent's part. Respondent's exhibits document a substantial degree of compliance in supplying prior notice and, even after granting Petitioner full benefit of its allegations on this point, the conclusion must be that Respondent was not mandated to provide prior notice in each and every instance.

24. Additional PEERA claims brought by Petitioner are triggered by the Respondent's allegedly premature, unauthorized, or MOA-breaching dismissals of four grievances that all contested the promotion processes. First, the MOA defines the scope of issues that may be grieved, limiting them to those disputes concerning the terms of the MOA or working conditions. Because there are no provisions regarding promotions within the MOA (but for the discrimination issue, *see infra*), and because working conditions, *i.e.*, conditions of employment, have been addressed by the analysis *supra* in finding that promotion processes are not within such conditions, the four dismissed grievances at hand do not constitute actionable grievances under the agreed upon terms of the MOA. Second, the allegation that Respondent possessed no authority to dismiss them and therefore violated the MOA's grievance process is without merit. The Respondent would have violated MOA grievance provisions by continuing to hear and resolve filed grievances that are outside the scope of the MOA. Again, the MOA's exclusion provision in Article 27 is instrumental. It specifies that matters absent from the MOA – in this case, the disposition of grievances when the grieved topic is outside the scope of agreed upon subject matter – will fall within the powers, duties and responsibilities of Respondent. This is the authority Respondent exercised and the duty it upheld in dismissing the grievances. The terms of the MOA required Respondent to dismiss the grievances. The issue is akin to judicial procedure when, perhaps well after a trial is underway, a party or the court itself may discover a jurisdictional shortcoming that requires an abrupt dismissal of the case.

25. Finally, Petitioner alleges a PEERA-prohibited practice in relation to the sole instance in which promotions are addressed by the MOA: discrimination in promotions by reason of membership or participation in the employee organization, MOA Article 5(C), or for engaging in other protected activities under K.S.A. 75-4333(b)(4). Petitioner's first basis for this allegation is the deposed account of an incident in March 2010, a matter that transpired well before the sequence of events that prompted this immediate PERB petition and well before the effective date of the controlling MOA in this case. It is therefore not material to the present dispute. Petitioner's second basis for this discrimination claim is the testimony of Captain Dusenbery. Reviewing the Captain's deposition in the light most favorable to Petitioner, his assertions about a corrupted process for promotions may express his

frustration with what he considered to be a chaotic, unpredictable, and/or disfavored process, but still do not contain any hint of an anti-union bias by Respondent or any retribution against the Captain that may be attributable to his union participation, complaints, or grievance. His grievance was placed in abeyance in proper accord with MOA Article 5(B) and for legal reasons not relating substantively to PEERA.

Order

Finding no genuine issue as to any material fact and finding the law in support of Respondent's position, I hereby grant the Respondent's motion for summary judgment.

Right of Review

This is an Initial Order issued pursuant to K.S.A. 77-526 which becomes a final order unless reviewed in accordance with K.S.A. 77-527.

The petition for review, stating the basis for the requested review, must be filed with the Public Employee Relations Board, 401 SW Topeka Blvd., Topeka, Kansas 66603 within 15 days after service of this order.

Bob L. Corkins, Presiding Officer
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Telephone: 785-296-2433

CERTIFICATE OF SERVICE

On March 24, 2014, I mailed a copy of this document to:

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