

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

Fort Hays State University Chapter of the)
American Association of University Professors,)
)
Petitioner,)
)
v.)
Fort Hays State University,)
)
Respondent.)
_____)

Case No.: 75-UCA-2-2005

FINAL ORDER

NOW ON THIS 21st day of January 2009, this case comes regularly before the Public Employee Relations Board (Board) on respondent Fort Hays State University's (FHSU) request to review the Presiding Officer's initial order. The following board members were present: Ken Gorman, Chairperson; Sally O'Grady; Dr. Burdett Loomis; and Keith Lawing. Wayne Maichel was absent.

Petitioner Fort Hays State University Chapter of the American Association of University Professors (AAUP) appeared by and through Lawrence Rebman, Rebman & Associates, LLC; and FHSU appeared by and through its general counsel Todd D. Powell.

The Board's jurisdiction is set forth in the Kansas Public Employer-Employee Relations Act K.S.A. 77-4321 et seq. (PEERA); the Kansas Administrative Procedures Act, K.S.A. 77-501 et seq. (KAPA); and the Board's regulations found at K.A.R 84-1-1 et seq. and K.A.R. 84-2-1 et seq.

K.S.A. 77-527(d) sets out the following standard applicable to the Board's review of the initial order.

In reviewing an Initial Order, the agency head or designee shall exercise 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, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties.

K.S.A. 77-527(d). See K.A.R. 84-2-2(i) and *Matter of University of Kansas Faculty*, 2 Kan. App.2d 416, 581 P.2d 817 (1978).

While the Board possesses the authority to review the record, as if it heard the case in the first instance, the Board can adopt all or part of the presiding officer's findings of fact. But K.S.A.77-527(h) requires that the Board "state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion."

PROCEDURAL BACKGROUND

The presiding officer issued the *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election* on July 30, 2007.

Following the self-determination election, the presiding officer on May 30, 2008 issued the *Certification of Results of Self-Determination Election Superceding, Replacing and Making Null and Void the Certification of Representative and Order to Meet and Confer*.

FHSU filed its *Petition for Review* with PERB. The Board granted FHSU's request for review, mailing its *Order Granting Petition for Review* to FHSU and AAUP on July 18, 2008. In its order, the Board requested that the parties submit specific written argument on the following issues, as the Board believed it had enough information to review the remaining issues.

- Should the hearing officer have recused himself from the proceedings.
- Whether the definition of the Fort Hays State University faculty bargaining unit should be amended to eliminate the modifier "non-temporary" from the definition of faculty members included in the unit. (See Issue Number Three, *Order*

Clarifying or Amending Bargaining Unit and Directing Self-Determination Election.)

- Whether application of the Board's policy favoring inclusion in the bargaining unit of all "regular part-time" faculty members would be an appropriate exercise of the Board's discretion. (*Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election, See page 68.*)

The Board set August 18, 2008 as the deadline for the parties to submit their briefs.

On November 19, 2008, the counsel for each party presented argument to the Board. The Board announced to the parties that it was taking the matter under advisement and that it would issue its final order on January 21, 2009.

STATEMENT OF LEGAL ISSUES

1. Should the presiding officer have recused himself from the proceedings?
2. Whether the FHSU faculty bargaining unit, as defined, excludes from its coverage and benefits those faculty members that are in phased retirement.
3. Whether the FHSU faculty bargaining unit, as defined, excludes from its coverage and benefits those faculty members on a terminal contract.
4. Whether to amend the definition of the FHSU faculty bargaining unit by removing the modifier "non-temporary" from the definition of faculty members included in the unit.
5. Whether to include in the bargaining unit, all "regular part-time" faculty members.
6. Whether to amend the description of the FHSU faculty bargaining unit to exclude the allegedly supervisory positions of Curator and Academic Director, and to exclude

the position of Program Specialists, for lacking a sufficient community of interest with other bargaining unit members.

7. Whether to amend the definition of the FHSU faculty bargaining unit to include full-time adjunct faculty as a prophylactic measure.

STATEMENT OF FINDINGS OF FACT

The Board finds and concludes that the Presiding Officer's findings of fact are based upon and supported by a preponderance of substantial, competence evidence in the record and not otherwise unreasonable, arbitrary or capricious.

The Board thereby by reference adopts—unless otherwise stated—the findings of fact stated on pages 6-31 of the *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*.

CONCLUSIONS OF LAW

Whether the Presiding Officer's denial of FHSU's request to recuse himself was incorrect.

FHSU's complaint against the presiding officer appears to have a common theme which centers around the

language utilized by Presiding Officer Hager in previous decisions involving the same parties to the instant matter could certainly cause a reasonable person to question whether Mr. Hager had a preconceived opinion against FHSU, and/or a predisposition to decide this matter in FHSU-AAUP's favor.

Further, a review of the record contains ample evidence of Presiding Hager's bias or prejudice.

Brief In Support of Petition for Review, p. 9.

When FHSU objected to the presiding officer's qualification it gave two reasons, the basis for which arose from the unrelated case *Fort Hays State Univ. Chapter of the Am. Ass'n of Univ. Professors v. Fort Hays State Univ.*, Case No.: 75-CAE-12-2001. See FHSU's *November 1, 2005 letter* and *November 15, 2005 letter*.

The first reason FHSU gave for objecting to the presiding officer's participation was the language that the presiding officer used in the initial order from *FHSU/AAUP*, Case No.: 75-CAE-12-2001. FHSU complained that the language chosen by the presiding officer "shows that Your Honor's impartiality might reasonably be questioned." *November 1, 2005 letter*, p. 1-2. See also, the *November 15, 2008 letter*. FHSU gave examples of comments it believed exhibit the presiding officer's bias and prejudice against it. The Board considers the second reason for FHSU objection in the context of the status of *FHSU/AAUP*, Case No.: 75-CAE-12-2001. Before FHSU filed its November 1, 2005 written objection Shawnee County District Judge Charles E. Andrews, Jr. had remanded *FHSU/AAUP*, Case No.: 75-CAE-12-2001 to the Board to make a specific finding. FHSU expressed its concern that if the Board remanded the aforementioned case to the presiding officer for a decision then "it is possible that the apparent ill will towards FHSU as evidenced by the strong and negative language in the prior case [*FHSU/AAUP*, Case No.: 75-CAE-12-2001] may influence the hearing officer's decision in the instant case." *November 1, 2005 letter*, p. 2. See also, *November 15, 2008 letter*. The history of *FHSU/AAUP*, Case No.: 75-CAE-12-2001 shows that the Board did not remand the case to the presiding officer but instead issued a final order, which became the source of continual litigation including the Board's filing a petition for review with the Kansas Supreme Court.

FHSU argues that the presiding officer's bias and prejudice against FHSU came out through statements in the *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election* and comments the presiding officer made during the hearing that took place January 26-27, 2006. FHSU explains how the presiding officer exhibited "possible"—the word used by FHSU—bias and prejudice. See *FHSU Brief in Support of Petition for Review*, pp. 8-17 and *Transcript of November 19, 2008 Argument before the Board*, p. 8. During argument before the Board, counsel for FHSU reiterated the general complaint against the presiding officer. FHSU generally offers the following as examples to support its allegation that the presiding officer showed a predisposition to decide against FHSU.

- The presiding officer has a tendency to recite the history between the parties in a light not favorable to FHSU.
- The presiding officer both in the order and during the hearing commented and editorialized on prior cases not germane to this case.
- The presiding officer revealed he had reserved concern about the bargaining unit definition that the parties agreed to in 1999.

Transcript of November 19, 2008 Argument before the Board, pp. 8-9; 42-8.

FHSU has asked the Board to exercise under K.S.A.77-527(d) "all the decision-making power that the agency head or designee [the Board] would have had to render a final order had the agency head or designee presided [the Board] over the hearing." FHSU reminds the Board that along with its unlimited review of the record, it "may also disregard those portions of the initial order that are apparently based upon the Presiding Officer's preexisting beliefs or observations regarding FHSU's labor practices and which are irrelevant to a determination of the proper bargaining unit." *Brief in Support of Petition for Review*, p. 7-8.

The Board acting upon its review authority has found nothing in the record supporting FHSU's allegation that the presiding officer showed a predisposition to rule against FHSU.

K.S.A. 77-514 provides for the presiding officer's appointment and the grounds for disqualification. The presiding officer's authority to have heard and decide the case now before the Board is set forth in K.S.A. 75-4323(e)(2).

The presiding officer "is subject to disqualification for administrative bias, prejudice or interest." K.S.A. 77-514(b). The statute requires the prompt filing of a challenge to the presiding officer's qualification. K.S.A. 77-514(c). After receiving the petition for disqualification, the presiding officer "shall determine whether to grant the petition, stating facts and reasons for the determination." K.S.A. 77-514(d).

An e-mail dated March 30, 2005 notified FHSU and the AAUP that Doug Hager was the appointed presiding officer. The *Notice of Prehearing Conference* sent to the parties on May 23, 2005 identifies Doug Hager as the presiding officer. Neither party raised the presiding officer's qualification as an issue in their respective prehearing questionnaires filed in June 2005. And the questionnaire names Douglas Hager as the presiding officer. From March 30, 2005 until November 1, 2005—the date FHSU registered its objection to the presiding officer qualifications—the presiding officer conducted conferences with the parties.

The presiding officer verbally denied FHSU's recusal request during a telephone conference held on November 15, 2005. FHSU faxed its written objection to the presiding officer's decision on November 16, 2005. The record does not contain any details why the presiding officer denied FHSU's request. K.S.A. 77-514(d) however only requires that the presiding officer "determine

whether to grant the petition, stating facts and reasons for the determination,” nothing here indicates that the decision be in writing. The Board can assume that the presiding officer gave the parties facts and reasons for the denial of FHSU request.

FHSU argues that its November 1, 2005 letter was timely because the presiding officer’s *Prehearing Conference Order* that was mailed to the parties on October 21, 2005 “invited objection.” *Transcript of November 19, 2008 Argument before the Board, pp. 53-4.*

Although the *Prehearing Questionnaire* appears to have “invited objection,” K.S.A. 44-514(c) required that FHSU file its petition challenging the presiding officer’s qualification “promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is latest.” KAPA does not define “promptly.” Nor does K.S.A.77-514 prescribe the method that the Board must use when appointing a presiding officer or explain how it will notify parties of the appointment.

The Board’s regulation K.A.R. 84-2-2(g) gives the time frame in which FHSU should have filed its objection to the presiding officer’s appointment. The subsection states, “Upon appointment by the board of a presiding officer to perform any of its function, the parties must file within three days any objection to the person appointed. The objection must contain a statement setting forth the reasons for the party’s position.”

The Board concludes that March 30, 2005 is the date that the Board notified FHSU and the AAUP of the presiding officer’s appointment. The Board therefore would not have considered FHSU filing its objection to the presiding officer’s appointment on November 1, 2005 as “promptly” made.

K.A.R. 84-2-2(g) only requires “a statement setting forth the reasons for the party’s position.” As this is the only format requirement that the Board imposes, FHSU’s November 1, 2005 is sufficient in giving the reasons for its objection.

Since the presiding officer ruled on FHSU’s petition of disqualification, the Board will decide whether the presiding officer correctly denied FHSU’s recusal request.

To begin “[a] rebuttable presumption of validity attaches to an administrative agency’s actions, and the party challenging the agency’s action bears the burden of proving arbitrary and capricious conduct.” *Brewer v. Schalansky*, 278 Kan. 734, 737, 102 P.3d 1145 (2004).

In *Tri-County Concerned Citizens, Inc. v. Bd. of Co. Comm’ns of Harper Co.*, 32 Kan.App.2d 1168, 1175-77, 95 P.3d 1012 (2004), the court of appeals gives the framework by which to analyze administrative/quasi-judicial bias and prejudice.

The court of appeals in *Cain v. Kansas Corp. Comm’n*, 9 Kan.App.2d 100, 103, 673 P.2d 451 (1983), cites to *Crane v. Mitchell Co. U.S.D.* 273, 232 Kan. 51, 62, 652 P.2d 205 (1982) for the requirement that FHSU “must show actual bias to overcome the presumption that an administrative body [here the presiding officer] will act fairly and impartially.” See also *Davenport Pastures, LP v. Morris County Bd. of County Comm’ns*, ___ Kan.App.2d ___, 194 P.3d 1201, 1206-7 (2008).

The presiding officer’s action is unreasonable if taken without regard to the benefit or harm to FHSU and the AAUP. *Zinke and Trumbow, Ltd. v. Kansas Corp. Comm’n*, 242 Kan. 470, 474, 749 P.2d 21 (1988). The presiding officer’s decision is not arbitrary and capricious if based on a foundation in fact. *Pork Motel Corp. v. Kansas Dep’t of Health and Environment*, 234 Kan. 373, 381, 673 P.2d 1126 (1983).

To find that the presiding officer should have recused himself, the record must show that the presiding officer exhibited an “irrevocably closed mind.” *Tri-County*, 32 Kan.App.2d at 1176, 95 P.3d 1012. In other words, the presiding officer was not going to allow procedural and substantive protections to stand in the way of reaching a decision adverse to FHSU thereby denying FHSU due process rights by refusing to conduct a “fair, open, and impartial” hearing. *Davenport Pastures, LP*, ___ Kan.App.2d ___, 194 P.3d at 1206.

Although the presiding officer’s recitation of the history between FHSU and the AAUP may provide an interesting background to the parties’ labor disputes, it has no probative value to the Board’s review neither will it support an argument of the presiding officer being disqualified under K.S.A. 77-514.

The record does not support the complaint that the presiding officer exhibited an “irrevocably closed mind.” The presiding officer gave each party opportunity to present its arguments, offer evidence, and cross-examine witnesses. Nothing in the record indicates that the presiding officer favored either party in the conduct of the hearing. The presiding officer’s familiarity with the parties’ relationship would not in itself disqualify the presiding officer.

There must be proof of actual bias or prejudice. FHSU shows none.

The Board relying on its authority under K.S.A. 77-527 will turn its attention to the remaining issues.

The FHSU faculty bargaining unit, as defined, includes under its coverage and benefits those faculty members that are in phased retirement.

Upon examining the record, the Board finds that the presiding officer’s findings of fact are based upon and supported by substantial competence evidence in the record and not otherwise

unreasonable, arbitrary, or capricious. Further, the Board finds no errors in the application of law to the findings of fact. See *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 31-40.

The Board on this issue adopts the presiding officer's findings of fact and conclusions of law as its own.

Faculty members that are in phased retirement retain the status as members of the bargaining unit.

The FHSU faculty bargaining unit, as defined, includes under its coverage and benefits those faculty members on a terminal contract.

Upon examining the record, the Board finds that the presiding officer's findings of fact are based upon and supported by substantial, competence evidence contained in the record and not otherwise unreasonable, arbitrary, or capricious. Further, the Board finds no errors in the application of law to the findings of fact. See *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 40-3.

The Board on this issue adopts the presiding officer's findings of fact and conclusions of law as its own.

Faculty members that are on a terminal contract retain the status as members of the bargaining unit.

The Board agrees with the presiding officer's amendment to the definition of the FHSU faculty bargaining unit by removing the modifier "non-temporary" from the definition of faculty members included in the unit.

Upon examining the record, the Board finds that the presiding officer's findings of fact are based upon and supported by substantial, competence evidence contained in the record and not

otherwise unreasonable, arbitrary, or capricious. Further, the Board finds no errors in the application of law to the findings of fact. See *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 43-68.

The Board on this issue adopts the presiding officer's findings of fact and conclusions of law as its own. The teaching environment at FHSU has sufficiently evolved since 1999 so to reflect the result of those changes in the unit definition conforms to the purposes of PEERA. As the record shows, this evolution has taken place in order that FHSU can adapt to the changing nature of higher education. For example, increase use of non-tenured faculty, augmentation of traditional classroom instruction with on-line classes, and expansion into the foreign market.

Taking into consideration the totality of the facts and changes taking place in FHSU academic environment since 1999 it was appropriate for the presiding officer to redefine the bargaining unit by deleting "non-temporary" from the unit definition.

The unit shall include the faculty that the presiding officer determined are "full-time."

It is not—at this time—appropriate to include "regular part-time" faculty members in the unit definition.

The presiding officer raised this issue *sua sponte*. See *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 68-71.

The Kansas appellate courts do not favor raising issues *sua sponte*. But when permitted it is under very limited circumstances. Raising an issue *sua sponte* deprived FHSU and the AAUP an opportunity to address the issue. The presiding officer should have "afforded [FHSU and the AAUP] a fair opportunity to brief the new issue and to present their positions." *State v. Puckett*, 230 Kan. 596, 601, 640 P.2d 1198 (1982). It is a matter of fundamental fairness. The presiding officer

could raise—on his own motion—the question of jurisdiction, however, this was not the issue decided here. *Estate of Tracy*, 36 Kan.App.2d 401, 406, 140 P.3d 1045 (2006). In some cases, the NLRB has raised matters of remedy *sua sponte*. *Cleveland Cinemas Mgmt. Co., LTD*, 346 NLRB 785, 786 (2006).

Under principles stated above, the presiding officer should have given FHSU and the AAUP notice that the presiding officer was considering the issue of “regular part-time faculty” *sua sponte* and then given the parties opportunity to present argument and evidence in their behalf. *Bloom & Meyer Constr. Co.*, 230 NLRB 370, 371 (1977).

This is especially pertinent because the presiding officer adopted the four-to-one policy that has been applied under the Professional Negotiations Act, K.S.A. 72-5413, et seq. *Colby Cmty. Coll. Faculty Alliance v. Colby Cmty. Coll., Colby, Kansas*, 72-UCA-4-1992 (November 1, 1993). In the *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election* p. 70 the presiding officer explains that according to the four-to-one policy “[f]aculty members teaching at least one-quarter the normal load for full-time faculty members are considered regular part-time faculty who must be included in the same unit as full-time faculty.” See also footnote 30 of the order in which the presiding officer summarizes how the NLRB approaches the policy of including part-time faculty into a unit consisting of full-time faculty. For purposes of the application and enforcement of the PEERA, the Board prefers that FHSU and the AAUP had opportunity to address this issue explaining whether in their opinion the application of the four-to-one policy—or some other formula—further the purposes of PEERA.

The Board finds that the presiding officer raising this issue *sua sponte* without giving FHSU and the AAUP notice and failing to allow presentation of evidence and argument was incorrect.

The Board reverses this portion of the presiding officer's order of clarification and thereby removes "regular part-time faculty" from the revised bargaining unit definition.

The presiding officer was correct to amend the description of the FHSU faculty bargaining unit to exclude the positions of Curator and Academic Director, and to exclude the position of Program Specialists with assigned unit supervisory duties, for lacking a sufficient community of interest with other bargaining unit members.

Upon examining the record, the Board finds that the presiding officer's findings of fact are based upon and supported by substantial, competence evidence contained in the record and not otherwise unreasonable, arbitrary, or capricious. Further, the Board finds no errors in the application of law to the findings of fact. See *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 72-5.

The Board on this issue adopts the presiding officer's findings of fact and conclusions of law as its own.

The exclusion of curator and academic director from the bargaining unit was appropriate. In addition, the presiding officer including in the unit the "Program Specialists, excepting those with assigned unit supervisory duties" was appropriate.

Is not appropriate—at this time—for the Board to amend as a prophylactic measure the definition of the FHSU faculty bargaining unit to include full-time adjunct faculty.

The Board after reviewing the record reverses the presiding officer amending the bargaining unit definition to include full-time adjunct faculty. The presiding officer reason for including full-time adjunct faculty was to initiate "a prophylactic measure to avert further confusion to the

bargaining unit description and to prevent further erosion of the bargaining unit composition.” *Order Clarifying or Amending Bargaining Unit and Directing Self-Determination Election*, pp. 77-8. Secondly, as another basis to include full-time adjunct faculty into the unit, the presiding officer relied on the rationale used to include regular part-time faculty into the unit. *Ibid*, p. 78.

The AAUP in its *Petition for Clarification or Amendment of Appropriate Unit* requested the including in the unit full-time adjunct faculty. *Hearing Exhibit No. 1*. Dr. Rich Hughen (Hughen) the president of the campus employee organization testified during the administrative hearing that FHSU did not have full-time adjunct faculty. *Transcript of the January 26 and 27, 2006 Hearing*, p. 131. Hughen also admitted being confused over how to characterize adjunct faculty within the context of FHSU’s academic environment and did not know of any adjuncts to be included in the unit. According to Hughen, they refer to adjunct faculty as “junior part-time” who “teach the virtual college course and maybe teach one course” and if part-time, they would not be included in the bargaining unit. *Ibid*, p. 130-1.

The Board is not prepared at this time to expand the unit definition to include the category of full-time adjunct faculty because there may be in the future a re-characterization of some faculty as full-time adjunct with the goal to erode the existing bargaining unit. The purpose of this action is to examine whether the 1999 definition of the faculty bargaining unit is the most appropriate in light of the realities of FHSU’s teaching environment. The Board in its quasi-judicial function must rely on the facts that the record establishes and not on events yet to occur. *Brown v. Bd. of Educ.*, *USD No. 333, Cloud County*, 261 Kan. 134, 149, 928 P.2d 57(1996). See Hughen’s testimony referenced above. The Board therefore leaves the issue of full-time adjunct faculty for another time.

Because the Board has expressed its reluctance to apply the four-to-one policy, the Board will not rely on that policy to include full-time adjunct faculty in the unit.

The faculty bargaining will not include the category of full-time adjunct faculty.

CONCLUSION

Nothing in this order or in the presiding officer's order will "per se preclude the employer from adding to, or subtracting from the employees' work assignments." See *AFL-CIO v. Westinghouse Elec. Corp.*, 375 U.S. 261, 269, 84 S.Ct. 401 (1964) and *One Amalgamated Lithographers of America v. Stearns & Beale, Inc.*, 812 F.2d 763, 768-9, 124 L.R.R.M. (BNA) 2809 (2nd Cir. 1987).

Under this order, the concern is only the appropriateness of the faculty unit and does not impede on FHSU's rights under K.S.A. 75-4326, which are that

Nothing in this act [PEERA] is intended to 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.

The underlying issue is whether certain classifications of faculty shall comprise the most appropriate unit at FHSU. This does not dictate or prevent FHSU from exercising its rights that PEERA guarantees. The redefining of the unit without doubt expands and extends PEERA protections to additional faculty members but it—the order—does not prescribe nor proscribe how FHSU operates under K.S.A. 75-4326.

To be sure, when it comes to the specific details surrounding terms and conditions of employment, PEERA safeguards the rights of FHSU and the AAUP to resolve differences over those that are mandatorily negotiable. *Kansas Bd. of Regents v. Pittsburg State University Chap. Of Kansas-NEA*, 233 Kan. 801, 821-8, 667 P.2d 306 (1983).

IT IS THEREFORE ORDERED by the Board that the appropriate unit—except as otherwise noted—shall be composed of the faculty as determined by the presiding officer. At present, the unit is as follows.

Include: All full-time ~~and regular part-time~~ Fort Hays State University faculty members who hold academic rank as Instructor, Lecturer, Assistant Professor, Associate Professor or Professor, ~~or Adjunct Professor~~. Also included are employees who hold the rank as Program Specialist, Librarian or Research Scientist.

Exclude: All employees who have appointments as: President, Provost, Vice Provost, Vice President, Associate Vice President, Assistant Vice President, Dean, Associate Dean, Assistant Dean, Department Chair, Curator, Academic Director, Director of the Library, Assistant Director of the Library, and Head Reference Librarian and other employees with assigned unit supervisory duties. Also exclude Visiting Faculty, persons who are confidential employees, and members of the classified service of the State of Kansas.

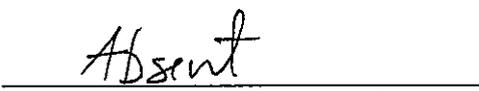
THE BOARD ENTERS THIS FINAL ORDER ON THIS ____ DAY OF JANUARY 2009.
PUBLIC EMPLOYEE RELATIONS BOARD

By:


Kenneth Gorman, Board Member, Chair


Sally O'Grady, Board Member


Keith Lawing, Board Member


Wayne Maichel, Board Member


Dr. Burdett Loomis, Board Member

NOTICE OF RIGHT TO REVIEW

Under the provisions of K.S.A. 77-530(b)(2), this Order converts the Initial Order of the Presiding Officer into a Final Order of the Public Employee Relations Board. To obtain district court review of the agency's decision in this case, an aggrieved party must file a petition for judicial review with the clerk of the appropriate district court within 33 days after service of this Notice. See K.S.A. 77-601 et seq. You must also serve a copy of your petition for judicial review on the Kansas Department of Labor. The agency officer to receive service of a copy of your petition for judicial review on behalf of this agency is: Chief Counsel A.J. Kotich, 401 SW Topeka Blvd., Topeka, KS 66603.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2009 true and correct copies of the above and foregoing Order was served upon the parties to the case by depositing the copies in the United States mail, first class addressed to:

Todd D. Powell, General Counsel
Fort Hays State University
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Lawrence Rebman, Attorney at Law
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Kansas City, Missouri 64106

And to members of the PERB on January 21st, 2009.

Sharon K. Tunstall
Sharon Tunstall, Office Manager