BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Communication Workers of America,
Petitioner,

v.

OAH No. 16DL0110 PE
Case No. 75-UDC-3-2016

The University of Kansas
Medical Center,
Respondent.

INITIAL ORDER

Petitioner, Communication Workers of America (CWA), brings this action to seek determination that a group of workers at respondent, University of Kansas Medical Center, is an appropriate bargaining unit for purposes of certification and procedural recognition under the Public Employer-Employee Relations Act (PEERA), K.S.A. 75-4321 *et seq.*, administered by the Public Employee Relations Board (PERB).

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, Scott Brown and David Van Os. Respondent appears by and through its counsel, Kelly Nash.

Respondent filed a motion to dismiss on grounds of *res judicata* and/or collateral estoppel, petitioner briefed its response to this motion, and on February 12, 2016, the ALJ denied the motion and ordered the parties to show cause why the case should not be decided on the basis of summary judgment. Both parties then responded concurring that the case is appropriate for summary judgment, the petitioner filed a withdrawal of its request for evidentiary hearing, the ALJ raises the issue *sua sponte*, both parties have received their opportunity to brief the question, and the matter is now ripe for consideration.

Findings of Uncontroverted or Presumed Fact

1. Five communications operators, *i.e.*, dispatchers, working within the police department at respondent's facility would comprise a new bargaining unit under the certification sought by this petition.

2. The five workers have a common community of interest among themselves.

3. The five workers all perform their work at one geographical location.

4. The five workers do not currently belong to any bargaining unit, thus, no splintering of an existing bargaining unit would occur if this CWA unit were certified.

5. Petitioner asserts that for this same reason of current non-membership in any certified unit, the proposed CWA unit would not result in over-fragmentation of respondent's work force.

6. Petitioner asserts that "...it is reasonable and functional to suggest that a dispatchers unit would be consistent with the principle of efficient administration of government..."

7. In 1988, PERB was posed with the question of whether a proposed bargaining unit of respondent's police officers should appropriately include five dispatchers. PERB's final order in that case cited the hearing examiner's finding that he "...is convinced that a unit consisting of five dispatchers would be most *in*appropriate." [same emphasis in original]

8. Petitioner's pleadings include no substantive argumentation after that submitted in its January 14, 2016, response to respondent's motion to dismiss. Petitioner was ordered to show cause why this case should not be decided on summary judgment, was given the opportunity to fully brief that question, and responded only by filing a formal withdrawal of its request for an evidentiary hearing. Petitioner's withdrawal from hearing expressly stated that "neither discovery nor an evidentiary hearing is necessary for the Public Employee Relations Board to consider and rule upon the Petition" and that "Petitioner does not object to the President [sic] Officer moving *sua sponte* for summary judgment and issuing a ruling on the pleadings."

Discussion and Conclusions of Law

1. Proceedings in this case are governed by the Kansas Administrative Procedure Act (KAPA) at K.S.A. 77-501 *et seq*. K.S.A. 75-4327(c). KAPA requires that all parties be allowed to file pleadings, objections and motions, including motions to dismiss and motions for summary judgment. K.S.A. 77-519(a). Moreover, in PEERA hearings the presiding officer is mandated to rule upon such motions. K.A.R. 84-2-2(d)(2).

2. In considering a motion for summary judgment, the following standards are applied as established in *Stanley Bank v. Parish*, 298 Kan. 755, 759 (2014):

> Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

3. PEERA provides the following criteria for evaluating the appropriateness of a proposed bargaining unit:

> Any group of public employees considering the formation of an employee organization for formal recognition, any public employer considering the recognition

of an employee organization on its own volition and the board, in investigating questions at the request of the parties as specified in this section, shall take into consideration, along with other relevant factors: (1) The principle of efficient administration of government; (2) the existence of a community of interest among employees; (3) the history and extent of employee organization; (4) geographical location; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of K.S.A. 75-4325, and amendments thereto; and (7) the recommendations of the parties involved. K.S.A. 75-4327(e).

4. PERB has articulated that in applying these factors, this list of considerations is not exclusive, unit appropriateness is evaluated on a case-by-case basis, the weight to be assigned each factor is within the sole discretion of the PERB, and PERB's discretion is given considerable latitude. *See, e.g., City of Wichita v. Fraternal Order of Police, Lodge No. 5,* 75-UCA-1-1994 (October 27, 1995) and *Kansas Assoc. of Public Employees v. Dept. of Social and Rehabilitative Services*, 75-UCA-6-1990 (February 4, 1991).

5. Petitioner cites PERB's 1988 decision in *Kansas University Police Officers Association v. University of Kansas*, 75-UDC-6-1988 (July 25, 1988), regarding the interplay of these unit certification factors. That ruling held that no single factor takes precedence in terms of controlling importance. *Id.* at p.9. Petitioner extends this logic by then contending that, under the facts of this immediate case, the reliance on one single factor, *i.e.*, overfragmentation/splintering, to deny unit certification would give an improperly high value to this factor over other considerations. The presiding officer disagrees with this argument and finds, based on other PERB precedents cited *infra*, that certification denial could be lawfully based on any one of the statutory factors, any combination of the factors, or even none of the enumerated factors.

6. Although this presiding officer has already ruled that *KU Police* does not serve as *res judicata* for the immediate case, one of the fact questions the Board addressed in that decision is particularly instructive now – especially since petitioner has pleaded so few facts and has waived an evidentiary hearing. Like the immediate case, the Board in *KU Police* also wrestled with what to do about five dispatchers working within one location of the police department at this state employer. Petitioner is correct that the holding of *KU Police* did not rule on the merit of a separate bargaining unit of dispatchers. Nevertheless, *KU Police* did make factual findings about the dispatchers that were material to its holding. In the context of those material findings, the Board in that 1988 ruling made observations about the propriety of a 5-dispatcher unit that were *dicta* at the time, but which are certainly relevant – albeit, not binding – now. That relevant *dicta* in *KU Police* was that a small 5-dispatcher unit would inappropriately fragment the employer's work force.

7. Petitioner in the immediate case has not pled any facts which differentiate its petition from this *dicta* analysis in *KU Police*. Petitioner asserts that its unit certification would be consistent with governmental efficiency, but alleges no facts or authority in support of this conclusion. Petitioner asserts that its certification would not overfragment the respondent's workforce, but still alleges no supporting facts or authority to bolster this point.

8. Conversely, respondent has pled that proliferation of units is inefficient and even counterproductive to the purposes of PEERA, citing persuasive authority for both of these arguments. This presiding officer concurs, adding that with more certified units also comes increased duties on an employer to meet and confer in accord with PEERA mandates, thus increased time and resources away from respondent's core function, diminishing its efficiency. Furthermore, while the *dicta* of *KU Police* is not binding on this case, the presiding officer finds it, too, to persuasively bolster the conclusion that the immediate petition does not present an appropriate unit to certify in light of both higher inefficiency and higher fragmentation. Although petitioner duly notes the dispatchers' right to seek representation, no authority establishes this as an absolute right that overrides the standards established by K.S.A. 75-4327.

Order

After giving the benefit of all factual inferences to claimant, and finding no genuine issue as to any material fact, I hereby deny this petition for unit certification.

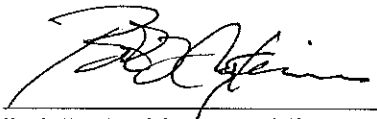
Right of Review

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.

IT IS SO ORDERED.

OFFICE OF ADMINISTRATIVE HEARINGS



Bob L. Corkins, Presiding Officer/ALJ
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CERTIFICATE OF SERVICE

On April 28, 2016, I mailed a copy of this document to:

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