

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

FRATERNAL ORDER OF POLICE,
LODGE #47,

Petitioner,

vs.

LEAVENWORTH COUNTY
SHERIFF'S DEPARTMENT,

Respondent

Case No.: 75-CAE-3-1999

INITIAL ORDER

NOW on this 22nd day of December 2000, the above-captioned Prohibited Practice Charge came on for decision pursuant to K.S.A. 75-4334 and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

On October 30, 1998, the Fraternal Order of Police, Lodge No. 47, (hereinafter "Petitioner"), filed a Complaint Against Employer to this agency, the Public Employee Relations Board, on a special form provided by the Board for that purpose. The Complaint alleged that the employer, Leavenworth County Sheriff's Department, (hereinafter "Respondent"), violated K.S.A.75-4333(b)(1), (3) and (4), by retaliating against bargaining unit members for their participation in conduct protected by the Public Employer-Employee Relations Act (hereinafter "PEERA" or "the Act"). More specifically, the complaint alleged that Leavenworth County Sheriff Herbert F. Nye transferred Petitioner member Deputy Rodney Schubert "from his normally assigned duties as a patrol officer to a less desirable position in the jail. . . . in response to Deputy Schubert's support for the Fraternal Order of Police and his participation in the efforts to have the Fraternal Order of Police recognized as the exclusive bargaining representative

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for the members of the Leavenworth County Sheriff's Department." Attachment to Complaint Against Employer, October 30, 1998. Petitioner seeks relief from the Board in the form of a cease and desist order to Respondent concerning the alleged violations, the posting of a notice advising bargaining unit members that the employer will not retaliate or discriminate against employees because of conduct protected by the Act, the transfer of Deputy Schubert back to his previous position, and to "make [Deputy Schubert] whole for any losses sustained as a result of [the] transfer." *Id.*

Respondent filed its response to the Complaint by letter dated November 10, 1998, and countered, essentially, that Petitioner's complaint was without merit. Respondent alleged further that Deputy Schubert suffered no compensable loss as the result of his transfer to serve as a jail officer. *See* Letter from Leavenworth County Counselor, November 10, 1998.

Following an evidentiary hearing before this administrative presiding officer, the parties submitted post-hearing legal memoranda. The presiding officer then requested that the parties answer additional questions raised by the record and briefs. This "oral argument" session was held and the parties submitted supplemental legal briefs on the questions noticed up for argument by the presiding officer. The supplemental briefs have been received and the presiding officer considers this matter to be fully submitted and ready for issuance of an initial order. *See* K.S.A. 77-526(b).

ISSUES OF LAW

The sole legal issue implicated in this matter is whether Respondent Sheriff's Department engaged in a prohibited practice by willfully interfering, restraining or coercing public employees in the exercise of rights granted in K.S.A. 75-4324, discouraging membership in an employee organization, committee, association or representation plan by discrimination in tenure or other conditions of employment, and discriminating against an employee because he filed a petition or complaint under the Act, and because he has formed, joined or chosen to be represented by an employee organization.

FINDINGS OF FACT

1. On or about October 29, 1998, Petitioner filed a prohibited practice charge, (hereinafter the "complaint"), against Respondent. The complaint states that the Respondent engaged in prohibited practices within the meaning of K.S.A. 75-4333(b)(1), (3) and (4) of the Public Employer-Employee Relations Act (hereinafter "PEERA").
2. Petitioner's complaint alleges that Respondent violated and continued to violate the PEERA by retaliating against bargaining unit members because of their efforts to have Petitioner recognized as the exclusive collective bargaining representative for employees of Respondent.
3. Petitioner seeks an order from the Public Employee Relations Board ("PERB") finding that Respondent's actions violated K.S.A. 75-4333(b)(1), (3) and (4) and, an order from the PERB directing the employer to do the following: cease and desist from the aforesaid violations of the PEERA; post a notice specifically advising all employees in the bargaining unit that the employer shall not retaliate against or otherwise discriminate against its employees because of conduct protected under the PEERA; and transfer Deputy Rodney Schubert to the position held by him prior to his transfer from the road patrol unit to the jail and make him whole for any losses sustained as a result of that transfer.
4. Respondent denied that it retaliated against bargaining unit members. Its Answer states that the Sheriff has the ability to assign deputies as he sees fit and the fact that Deputy Schubert may not have wished to serve as a jail duty officer does not give rise to a basis of any violation of the PEERA. (Answer of Respondent, November 10, 1998).
5. Respondent employs approximately 71 people. They are divided into four divisions, Patrol, Detectives, Operations and Jail. (P. Ex. 12, Nye Depo. p. 3).
6. Respondent is a public employer within the meaning of the PEERA. (P.Ex. 7, Admission No. 1).
7. Rodney R. Schubert is employed as a Sheriff's Deputy by Respondent. Deputy Schubert joined the Sheriff's Department on September 8, 1975. (Tr. p. 16; P. Ex. 2).
8. Deputy Schubert is a public employee as defined in the PEERA. (P. Ex. 7, Admission No. 6).

9. Beginning in 1975, Deputy Schubert spent approximately twenty (20) months working as a communications jail officer. (Tr. p. 16-7). During that period, Deputy Schubert worked all assignments within the jail including booking prisoners and taking care of their needs, such as feeding them. (Tr. p. 17).

10. On April 1, 1978, Deputy Schubert was permanently transferred to the Road Patrol. He was permanently assigned to the Road Patrol until May 1, 1998. (Tr. p. 17).

11. Since 1979 or 1980, Respondent has operated under a seniority system in which officers bid their particular shift, assignment and vacations. (Tr. p. 19; P. Ex. 12, Nye Depo. p. 7-8).

12. Under this seniority system, when an opening occurs in the Road Patrol Division, the senior jail officer may be transferred to a Road Patrol position if he has been a competent jail officer, and there are no reasons to deny the requested transfer. (P. Ex. 12, Nye Depo. p. 7).

13. Under Respondent's seniority system, Deputy Schubert was senior in all divisions and wouldn't have been assigned to the jail unless he requested reassignment. (Tr. p. 17).

14. Petitioner was formed in approximately 1990 or 1991. (Tr. p. 74). Deputy Schubert has been Petitioner's President since 1994. (Tr. p. 16).

15. In 1992, Herbert Nye was elected Sheriff of Leavenworth County. (Tr. p. 74).

16. In approximately 1995, Leavenworth County came under the PEERA. (Tr. p. 22).

17. In a November 27, 1997 article in the Kansas City Star, Wyandotte/Leavenworth County Section, entitled "Better Pay Benefits Could Boost the Sheriff's Department", Deputy Schubert was quoted as stating that he would push for a vote on collective bargaining. Sheriff Nye was quoted as stating that it did not matter to him whether the deputies chose collective bargaining. (P. Ex. 2).

18. In March, 1998, Sheriff Nye asked Deputy Dave Jennings why he was circulating a Showing of Interest petition while on duty. Deputy Jennings stated that it was a petition for a showing of interest in collective bargaining. (P. Ex. 12, Nye Depo. pp. 34 & 40).

19. On April 1, 1998, Petitioner filed the Showing of Interest petition and a Petition for Unit Determination and Certification, (hereinafter the "Petitions"), with the PERB.

20. On or about April 3, 1998, PERB Executive Director George M. Wolf sent a letter to Sheriff Nye indicating that the PERB was in receipt of a Petition from Petitioner for a Showing of Interest and Certification election among certain employees of the Sheriff's Department.
21. Shortly thereafter, Sheriff Nye made a statement "that the F.O.P., instead of wishing to work together, had stabbed him in the back." (P. Ex. 7, Admission No. 4).
22. After learning of the filing of the Petitions, Sheriff Nye also made the statement, "we were close to getting KP&F with total buy-in, and this action would most likely end that chance." (P. Ex. 7, Admission No. 5). KP&F is the Kansas Police & Fire Retirement Plan. Respondent employees are covered by the Kansas Public Employees Retirement System, which has much lower benefits than KP&F. (Tr. pp. 29-30).
23. According to testimony of Sergeant Charles Yates, Sheriff Nye stated that the F.O.P. would not run his Department. (Tr. p. 82).
24. On or about April 9, 1998, shortly after learning of the filing of the Petitions, Sheriff Nye drafted a memo transferring Deputy Schubert, effective May 1, 1998, to the Jail Division. Deputy Juan Terlaje was transferred from Jail to the Road Patrol. Effective June 1, 1998, Deputy Kurt Eustice was scheduled to be transferred to the Jail Division and Charles Householder was to be transferred to Road Patrol. (P. Ex. 3; P. Ex. 12, Nye Depo. pp. 40-41).
25. Because he did not wish to be reassigned to the Jail Division, Deputy Eustice resigned from the Sheriff's Department, effective April 30, 1998. (Tr. p. 101).
26. Deputy Schubert did not wish to be reassigned to the Jail Division and believed his transfer was the result of his role in filing the Petitions. (Tr. pp. 21-22).
27. Prior to April 9, 1998, Sheriff Nye was aware that Deputy Schubert served as President of the F.O.P. Lodge #47. (P. Ex. 7, Admission No. 8).
28. Sheriff Nye had the understanding that Deputy Schubert took the Petitions to Topeka for filing. (P. Ex. 12, Nye Depo. p. 46).
29. The Sheriff's stated purpose for the reassigning or "cross-training" was to insure that deputies had a working knowledge of the new computer system in the jail. (P. Ex. 12, Nye Depo. pp. 12-3).

30. Lieutenant Francis P. Sparks is the Jail Division Commander for Respondent. It is Lieutenant Sparks' responsibility to oversee the operations of the jail. (P. Ex. 12, Nye Depo. p. 8; P. Ex. 10, Sparks Depo. p. 1).

31. In his deposition, Sheriff Nye stated that he had discussed with his staff the cross training of personnel when the new computers arrived in December, 1997. However, neither he nor Lieutenant Sparks could recall a specific meeting or memorandum establishing when or if this meeting would occur. (P. Ex. 10, Sparks Depo. pp. 9-10; P. Ex. 12, Nye Depo. pp. 41-2).

32. It was widely believed and rumored through the Department that Deputy Schubert was transferred to the jail because the Sheriff was retaliating against Petitioner for filing the Petitions. (Tr. pp. 21, 87, 92, 113, 133; P. Ex. 10, Sparks Depo. pp. 20, 24, 26; P. Ex. 11, Holmes Depo. p. 17).

33. Sergeant Yates recalled having a conversation with Lieutenant Duncanson, who is the head of the Patrol Division. During that conversation, Lieutenant Duncanson indicated that he perceived Schubert's reassignment as retaliation for the filing of the Petitions. (Tr. pp. 114-15).

34. On May 1, 1998, Deputy Schubert arrived at the jail. He was given a handcuff key for the types of handcuffs used at the jail and photographed by the computer camera. Deputy Schmierer stated that Deputy Schubert was too busy in the daytime to learn the new computer system; however, since Deputy Schubert was going to be assigned to the night shift, he should pick it up pretty quickly. (Tr. p. 32).

35. During the first two weeks of May, 1998, Deputy Schubert was not trained on the computer system and he did not book any prisoners into the jail. (Tr. p. 36).

36. During his re-assignment to the jail, Deputy Schubert was not provided any training on any aspects of the jail operations, other than the computer. (Tr. pp. 44-5).

37. In mid-May, 1998, Deputy Schubert was transferred to the midnight shift in the jail and worked with Deputy Dan Abramovitz. (Tr. pp. 127, 134).

38. Deputy Abramovitz was not assigned the task of teaching Deputy Schubert, but assisted Deputy Schubert when he had a problem. (Tr. p. 27; P. Ex. 10, Sparks Depo. p. 11).

39. All of Respondent's new non-clerical personnel start out in the jail division. (P. Ex. 12, Nye Depo. p. 17).
40. These new hires are provided training on booking prisoners, use of the fingerprint machine, general handling of first aid, biohazard training, firearm training, pepper spray training, etc. (P. Ex. 12, Nye Depo. p. 17; P. Ex. 11, Holmes Depo. pp. 6-7).
41. No formal computer-training program is provided to Respondent's new hires. Lieutenant Sparks tries to provide one week of training in the jail for new hires on the computer system with a control room officer. (P. Ex. 10, Sparks Depo. p. 14). Trainees assigned to the control room the first week are directed to watch another deputy on the computer the first day and learn as they go. (P. Ex. 11, Holmes Depo. p. 4).
42. It is the jail deputy's job to book prisoners into the jail. Road deputies do not book prisoners into the jail. (Tr. pp. 44-5; P. Ex. 12, Nye Depo. p. 17).
43. Respondent routinely keeps lists of officer training, such as weapons certification and pepper spray training. (P. Ex. 12, Nye Depo. p. 19).
44. Respondent does not keep a list of officers who are scheduled to go through computer cross training. (P. Ex. 12, Nye Depo. p. 19).
45. Sheriff Nye relies on Lieutenant Sparks to provide training and assessment of personnel in the Jail Division. (P. Ex. 12, Nye Depo. pp. 8, 18).
46. Sheriff Nye testified that the goal of jail computer training was for officers to gain a working knowledge or competent proficiency, as opposed to excellence. (P. Ex. 12, Nye Depo. p. 48).
47. Sheriff Nye testified that he told Lieutenant Sparks that he wanted to make sure people who are cross-trained have a thorough understanding of the new computer system. (P. Ex. 12, Nye Depo. pp. 12-3).
48. Sheriff Nye did not give any specific instructions to anyone relating to Deputy Schubert's cross training in the jail. Sheriff Nye did not have any direct involvement in that cross training. (P. Ex. 12, Nye Depo. pp. 13-5).
49. Sheriff Nye had no knowledge of who was assigned to instruct Deputy Schubert in the working of the new computer system. (P. Ex. 12, Nye Depo. p. 17).

50. During Deputy Schubert's reassignment to the jail, no one monitored Deputy Schubert's training on the computer. (P. Ex. 11, Holmes Depo. p. 8; P. Ex. 12, Nye Depo. pp. 48-9; P. Ex. 10, Sparks Depo. pp. 14-5).

51. Deputy Schubert testified that he became competent in the use of the computer by June, 1998. (Tr. p. 61).

52. Deputy Abramovitz testified that Deputy Schubert was competent on the computer system after two months. (Tr. pp. 128-9). Deputy Abramovitz testified that Deputy Schubert was average in his training on the new computer system. (Tr. p. 136).

53. Deputy Abramovitz testified that Deputy Schubert was excellent in other aspects of the jail deputy's job. Deputy Schubert knew what he was doing within two weeks and passed on to other jail officers "a lot of knowledge on how to deal with different types of people and different personalities." (Tr. pp. 135-6).

54. Deputy Schubert booked prisoners into the jail 7 times in May, 1998, 11 times in June, 1998, 30 times in July, 1998, 8 times each in August and September, 1998, and 11 times in October, 1998. Deputy Schubert booked no prisoners into the jail from October 24, 1998 until he was transferred back to Road Patrol on February 9, 1999. (P. Ex. 8).

55. On September 17, 1998, Sergeant Holmes completed an evaluation of Deputy Schubert covering the time period he was assigned to the jail. (P. Ex. 4; P. Ex. 11, Holmes Depo. p. 9). The evaluation states that Deputy Schubert had an average quality of work, had an adequate knowledge of his duties and completed them timely. (P. Ex. 4; P. Ex. 11, Holmes Depo. pp. 9-11). This evaluation included Deputy Schubert's computer training. (P. Ex. 11, Holmes Depo. pp. 10-3). Sheriff Nye signed Deputy Schubert's evaluation on September 17, 1998. (Tr. p. 93; P. Ex. 4).

56. Deputy Schubert had no problems while assigned to the jail. (P. Ex. 10, Sparks Depo. p. 24).

57. Despite his seniority, good work record, and lack of problems, during the nine months Deputy Schubert was in the jail, other officers were allowed to transfer from jail to road patrol ahead of him. (Tr. pp. 42-3; P. Ex. 10, Sparks Depo. pp. 12, 18-9).

58. Lieutenant Sparks testified that he did not know when or if Deputy Schubert became capable of performing the duties of a jail officer. Sparks did not know why he did not ask about Schubert's capabilities. (P. Ex. 10, Sparks Depo. pp. 19-20, 27-8).

59. Sheriff Nye testified that it was Lieutenant Sparks' sole discretion to determine whether Deputy Schubert was proficient in the use of the computer system and to transfer him back to Road Patrol. (P. Ex. 12, Nye Depo. pp. 48-9).

60. Lieutenant Sparks testified that, following filing of this prohibited practice complaint, he asked Sheriff Nye how long it would be before Deputy Schubert would be transferred back to Road Patrol. Sheriff Nye refused to transfer Deputy Schubert out of the jail because he had filed the prohibited practice charge. (P. Ex. 10, Sparks Depo. p. 17; *see also* Tr. p. 95). Sparks testified that it was Sheriff Nye's decision not to transfer Deputy Schubert out of the jail. (P. Ex. 10, Sparks Depo. p. 17).

61. When asked "Isn't it true that it was common knowledge that Officer Schubert had been transferred to the jail as retaliation measures for having the unit petition filed?", Lieutenant Sparks refused to answer, stating, "I would rather not give my opinion." (P. Ex. 10, Sparks Depo. p. 20).

62. According to Sheriff Nye, from May, 1998, until his deposition in this matter on November 9, 1999, only three deputies have been cross-trained on the new computer system in the jail. Those three deputies are Jennings, Schubert and Metcalf. (P. Ex. 12, Nye Depo. p. 24).

63. Deputy Jennings and Deputy Schubert are both officers in the F.O.P. and members of the negotiation committee. (Tr. p. 88). The Sheriff was aware that both Deputy Jennings and Deputy Schubert were involved in the circulation and filing of the Petitions. (P. Ex. 12, Nye Depo. pp. 34-46). Neither requested to be transferred to the jail. (P. Ex. 9; Tr. pp. 20-1).

64. Sheriff Nye testified that Deputy Metcalf was cross-trained because he was on light duty after suffering an injury. (P. Ex. 12, Nye Depo. p. 24). Deputy Metcalf was assigned to the jail from February 24 through March 13, 1998). (Tr. p. 106).

65. Deputy Jennings was transferred into the jail on February 3, 1999, and cross-trained for approximately two and one-half weeks; then he was returned to the road patrol. (Tr. p. 88; P. Ex. 9; P. Ex. 12, Nye Depo. p. 25).

66. On February 10, 1999, nine months after he was transferred to the jail, Deputy Schubert was transferred back to the Road Patrol. (P. Ex. 5). Sheriff Nye testified that the reason Deputy Schubert was transferred back to the Road Patrol was due to the PERB

mediation conference. (P. Ex. 12, Nye Depo. pp. 55-6). Sheriff Nye stated that he returned from the mediation conference and inquired about Deputy Schubert's ability to use the computer. Sheriff Nye stated that he found that Deputy Schubert obviously obtained the required level of proficiency because he was functioning in the jail as the booking officer. (P. Ex. 12, Nye Depo. pp. 55-6).

67. Because of his assignment to the Jail Division, Deputy Schubert was not allowed to use his assigned patrol car to drive to and from work. (Tr. pp. 55-6).

68. As a result of the transfer to the Jail, Deputy Schubert was required to pay for the gas and maintenance of his own vehicle for driving to and from work during this period. (Tr. pp. 55-6).

69. K.S.A. 75-3203(a) sets the state rate of travel reimbursement based on rates allowed by the Internal Revenue Service. That rate is currently 33 cents per mile.

70. Deputy Schubert's loss of a take-home vehicle resulted in travel expenses to and from work. The travel distance between his home and work is 19 ½ miles one way. Between May 1, 1998 and February 10, 1999 there were approximately 187 working days. Deputy Schubert's total travel expenses from May 1, 1998 through February 10, 1999 equal \$2,406.69. (Tr. pp. 55-6).

71. Prior to being transferred to the jail, Deputy Schubert received an additional two hours of straight time in each two week pay period as a road deputy at \$15.41 per hour. (Tr. pp. 56-7).

72. Between May 1, 1998 and February 10, 1999, Deputy Schubert worked three hours of additional straight time as a jail deputy. (Tr. p. 59).

73. As a result of the transfer to the jail, Deputy Schubert lost \$446.89 of income during the time period in question, net of the three hours in Finding of Fact No. 72.

74. Deputy Schubert's total monetary loss as a result of the transfer to the Jail was \$2,853.58.

CONCLUSIONS OF LAW/DISCUSSION

1. Respondent is an appropriate employer within the meaning of K.S.A. 75-4321 *et seq.* Deputy Rodney Schubert is a public employee as defined at K.S.A. 75-4322(i).

2. The Kansas PEERA guarantees that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." K.S.A. 75-4324.

3. In order to make "some provision for [the] enforcement" of the aforesaid employee rights, Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980), the Kansas PEERA provides that it is a "prohibited practice for a public employer or its designated representative willfully to:

(1) interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324:

....

(3) encourage or discourage membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by black listing;

(4) discharge or discriminate against any employee because he or she has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he or she has formed, joined or chosen to be represented by any employee organization"

K.S.A. 75-4333(b).

4. Although with regard to the section titled "Prohibited practices; evidence of bad faith.", the PEERA, at K.S.A. 75-4333(e), cautions that "[i]n the application and construction of this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent", it is nevertheless true that Kansas courts have sought guidance for the interpretation of PEERA from federal case law interpreting similar provisions of the National Labor Relations Act. See, e.g., *Kansas Ass'n of Public Employees v. Public Service Employees Union*, 218 Kan. 509, 517 (1976)(acknowledging cautionary admonition repeated above and asserting that court "nevertheless [sees] no reason why the rule announced in federal cases should not be applicable" to that matter). See also, Raymond Goetz, *The Kansas*

Public Employer-Employee Relations Law, 28 KAN. L. REV. 243, 265 (1980) (asserting that "in the absence of unusual circumstances . . . it is difficult to see any reason not to adopt in the public sector the kind of balance that federal law permits in the private sector between the competing interests of employees . . . and employers . . .").

5. The petitioner bears the initial burden of establishing a *prima facie* showing that the employee's protected conduct of filing the Petitions was a motivating factor in the employer's taking of adverse action, here reassigning Deputy Schubert to the Jail Division for an extended time period. Once a *prima facie* case is established, the employer can only avoid being held in violation of the prohibited practice section of PEERA by showing that the adverse action rested on the employee's unprotected conduct and that the same action would have been taken anyway. See, e.g., *Wright Line*, 251 NLRB 1083 (1980) (holding that once a *prima facie* case is established, the employer can avoid being held in violation of the NLRA section 8(a)(1) and (3), only by showing that the adverse action rested on the employee's unprotected conduct and that the same action would have been taken "in any event"). See also, *Goetz, supra*, at p. 267 (suggesting that when evidence established a dual motive, such as discouragement of union membership and some other cause, the burden should be on the employer to show that the action would have been taken without regard to the union organizational activity).

6. Sheriff Nye's claims to the contrary notwithstanding, see P. Ex. 12, Nye Depo. p. 54, the preponderance of evidence submitted in this matter, together with reasonable inferences drawn therefrom, demonstrates persuasively that Deputy Rodney Schubert was transferred to the Jail Division in retaliation for filing the Petitions, in violation of K.S.A. 75-4333(b)(1), (3) and (4). See Findings of Fact, Nos. 18-28, 32, 33, 45-66. Sheriff Nye inquired in March, 1998 about Deputy Jennings actions of circulating a Showing of Interest Petition. Sheriff Nye testified that he felt that signatures for the Petition had been obtained under "false pretenses" and indicated his displeasure at the "underhanded way that the Fraternal Police Lodge 47 went about [achieving recognition as exclusive bargaining agent]." P. Ex. 12, Nye Depo. pp. 34-5. Sheriff Nye knew about the filing of the Petitions prior to issuing the April 9, 1998 memorandum transferring Deputy Schubert to the Jail Division. In point of fact, Sheriff Nye received a letter from the Executive Director of PERB, George M. Wolf, indicating that PERB was in receipt of the Petitions from the

F.O.P. only days prior to his issuance of the April 9, 1998 memorandum transferring Schubert to the Jail Division. See Findings of Fact No. 19, 20. It was Sheriff Nye's belief that Deputy Schubert had delivered the completed Petitions to Topeka for filing. P. Ex. 12, Nye Depo. p. 46. Sheriff Nye admitted to stating that the F.O.P. had "stabbed him in the back", and admitted that the timing of the filing of the Petitions "irritated the living hell out of [him]". These and other facts found above and abounding in the record as a whole¹ persuade the presiding officer that Sheriff Nye's action of transferring Deputy Schubert to the Jail Division was motivated by the Sheriff's displeasure with Petitioner's organizational activities, conduct which is protected under state law. The Petitioner has amply carried its burden of establishing a *prima facie* case against Respondent.

7. Although Respondent alleges in effect that Deputy Schubert's reassignment to the Jail Division was an action that would have been taken "in any event", regardless of Deputy Schubert's protected conduct in seeking employer recognition of Petitioner as exclusive bargaining agent, and was for the purposes of cross-training on the jail's new computer system and to refresh Deputy Schubert's knowledge of duties as a jail officer, see P. Ex. 12, Nye Depo. pp. 12-4, the presiding officer does not find these contentions to be persuasive. There is no credible evidence in the record of this matter supporting Respondent's contentions. Sheriff Nye stated at his deposition that he "wanted people [computer] cross trained [] starting with the most senior". P. Ex. 12, Nye Depo. p. 41. However, although people staffing the jail at the time of the computer's installation were provided training, no timetable was established for cross-training others. *Id.* Sheriff Nye was unable to recall holding any meetings with his senior staff regarding this topic prior to issuance of the April 9 memo reassigning Deputy Schubert. P. Ex. 12, Nye Depo. p. 42-3. Further, Sheriff Nye was unable to produce a calendar reflecting any such meetings, P. Ex. 12, Nye Depo. p. 43, nor did the record contain any other writings substantiating the Sheriff's assertions. Aside from Deputies Schubert and Jennings, who each played an integral role in the filing of the Petitions, no other officers have been subjected to this "cross-training", P. Ex. 12, Nye Depo. p. 47, save Deputy Metcalf, who was briefly assigned to the Jail Division "to give

¹ Although Respondent objects, alleging that much of the testimony in the record is hearsay, strict rules of evidence are inapplicable to administrative proceedings. See K.S.A. 77-524. Further, most of the hearsay testimony objected to in this record would be admissible in judicial proceedings under various hearsay

him light duty" because of an injury. P. Ex. 12, Nye Depo. p. 24. Further, Sheriff Nye's proffered reasons for Deputy Schubert's transfer are contradicted by several other uncontroverted facts. First, upon his transfer to Jail, Deputy Schubert was not provided with any computer training. In addition, no one bothered to check on or even inquire about Deputy Schubert's level of computer proficiency, *see, e.g.*, P. Ex. 12, Nye Depo. p. 56; P. Ex. 11, Holmes' Depo. pp. 16-7; P. Ex. 10, Sparks' Depo. p. 15; nor was he transferred back to Road Patrol upon achieving a level of competence in use of the computer system, as demonstrated by his booking in significant numbers of prisoners in the time period following his transfer, and as testified to by Deputy Abramovitz. *See* Findings of Fact 52. Furthermore, Deputy Schubert was forced to remain in the Jail Division for nine months. At one point, when asked by Lieutenant Sparks how long it would be until Deputy Schubert would be transferred back to Road duty, Sheriff Nye responded that he couldn't move him back because Deputy Schubert had filed this prohibited practice action. P. Ex. 10, Sparks' Depo. p. 17. While this fact may not be strictly relevant to the issue at hand, i.e., whether Sheriff Nye's transfer of Deputy Schubert to Jail was a response to Deputy Schubert's protected conduct, Sheriff Nye's response is consistent with that conclusion and suggests that his motivation for the transfer itself was unlawful.

8. Respondent alleges that the PERB is without authority to grant the monetary relief requested by Petitioner. Respondent's contention is contradicted by Kansas law. PEERA mandates that the PERB is to make appropriate findings to remedy and prevent public employers from engaging in prohibited practices. K.S.A. 75-4334(b); K.S.A. 75-4321(b). PEERA grants the Board authority to "[e]stablish procedures for the prevention of [prohibited practices]", and to "[h]old such hearings and make such inquiries as it considers necessary to carry out properly its functions and powers". K.S.A. 75-4323. PEERA also authorizes the Board to "exercise such other powers as appropriate to effectuate the purpose and provisions of this act." K.S.A. 75-4323(e)(3). To conclude as Respondent suggests, that this tribunal is without authority to award monetary damages, would leave this Petitioner with no legal remedy. A similar argument with regard to the authority of the Secretary of the Kansas Department of Human Resources to remedy prohibited practices in

exceptions. *See* the discussion of this issue at Petitioner's Supplemental Memorandum, pp. 3-6. The presiding officer finds that the record as a whole strongly supports the Petitioner's position in this matter.

teachers' union/school district disputes was rejected by the Kansas Supreme Court in *Unified School District No. 279, Jewell County v. Secretary of Kansas Department of Human Resources*, 247 Kan. 519 (1990). In rejecting the argument, the Court held:

"We do not believe the legislature purposefully defined certain acts of prohibited practice, provided procedures to file a complaint of such acts, and granted the Secretary authority to determine whether or not the complained-of action constituted a prohibited practice without also granting the Secretary authority to remedy an infraction."

Id., at 532. Kansas law requires that the Board reject this Respondent's argument also.

CONCLUSION

Based upon a careful review of the lengthy record in this matter, it is the conclusion and recommendation of the presiding officer that the Petitioner has clearly carried its burdens of proof and persuasion, and that Respondent has failed to show that the complained-of action would have been taken regardless and for other reasons. Respondent Leavenworth County Sheriff's Department violated K.S.A. 75-4333(b)(1), (3) and (4) by transferring Deputy Schubert to the Jail Division for nine months. The remedy requested by the Petitioner is appropriate to the facts of this case. Therefore, it is hereby ordered that Respondent do the following:

- 1) Cease and desist from the aforesaid violations of the PEERA;
- 2) Post a notice specifically advising all employees in the bargaining unit that the employer shall not retaliate against or otherwise discriminate against its employees because of conduct protected under the PEERA;
- 3) Transfer Deputy Schubert to the position held by him prior to his unlawful transfer, and;
- 4) Make Deputy Schubert whole for \$2,853.58. in losses sustained as a result of the Respondent's unlawful conduct.

IT IS SO ORDERED.

Dated this 22nd day of December, 2000.



Douglas A. Hager, Presiding Officer
Public Employee Relations Board
1430 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on **February 15, 2001**, addressed to: Public Employee Relations Board & Labor Relations, 1430 SW Topeka Blvd., Topeka, Kansas 66612-1853.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Manager for Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 26th day of January, 2001, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Mr. David C. Van Parys
Leavenworth County Counselor
Courthouse, 300 Walnut
Leavenworth, KS 66048

Mr. Lawrence G. Rebman
Steve A. J. Bukaty, Chtd.
8826 Santa Fe Dr., Ste. 218A
Overland Park, KS 66212

And to the members of the PERB on February 7th, 2001.



Sharon Tunstall