

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

Professor Richard Hughen,)
)
Petitioner)
)
v.)
)
Fort Hays State University,)
)
Respondent)

Case No.: 75-CAE-3-2003

**ORDER DENYING EMPLOYER'S MOTIONS TO DISMISS,
GRANTING EMPLOYEE ORGANIZATION'S MOTION TO INTERVENE
& DENYING INTERVENOR'S MOTION FOR PRELIMINARY INJUNCTION**

NOW, on this 5th day of August, 2003, Employer Fort Hays State University's Motions to Dismiss and Movant Fort Hays State University Chapter of the American Association of University Professors' Motion to Intervene, filed on May 13, 2003, came on for consideration in the above-captioned matter before presiding officer Douglas A. Hager.

APPEARANCES

Fort Hays State University Chapter of the American Association of University Professors, hereinafter "FHSU-AAUP", and Professor Richard Hughen, a member of the bargaining unit at Fort Hays State University, appear by counsel, Lawrence G. Rebman, Attorney at Law, Rebman & Associates, L.L.C. Respondent/Employer Fort Hays State University, hereinafter "FHSU", appears through Kim Christiansen, General Counsel. The Department of Administration appears through Allison Burkhart, Attorney at Law.

75-CAE-3-2003

PROCEEDINGS

On August 30, 2002, Professor Richard Hughen, a member of the FHSU professors bargaining unit who serves on its negotiating team and as President of its employee organization, the Fort Hays State University Chapter of the American Association of University Professors (hereinafter "FHSU/AAUP"), filed a prohibited practice complaint against Employer Fort Hays State University. The complaint against employer, docketed by the Public Employee Relations Board as case number 75-CAE-3-2003, alleged that Fort Hays State University violated the Public Employer-Employee Relations Act, (hereinafter "PEERA"), at K.S.A. 75-4333(b)(5), "by engaging in 'surface bargaining,' rather than negotiating in good faith". See Complaint Against Employer, 75-CAE-3-2003, filed August 30, 2002, Attachment. According to the complaint, the Employer's surface bargaining "constitutes a means by which to conceal a purposeful strategy to make negotiations futile or fail." *Id.* The complaint cited two issues over which the Employer allegedly failed to negotiate in good faith, faculty salaries and grievance policy, and explained how the Employer allegedly failed to negotiate in good faith with the employee representative regarding these issues, generally. *Id.*

Amendments to the complaint were filed on October 22, 2003 and November 22, 2003. These amendments alleged additional actions by the Employer purported to be in violation of K.S.A. 75-4333(b)(2), (3), (5) and (6). See Amendments to the complaint 75-CAE-3-2003, October 22, 2002; Second amendment to the complaint 75-CAE-3-2003, November 22, 2002.

In its September 23, 2002 answer to the complaint, Respondent/Employer FHSU generally denied that it failed to meet and confer in good faith with the faculty bargaining representative FHSU-AAUP. *See* Respondent Employer Fort Hays State University's Answer, 75-CAE-3-2003, September 23, 2002, pp. 3-4. The Employer filed a Motion to Dismiss, alleging that Petitioner Professor Hughen lacked standing to file the complaint and that the complaint failed to state a claim upon which relief could be granted. *See* Motion to Dismiss, 75-CAE-3-2003, September 23, 2002. The Employer also filed responses to each of Petitioner's amendments, denying all allegations. *See* Respondent Employer Fort Hays State University's Response to Petitioner's Amendment, 75-CAE-3-2003, November 25, 2002; Respondent Employer Fort Hays State University's Answer to Petitioner's Second Amendment, 75-CAE-3-2003, November 26, 2002.

This matter came on before the presiding officer for an initial status conference by telephone on October 29, 2002. During that call, this presiding officer inquired whether Petitioner planned to respond to Respondent's September 23, 2002 Motion to Dismiss. Petitioner was directed to file a response by not later than November 4, 2002 and Respondent objected to Petitioner being allowed to file out of time and orally moved not to allow untimely response to the Motion to Dismiss. The presiding officer did not grant Respondent's oral motion.

On November 4, 2002, Petitioner Professor Richard Hughen mailed this office a response to the Employer's September 23, 2002 Motion to Dismiss, asserting with regard to Employer's "lack-of-standing" argument that the original complaint was filed by him in his capacity as President of FHSU-AAUP on behalf of the employee organization, with

full knowledge and support of its executive committee. Petitioner's Response to Motion to Dismiss, 75-CAE-3-2003, mailed November 4, 2002.

Thereafter the Employer filed a series of motions to dismiss, regarding both the original complaint, the amendments and Petitioner's November 4, 2002 Response to Motion to Dismiss, alleging, among other grounds, that the Petitioner, Professor Richard Hughen, lacked standing to file the complaint, and that the complaint, response or amendments were untimely or failed to state claims upon which relief could be granted. See Motion to Dismiss, 75-CAE-3-2003, September 23, 2002; Motion to Dismiss the Amendment for Lack of Proper Service, 75-CAE-3-2003, November 25, 2002; Motion to Dismiss the Petitioner's Second Attempt at Amendment for Failure to State a Claim Upon Which Relief Can Be Granted Regarding Grade Submission Dates, 75-CAE-3-2003, November 26, 2002; Respondent Employer's Renewed Motion to Dismiss Petitioner's Response to Respondent Employer Motion to Dismiss the Above Captioned Case for Lack of Standing and for Failure to State a Claim Upon Which Relief can be Granted, 75-CAE-3-2003, November 25, 2002.

The presiding officer conducted a status conference by telephone with the parties on April 8, 2003 to discuss his ruling with regard to Respondent's motions to dismiss for lack of standing. Although it appeared reasonable to this presiding officer to conclude that the original complaint in this matter was filed by Professor Hughen in his role as President of FHSU-AAUP on behalf of the employee organization, it seemed the more appropriate manner of proceeding to have the employee organization file a motion, through counsel, to intervene. Consequently, during that call, I directed Professor Hughen to secure assistance of counsel for FHSU-AAUP and to have counsel file an

entry of appearance, as well as a motion to intervene. Subsequently, on April 18, 2003, an Entry of Appearance was filed in this matter by Lawrence G. Rebman.

On May 13, 2003, Respondent filed another motion to dismiss, alleging that Petitioner had failed to obtain counsel and to have counsel file a motion to intervene within ten days of the April 8 conference call and that counsel had filed an ineffective appearance by failing to notify the proper parties. *See Renewed Motion to Dismiss, 75-CAE-3-2003, May 13, 2003, p. 2.* Also on that date, this office received from FHSU-AAUP a Motion to Intervene, alleging a legitimate interest in this prohibited practice proceeding by Intervenor FHSU-AAUP. *See Motion to Intervene, 75-CAE-3-2003, May 13, 2003.*

Intervenor FHSU-AAUP filed a Motion for Preliminary Injunction on July 14, 2003, seeking to prevent Employer from implementing its proposed memorandum of agreement containing a grievance procedure allegedly significantly different from the one the parties have been using. Injunction is necessary, Intervenor alleges, because implementation of the agreement “will immediately and irreparably deny FHSU/AAUP and its members the right to appeal tenure and promotion decisions and grieve Reduction in Force Provisions” and “will damage the status, power and authority of the FHSU/AAUP as the exclusive bargaining unit representative” at Fort Hays State University.

MOTIONS TO DISMISS

In support of its September 23, 2002 motion to dismiss, Employer asserts that Petitioner, as an individual, lacks standing to allege a prohibited practice complaint under K.S.A. 75-4333(b)(5). It is this presiding officer's view that Employer's assertion is correct. Were this "failure to bargain in good faith" charge to be brought by an individual, acting solely on his or her own behalf, it would appropriately be dismissed for lack of standing. The responsibility of an employer to bargain in good faith is owed to the employee unit's bargaining representative, and it is the bargaining representative alone who is in a position to evaluate the employer's good faith, or lack thereof, during negotiations. *See* K.S.A. 75-4333(b)(5)(providing that it is a "prohibited practice" for an employer willfully to "[r]efuse to meet and confer in good faith *with representatives of recognized employee organizations* as required in K.S.A. 75-4327". K.S.A. 75-4333(b)(5)(emphasis added)). In the instant matter, however, the presiding officer accepts as credible Dr. Hughen's explanation, backed up by a signed statement of the employee organization's executive committee, that the initial petition was inadvertently marked as having been filed by an individual employee, when in fact the intent was to file on behalf of the bargaining representative. Even were this not so, the presiding officer believes it appropriate under the facts and circumstances of this matter to allow intervention by the bargaining representative, as explained below. Respondent's motion to dismiss for lack of standing is denied.

As the second ground for its motion to dismiss, Employer asserts that the Petition in this matter fails to allege sufficient information to sustain a charge of failure to bargain

in good faith. Employer notes that "totality of conduct" is the appropriate standard by which to gauge a party's good or bad faith in bargaining. Respondent Employer Fort Hays State University's Memorandum in Support of Motion to Dismiss, 75-CAE-3-2003, September 23, 2002, p. 9. "Petitioner's complaints fail to acknowledge the simple fact that employers and representatives have a duty to meet and confer, but there is no duty to move from a position that the Employer believes is reasonably held." *Id.*, p. 10. In this regard, Employer entertains a mistaken notion regarding applicable law. While there is no duty under Kansas law to move during negotiations from a position reasonably taken, the determination of whether the negotiator's position is reasonable is a question for resolution by this hearings process. The question is whether Respondent's positions were objectively reasonable, not simply whether Respondent believed its position to be a reasonable one, as Respondent's argument seems to suggest.

The presiding officer has reviewed the Petitioner's complaint and each of its amendments. In its original complaint, Petitioner pleads sufficient facts to put Employer on notice of the charges against them, which, if established as true, would entitle Petitioner to prevail on a charge of failure to bargain in good faith. *See* Complaint Against Employer, 75-CAE-3-2003, August 30, 2002, Attachment. Further, the Petition alleges sufficient facts with regard to the grievance policy issue that, if proven, would constitute violations of K.S.A. 75-4333(b)(1), (2) and (3), as well. *Id.* Respondent's motion to dismiss for failure to state a claim upon which relief can be granted is denied.

Respondent requests that the presiding officer dismiss Petitioner's amendments for Petitioner's failure to adhere strictly to the requirements for service set out in applicable Kansas administrative regulations. *See* Motion to Dismiss the Amendment for

Lack of Proper Service, 75-CAE-3-2003, November 25, 2002, pp. 2-3; Respondent Employer Fort Hays State University's Answer to Petitioner's Second Amendment, 75-CAE-3-2003, November 26, 2002, pp. 2,4. While the presiding officer shares Respondent's concern for Petitioner's failure to follow applicable procedure, Petitioner's failures are not so severe that dismissal is warranted. The office of labor relations took appropriate steps to ensure that Respondent timely received copies of Petitioner's amendments and Respondent's rights were not prejudiced in any way by Petitioner's failure strictly to comply with service requirements. Further, in light of Respondent's concerns, the presiding officer exercised his express and implied authority to regulate the course of these proceedings, *see* K.S.A. 77-523(a), by requiring Petitioner, during the status conference call of April 8, 2003, to secure the assistance of counsel. K.S.A. 77-515(c). The filing of amendments, post-petition, is expressly permitted under applicable Kansas regulations, K.A.R. 84-2-9, and under the circumstances of this matter the presiding officer concludes that dismissal of Petitioner's amendments would not be proper or just. Respondent's motions to dismiss Petitioner's amendments are denied.

Respondent asserts that the first allegation contained in Petitioner's second amendment should be dismissed for failure to state a claim upon which relief can be granted. See Motion to Dismiss the Petitioner's Second Attempt At Amendment for Failure to State a Claim Upon Which Relief Can Be Granted Regarding Grade Submission Dates, 75-CAE-3-2003, November 26, 2002. Highly summarized, Petitioner alleges that Employer's administration has violated K.S.A. 75-4333(b)(5) and (6) by modifying terms and conditions of employment without first negotiating them with the bargaining unit's exclusive representative by changing the date upon which faculty are

required to submit students' final grades from noon on the Monday following final examination week to noon on the Sunday following final exams, a change of 24 hours.

When considering a motion to dismiss for failure to state a claim upon which relief can be granted:

“[t]he question for determination is whether in the light most favorable to [petitioner], and with every doubt resolved in [petitioner's] favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate [petitioner] does not have a claim.”

312 Education Association v. U.S.D. 312, 47 P.3d 383, 388 (Kan. 2002). Based upon a review of Petitioner's allegation, it is the conclusion and ruling of the presiding officer that Respondent's motion to dismiss regarding this charge must be denied. While Respondent might conceivably ultimately prove to be correct when it counters that the question of when final grades must be submitted is an inherent managerial right not encompassed as a mandatory subject of bargaining by application of PERB's balancing test, that contention is far from assured based solely upon the pleadings. Respondent's motion to dismiss this portion of Petitioner's second amendment is denied.

Respondent's Renewed Motion to Dismiss was filed in this matter on May 13, 2003, approximately five weeks after the parties met with the presiding officer telephonically to review the status of this matter and its many pending procedural motions. Respondent's Renewed Motion asks this officer to dismiss this entire matter for Petitioner's failure to secure assistance of counsel and have counsel file a motion to intervene within ten days of the aforementioned conference call. Respondent suggests that Petitioner was ordered by this presiding officer to have obtained counsel and to have counsel file a motion to intervene on behalf of bargaining unit representative Fort Hays

State University Chapter of the American Association of University Professors within said ten day timeframe. Although the presiding officer does not recall, and his notes do not reflect, such an edict, it may well be that words to that effect were used in an effort to impress upon Dr. Hughen the presiding officer's resolve that assistance of counsel be secured, that a proper motion to intervene be filed to clarify confusion in the record over Petitioner's identity and that this proceeding not be inordinately delayed in the process. In short, the presiding officer concludes that these circumstances do not warrant dismissal. On the contrary, doing so would almost surely constitute an abuse of discretion. Respondent's Renewed Motion to Dismiss is denied.

MOTION TO INTERVENE

As noted above, the Fort Hays State University Chapter of the American Association of University Professors, the certified employee organization representing the professor's bargaining unit at FHSU, filed a Motion to Intervene in this matter. Motion to Intervene, 75-CAE-3-2003, May 13, 2003. In support of its motion, Intervenor alleges that it is the certified collective bargaining representative of bargaining unit members at FHSU, that the prohibited practice complaint in this matter was filed by its president, Dr. Richard Hughen, acting in his official capacity and that Intervenor has a legitimate interest in the proceeding. *Id.*

A motion to intervene is appropriate from "any third party having a legitimate interest in any proceedings" under the PEERA. K.A.R. 84-2-3. Further,

“[a]ny organization which has a signed, valid memorandum of agreement encompassing the proposed unit or any portion thereof shall be considered to have a legitimate interest in any proceedings upon presentation of same.”

Id. See also, K.S.A. 77-521 (providing that a presiding officer shall grant a petition for intervention if the petition is submitted in writing to the presiding officer with copies to all named parties at least three days before hearing stating facts that the petitioner’s legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law, and the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention).

Intervenor’s motion is appropriate under the circumstances. The bargaining unit representative has legitimate interests in this proceeding which may be substantially effected by its outcome. Further, the interests of justice and the orderly and prompt conduct of these proceedings will not be impaired by allowing this intervention. FHSU-AAUP’s Motion to Intervene is granted.

MOTION FOR PRELIMINARY INJUNCTION

Intervenor FHSU-AAUP filed a motion for preliminary injunction on July 14, 2003 with this office. Intervenor urges the Public Employee Relations Board to enjoin Respondent from implementing a proposed memorandum of agreement at Fort Hays

State University. Motion for Preliminary Injunction, 75-CAE-3-2003, July 14, 2003. In support of its motion, Intervenor urges that unilateral implementation of a contract by Employer would be in violation of applicable law, that movant would eventually prevail on the merits of its prohibited practice charge, that unilateral implementation by Employer of its proposed memorandum of agreement would cause irreparable injury and damage to the protected rights of unit members and its representative, specifically by denying the unit's representative and its members the right to appeal tenure and promotion decisions and to grieve reduction in force provisions, that said injury to unit members and representative substantially outweighs any harm to Respondent and that an injunction would have no adverse impact on the public interest. *Id.*

By telephone conference on or about July 18, the presiding officer discussed the motion with representatives of the parties and advised of his tentative conclusions regarding same. It is this officer's conclusion that the Board is without authority to grant injunctive relief. The authority to grant injunctive relief is an equitable remedy. *Wichita Wire, Inc. v. Lenox*, 11 K.A.2d 459 (1986). This tribunal, conversely, is a creature of statute and its authority is limited to the powers expressly created and necessarily implied therein. *See Woods v. Midwest Conveyor Co.*, 231 Kan. 763 (1982); *Pork Motel, Corp. v. Kansas Dept. of Health and Environment*, 234 Kan. 374 (1983); *City of Wichita v. Wyman*, 158 Kan. 709 (1944). While this public labor relations board's federal private employer counterpart, the National Labor Relations Board, is expressly granted by statute the authority under certain conditions to petition federal district courts for injunctive relief on behalf of parties to labor disputes under its jurisdiction, Kansas law contains no equivalent grant of authority. *See K.S.A. 75-4321, et seq.* Moreover, even if Kansas'

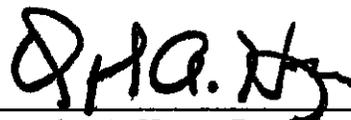
legislature had given such authority to the Board, it is not clear to the presiding officer that Employer's unilateral implementation of a memorandum of agreement which includes the Employer's preferred grievance processes will result in irreparable injury to movant or its members. Should movant prevail on its claim that Employer failed to negotiate with it in good faith, and should the Public Employee Relations Board determine that Employer's conduct warrants a return to the *status quo ante*, the statute's broad grant of authority, *see* K.S.A. 75-4323, would enable the Board to provide movant and its members an adequate remedy.

CONCLUSION

After a thorough review of the pleadings and arguments of the parties, and of applicable and persuasive law, it is the conclusion and order of the Presiding Officer, as set out in more detail above, that Respondent's Motions to Dismiss are denied, Intervenor's Motion to Intervene is granted, and Intervenor's Motion for Preliminary Injunction is denied.

IT IS SO ORDERED.

Dated this 5th day of August, 2003.



Douglas A. Hager, Presiding Officer
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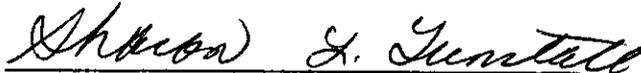
CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager for Labor Relations, Kansas Department of Human Resources, hereby certify that on the 6th day of August, 2003, a true and correct copy of the above and foregoing Order Consolidating Related Cases was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

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