

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS

Dr. Norman Caulfield and )  
Dr. Thomas O. Guss )  
 )  
Petitioners, )  
v. )  
 )  
Fort Hays State University Chapter )  
of the American Association of )  
University Professors (FHSU-AAUP) )  
 )  
Respondent )  
\_\_\_\_\_ )

Case No.: 75-CAEO-1-2001

**ORDER ON MOTION TO DISMISS**

NOW on this 22nd day of November, 2002, a Motion to Dismiss came on for consideration in the above-captioned matter before presiding officer Douglas A. Hager.

**APPEARANCES**

Petitioners Norman Caulfield and Thomas O. Guss appear *pro se*. Respondent Fort Hays State University Chapter of the American Association of University Professors appears through counsel Lawrence Rebman, Attorney at Law, Steve A.J. Bukaty, Chartered.

**PROCEEDINGS**

On April 20, 2001, Professors Norman Caulfield and Thomas Guss, (hereinafter "Petitioners"), filed a Complaint Against Employee Organization against the Fort Hays State University Chapter of the American Association of University Professors, (hereinafter "FHSU-AAUP" or "Respondent"). In its complaint, Petitioners allege that "individual members and officers of the Fort Hays State University Chapter of the American Association of University Professors . . . have engaged in activities that violate

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K.S.A. 75-4327(h).” *See* Complaint Against Employee Organization, April 20, 2001, Attachment, p. 1.

Respondent subsequently timely filed its answer to Petitioners’ complaint. *See* Respondent’s Answer, May 8, 2001. Respondent’s answer denied that Petitioners’ are entitled to any of the relief sought and averred that the facts alleged by Petitioners’ complaint do not constitute a prohibited practice as defined by Kansas law. *Id.* Further, Respondent asserted that the “PERB lacks jurisdiction to entertain a complaint over . . . matters [which] constitute exclusive internal disputes which are subject to resolution solely by the Respondent and its parent organization, the American Association of University Professors.” *Id.* In a separate motion, Respondent seeks dismissal of Petitioners’ complaint. *See* Motion to Dismiss, June 25, 2001. Legal arguments were submitted by the parties. *See* Memorandum Brief in Support of Respondent’s Motion to Dismiss, June 25, 2001; Respondent’s Letter and Attachments Regarding Other State’s Case Law on Internal Election Disputes, October 15, 2001; Petitioners’ Answer to Respondent’s Memorandum Brief in Support of Motion to Dismiss, November 26, 2001; Respondent’s Reply to Petitioners’ Answer to Respondent’s Motion to Dismiss, January 7, 2002.

The parties subsequently agreed to participate in an alternative dispute resolution process in an effort to informally resolve the matter. However, the presiding officer was later advised by the assigned mediator that mediation was not a viable option for the resolution of this matter. *See* Letter from Darren Root, May 30, 2002. At the request of Petitioners, consideration of this matter was postponed during each of the two summer sessions during its pendency. *See* Petitioners’ Letter Requesting Postponement, June 25, 2001. The presiding officer now concludes that this matter is ripe for determination.

#### **MOTION TO DISMISS/DISCUSSION**

As noted above, Respondent requests that this complaint be dismissed. Respondent submits that this action be dismissed on alternative grounds, first, for Petitioners’ failure to state a claim upon which relief can be granted, and, second, for lack of jurisdiction. Memorandum Brief in Support of Respondent’s Motion to Dismiss, June

25, 2001, pp. 3-4. In support of its first reason for dismissal, Respondent argues that “[t]he allegation of failure to maintain democratic procedures and conduct secret ballot elections does not state a prohibited practice.” Memorandum Brief in Support of Respondent’s Motion to Dismiss, p. 4. In support of its alternative ground, Respondent urges that NLRB precedent is persuasive and applicable to this matter. “The NLRB and the courts have long held that ‘questions relating to the validity of internal union elections are not covered by the National Labor Relations Act and the National Labor Relations Board has no authority to consider such claims.’” *Id.*, p. 5 (citations omitted). “The courts have also consistently held that if union members wish to protest a union election, they must first exhaust their internal union remedies.” *Id.*

The Kansas PEERA is administered by a five-member Public Employee Relations Board. K.S.A. 75-4323. Among its duties, the Board is empowered to adjudicate charges of prohibited practices. K.S.A. 75-4334. This authority serves as a means for the enforcement of rights granted by the Act. See Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980).

The Act provides, in pertinent part, that “it shall be a prohibited practice for public employees or employee organizations willfully to:

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

K.S.A. 75-4333(c). At K.S.A. 75-4324, the Act 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.”

Petitioners correctly note that PEERA requires employee organizations to maintain democratic procedures and practices, including periodic elections by secret ballot. K.S.A. 75-4327(h). Petitioners assert that the Respondent violated democratic procedures contained in its own constitution and by-laws, and that this “violation of K.S.A. 75-4327(h) is in effect a violation of 75-4333(c)(1)”, that is, a restraining by the employee organization of the right of employees to participate in the activities of

employee organizations of their own choosing, and constitutes a prohibited practice. See Amendment to the Complaint, filed June 28, 2001.

It is noteworthy that the provision Petitioners rely upon is not a part of K.S.A. 75-4333, which designates certain proscribed activities under the heading "**Prohibited practices; evidence of bad faith.**" Petitioners suggest that the activities of which they complain constitute a prohibited practice, though proscribed by the Act under the heading "**Public employee organizations; recognition and certification; membership; meet and confer; determination and certification of appropriate unit; rules and regulations.**" This section of the Act provides, in pertinent part, that:

"No employee organization shall be recognized unless it establishes and maintains standards of conduct providing for: (1) The maintenance of democratic procedures and practices, including periodic elections by secret ballot and the fair and equal treatment of all members; and (2) the maintenance of fiscal integrity, including accurate accounting and periodic financial reports open to all members and the prohibition of business or financial interests by officers which conflict with their fiduciary responsibilities."

K.S.A. 75-4327(h). Petitioners correctly note that the language of K.S.A. 75-4327(h) reflects general principles found in the Labor-Management Reporting and Disclosure Act, 29 USC § 401 *et seq.* Petitioners' Answer to Respondent's Memorandum Brief in Support of Motion to Dismiss, Nov. 26, 2001, pp. 2-3. The LMRDA, however, unlike the PEERA, provides express means for the enforcement of rights guaranteed therein. 29 USC § 412.

Petitioners contend that because of legislative inclusion of the provision noted above, the PEERA should be construed broadly to allow for the prosecution of their internal election complaint as a prohibited practice. By the same reasoning, if an employee organization fails to maintain "fiscal integrity", for example, by failing to make its financial reporting available to all of its members, a prohibited practice action would be an appropriate remedy. Examination of the Act as a whole does little to support this reasoning. Were it the legislative intent that such acts constitute an appropriate subject of the statutory mechanism for resolution of prohibited practice complaints, the legislature could have made that intent clear by enumerating them in that section of the law.

An extensive review of administrative decisions from other state public employment relations boards fails to find any persuasive authority supportive of the relief sought by Petitioners, or of PERB's assertion of jurisdiction over such matters. *See, e.g.*, *Netti v. Florida PBA, Inc.*, 25 FPER P 30129 (1999)(in absence of facts indicating unlawful purpose, allegation of union election irregularities involved internal union affairs beyond PERC's jurisdiction); *LaMarca v. Capistrano Unified Education Association*, 25 PERC P 32106 (2001)(unfair practice charge dismissed by Board for failure of charge to demonstrate impact of election irregularities on employee-employer relations); *Hutchinson v. California State Employees Association*, 24 PERC P 31032 (2000)(unfair practice charge alleging that union interfered with internal union election process by violating union bylaws regarding timeframe for conducting elections, mailing election ballots, validating ballots, distributing election results and installing union officers, was dismissed as involving solely internal union activities which employees did not demonstrate had impact on employer-employee relations); *D'Fantis v. Amalgamated Transit Union, Local 268*, 8 OPER P ¶ 1653 (1991)(unfair labor practice charge dismissed for lack of probable cause that union failed to properly conduct internal union election); *In re: Murphy and District Council of Carpenters*, 26 PERB P 4667 (1993)("The board has long held that matters relating to internal union elections and politics are examples of internal union affairs which fall beyond its jurisdiction."). Accordingly, it appears to the presiding officer that the appropriate remedy for the conduct of which Petitioners complain lies elsewhere, perhaps within the organization itself through internal remedies, or through other avenues.

The legislature's failure to proscribe such acts in the prohibited practice section of the statute is consistent with the longstanding congressional policy against unnecessary governmental interference with internal union affairs. *See, e.g.*, *Wirtz v. Local 153, Glass Bottle Blowers Ass'n.*, 389 U.S. 463, 470-471, 88 S.Ct. 643, 647-648, 19 L.Ed.2d 705 (1968)(noting a longstanding congressional policy against unnecessary governmental interference with internal union affairs); *Hodgson v. Local Union 6799, United Steelworkers of America, AFL-CIO*, 403 U.S. 333, 338; 91 S.Ct. 1841, 1845; 29 L.Ed.2d 510 (1971)(same). And while the Kansas legislature did make some provision for regulation of internal union affairs in the PEERA, by requiring annual registration of

union business agents, K.S.A. 75-4336, and by requiring annual reports of financial condition, K.S.A. 75-4337, the Act "surprisingly" failed to adopt provisions to assure internal union democracy suggested in the model state public employee relations bill drafted in May, 1970 by the Advisory Commission on Intergovernmental Relations. *See* Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 287-288 (1980).

Even if the conduct complained of herein is an appropriate subject of a prohibited practice action, which such question this decision will not determine, documents submitted demonstrate that Petitioners failed to exhaust any potential internal remedies by failing to complain to the employee organization, or to the national organization with which it is affiliated, that the organization's second election was allegedly conducted by non-secret ballot. *See* Petitioners' Answer to Respondent's Memorandum Brief in Support of Motion to Dismiss, November 26, 2001, Attachment D. Petitioners allege that there is no provision for contesting an election in the constitution or by-laws of either the local employee organization or their national affiliate. Petitioners' Answer, p. 4. The presiding officer notes however, that the national organization's constitution clearly provides sanctions for a chapter's disregard of democratic procedures. Petitioners' Answer, Attachment B, Article 7. Moreover, although Petitioner Guss did voice, via e-mail to the chapter's leadership, his "concerns" regarding "anomalies" and "constitutional issues", the question whether the voting procedure used in the second election was flawed was not raised. Petitioners' Answer, Attachment D. Petitioners cannot remain silent to the employee organization and its national regarding their specific concerns of election irregularities and later file prohibited practice complaints with this agency to initially raise them. *See generally*, *Hodgson v. Local Union 6799, United Steelworkers of America, AFL-CIO, et al.*, 403 U.S. 333, 341; 91 S.Ct. 1841, 1846; 29 L.Ed.2d 510 (1971)(holding that "when a union member is aware of the facts supporting an alleged election violation, the member must, in some discernible fashion, indicate to his union his dissatisfaction with those facts if he is to meet the exhaustion requirement."). As such, it is the presiding officer's conclusion that the Petitioners' failure to exhaust internal remedies is fatal to the review of their complaint in this forum.

### CONCLUSION

Based upon a careful review of the pleadings and documents filed in this matter, and after due consideration of the parties' arguments and applicable law, it is the conclusion and recommendation of the presiding officer that the Petitioners' complaint in the above-captioned matter must be, and is hereby, dismissed. Even were it determined that an internal union election dispute is the appropriate subject of a prohibited practice complaint, Petitioners failure to pursue its complaints through internal remedies with the employee organization precludes their litigation in this forum.

**IT IS SO ORDERED.**

Dated this 22nd day of November, 2002.

  
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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 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 December 8, 2002, addressed to: Public Employee Relations Board, 1430 SW Topeka Blvd., Topeka, Kansas 66612-1853.

### CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Manager for PERB, Kansas Department of Human Resources, hereby certify that on the 22<sup>nd</sup> day of November, 2002, a true and correct copy of the above and foregoing 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:

Dr. Norman Caulfield  
216 N. Kansas St.  
Russell, KS 67665

Dr. Thomas O. Guss  
1914 Longfellow Dr.  
Hays, KS 67601

Mr. Larry Rebman, Attorney at Law  
Steve A.J. Bukaty, Chartered  
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And to the members of the PERB on December 5 2002.

Sharon Tunstall  
Sharon Tunstall