

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF KANSAS

International Association of  
Fire Fighters, Local No. 64,  
Petitioner,

OAH No. 21DL0012 PE  
PERB Case No. 75-CAE-8-2020

v.

Unified Government of Wyandotte  
County/Kansas City, KS,  
Employer.

**INITIAL ORDER**

**Statement of Case**

The matter comes before the Office of Administrative Hearings (OAH) for an administrative hearing pursuant to K.S.A. 75-4323(e)(2), K.S.A. 75-37,121, and K.S.A. 77-501 *et seq.* The Petitioner, the International Association of Fire Fighters, Local No. 64 (Union), alleges the Unified Government of Wyandotte County/Kansas City, Kansas (Employer) engaged in prohibited practices by unilaterally changing working conditions with respect to the practice of trading time, health insurance, and out of title pay.

Employer filed a counterclaim alleging the Union engaged in a prohibited practice by refusing to negotiate with Employer for a successor agreement to the Memorandum of Agreement. Employer recognized its counterclaim is moot because the parties' resumed negotiations and has agreed the counterclaim may be dismissed.

A formal hearing on this matter was held by video conference on April 1, 2021. Kahlea Porter, Presiding Officer/Administrative Law Judge (ALJ) presided over the hearing.

Scott Brown, attorney, appeared for the Union. The Union called the following witnesses to testify on its behalf: John J. Simma (JJSimma), Joseph Chizmar (Chizmar), Derrian Goldsmith (Goldsmith), John Ryan Simma (JRSimma), and Brian Taylor (Taylor).

Ryan Denk, attorney, appeared for the Employer. Employer called the following witness to testify on its behalf: Deputy Chief Jeff Stroud (Stroud), Bonnie Bloesser (Bloesser), and Chief Michael Callahan (Callahan).

## Evidentiary Rulings

Pursuant to the prehearing order, Union electronically filed proposed Exhibit A, the 2015-2017 Memorandum of Agreement between the Unified Government of Wyandotte County, Kansas City, Kansas and the International Association of Firefighters, Local No. 64 (MOA). Union moved for the admission of Exhibit A into evidence. Employer did not object and Exhibit A was admitted into evidence.

Employer electronically filed Exhibits 1 through 12 pursuant to the prehearing order and moved for the admission of these exhibits into evidence. Union did not object and Exhibits 1 through 12 were admitted into evidence. Employer moved for the admission of Exhibit 13, the two grievances that are based upon the same facts as the two prohibited practice complaints in this matter, into evidence. Union objected as to untimeliness and relevancy. Exhibit 13 is relevant but was untimely filed. Exhibit 13 was not admitted into evidence.

## Findings of Fact

1. The governing body of the Unified Government of Wyandotte County/Kansas City, Kansas (UG) is a public agency or employer<sup>1</sup> and has previously voted to be covered by the provisions of the Kansas Public Employer-Employee Relations Act (PEERA).<sup>2</sup>
2. The Kansas City, Kansas Fire Department (Fire Department) is an agency of the UG providing fire protection and emergency medical service response for Kansas City, Kansas and Wyandotte County.
3. Union is an employee organization<sup>3</sup> and is the recognized and acknowledged exclusive bargaining representative for all UG employees of the Fire Department holding the ranks of Captain and below for the purpose of negotiating collectively pursuant to PEERA with respect to conditions of employment, and grievances, as defined by PEERA.<sup>4</sup>
4. The relevant MOA was executed on April 27, 2017 and was effective on January 1, 2015 through December 31, 2017,<sup>5</sup> and was extended by the Memorandum of Understanding 2018 effective January 1, 2018 through December 31, 2018.<sup>6</sup> Collectively, this MOA and MOU are referred to in this Order as MOA.
5. On September 26, 2018, the UG sent notice to employees that the open enrollment period for benefits for the 2019 calendar year would begin on October 18, 2018, and end on November 9, 2018.<sup>7</sup>

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<sup>1</sup> K.S.A. 75-4322(f).

<sup>2</sup> K.S.A. 75-4321(c).

<sup>3</sup> K.S.A. 75-4322(i).

<sup>4</sup> Union Exhibit A, MOA, Article 2 – Recognition.

<sup>5</sup> Union Exhibit A, MOA, Article 36 – Duration.

<sup>6</sup> Employer Exhibit 12, pgs. 258-259.

<sup>7</sup> Employer Exhibit 8, pgs. 32-35.

6. In October 2018, the UG again sent notice to employees of the open enrollment period.<sup>8</sup>
7. On November 5, 2018, the UG again sent a notice to employees of the open enrollment period. This notice also included a large print caveat that all documentation, if required, must be submitted to Human Resources no later than 5 pm on November 9, 2018.<sup>9</sup> It specifically provided information that the failure to submit the 2019 \$150.00 opt out waiver form along with proof of other insurance coverage by November 9, 2018 would prevent receipt of the \$150.00 opt out per month payment.
8. Employees who opt out of medical coverage through the UG are provided a monthly payment of \$150.00 in lieu of insurance coverage through the Employer.<sup>10</sup>
9. In 2018, Taylor did not file an election of benefits for Employer's health insurance or an opt out form by November 9, 2018 for the 2019 plan year. Taylor was not allowed to make a late election to opt out of health insurance provided by the UG and he did not receive the \$150.00 per month incentive in 2019.
10. Another employee was denied a request to opt out of medical coverage through the UG because the request was not filed before the deadline.<sup>11</sup>
11. Bloesser, benefits coordinator for the UG, testified that an exception was made to allow all UG employees a limited opportunity to elect a Health Savings Account after the enrollment period closed because there was a new provider. There was no similar allowance given to any employee for the \$150.00 opt out of health insurance per month payment.
12. Union filed a grievance on Taylor's behalf, claiming that Employer denied Taylor the opportunity to make health benefit elections that other employees received. Union acknowledged that the subject of the grievance filed by the Union for Taylor is the same claim it made in the Prohibited Practice Charge currently before PERB. Taylor acknowledged that the Union filed a grievance on his behalf regarding his failure to opt out from health insurance coverage.
13. Employer denied Taylor's grievance at Step 1 and Union appealed to Step 2. Between the appeal and the Step 2 hearing, however, Union advised that it would be filing a prohibited practice charge and would be abandoning the grievance. Employer advised that this was not permitted under the MOA. Union did not appear at the Step 2 hearing.<sup>12</sup>
14. Article 16 of the MOA governs grievance procedures. It specifies, in pertinent part, "Where a matter within the scope of this grievance procedure is alleged to be both a grievance and a

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<sup>8</sup> Employer Exhibit 8, pg. 41.

<sup>9</sup> Employer Exhibit 8, pgs. 109-110.

<sup>10</sup> Employer Exhibit 8.

<sup>11</sup> Employer Exhibit 8, pg. 155.

<sup>12</sup> Union Exhibit A, MOA, Article 16.3(4) – Grievance Procedure.

prohibited practice under the jurisdiction of the Public Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided or by action before the Public Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and waiver of alternative remedy."

15. In the summer of 2019,<sup>13</sup> Goldsmith's station was called to an incident; upon arrival it was determined that an individual needed to be immediately taken to the hospital. On that particular shift, the Captain was off. Accordingly, the crew's Driver was serving as Acting Captain, and a Firefighter who holds the designation of Extra Driver, Chizmar, was serving as Driver for the shift. Goldsmith was the Firefighter on that shift, and the crew was operating a pumper apparatus. After arriving at the emergency, the Acting Captain, who was also the crew's paramedic that day, rode in an ambulance to accompany an injured individual to the hospital. Chizmar, having stepped into the Acting Captain role with the prior Acting Captain in the ambulance, decided that Goldsmith should drive the pumper to the hospital to pick up the original Acting Captain. Goldsmith could not recall at the hearing whether the pumper was in service when he drove it to the hospital. Goldsmith drove the pumper about two miles to the hospital. When the original Acting Captain was picked up, Chizmar returned to the role of Driver and drove the pumper back to the Station, while Goldsmith reverted to his position as Firefighter. Goldsmith testified that if the apparatus were called into service while he was driving it to the hospital, he would not have been able to serve the Driver role at the scene of a fire and Chizmar would have had to step back into that role.
16. Goldsmith testified that he was not paid out of title while driving the pumper to the hospital, and was told by Employer that he was not eligible for out of title pay because he was not "broken in." He claimed that he had been paid out of title for driving an apparatus on prior occasions, but he could not specifically recall any such prior instances.
17. Firefighter JRSimma testified he was not broken in and was not in training to be broken in. Simma testified that he was paid out of title pay while working as a Driver.
18. Union officials testified that because all Firefighters must hold a Class B drivers' license, which allows them to operate a large vehicle with air brakes, any Firefighter can operate a pumper or aerial regardless of being broken in.
19. Stroud testified that in order to qualify to work out of title as a Driver of a pumper or aerial apparatus a Firefighter must be "broken in," at which time they are classified as an Extra Driver. The employee still holds the rank of Firefighter, but carries the Extra Driver designation and is eligible to fill in when a Driver is absent. An apparatus cannot be "in service" and thus ready to provide emergency assistance without a fully trained Driver or Extra Driver.

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<sup>13</sup> Goldsmith could not recall when this incident occurred, but thought it was relatively close to when the Union filed a grievance about his out-of-title pay in July 2019.

20. Stroud testified that non-broken in Firefighters can drive a pumper or aerial when it is out of service, driving it when it is not available to or actively responding to a call. In such instances, Firefighters are not eligible for out of title pay for driving because they are not capable of performing all functions of a Driver, which include pumping and aerial functions, and the ability to perform those functions cannot be confirmed without the breaking in process. Stroud testified that, while a non-broken in firefighter can drive an apparatus, doing so does not fall under Article 9 of the MOA.
21. The MOA provides that each candidate for promotion to the position of Driver must be a Firefighter Class I, assigned to Fire Suppression, and have at least five continuous years as a sworn member of the Fire Department by January 1, of the year the written test is given. The candidate must achieve a score of at least 70% before being moved to the practical portion of the testing procedure. The candidate must also possess a current valid, unrestricted Kansas Vehicle Operators License which would permit the employee to operate appropriate fire apparatus and demonstrate the ability to operate appropriate fire apparatus.<sup>14</sup>
22. On July 19, 2019, Union filed a grievance relating to the denial of Goldsmith's out of title pay. This grievance alleged that Employer was denying employees compensation when working out of title and requested the relief of employees being compensated appropriately while working out of class according to Article 9 of the MOA.
23. Employer denied the grievance at Step 1 and Union appealed to Step 2.<sup>15</sup> Between the appeal and the Step 2 hearing, Union advised that it would be filing a prohibited practice charge and would be abandoning the grievance. Employer advised that this was not permitted under the MOA. Union did not appear at the Step 2 hearing.
24. On October 4, 2019, Union filed a Prohibited Practice Charge with the Public Employee Relations Board (PERB). The complaint contains three alleged prohibited practices. The first alleged prohibited practice related to the practice of trading time, and the parties stated this matter was resolved and accordingly was dismissed prior to the hearing. This case arises out of the remaining two alleged prohibited practices: the election of health insurance outside open enrollment period for Firefighters, and out of title pay for Firefighters who claim they are acting as Drivers during a call. The Union requested restoration of the status quo.
25. On October 22, 2019, Employer filed a Prohibited Practice Charge with the Public Employee Relations Board (PERB). The complaint alleged the Union refused to negotiate a successor agreement, prior to and after the expiration of the MOA. Employer requested appropriate remedial relief. Subsequently, Employer recognized its counterclaim is moot because the parties' resumed negotiations and has agreed the counterclaim may be dismissed.

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<sup>14</sup> Union Exhibit A, MOA, Article 27.1(a).

<sup>15</sup> Union Exhibit A, MOA, Article 16.3(4) – Grievance Procedure.

## Analysis and Conclusions of Law

If a substitute ALJ is appointed, the substitute ALJ may use the existing record or conduct any further proceedings deemed appropriate.<sup>16</sup> After review of the record of this proceeding, the undersigned ALJ has determined the existing record is sufficient to issue a decision in this matter.

The threshold issue to be decided is whether the health insurance issue and the out of title pay issue are grievable under the MOA. If so, then the prohibited practice complaints filed under the PEERA would be dismissed because the Union initially elected to file a grievance. Pursuant to Article 16 of the MOA, such election would bar a subsequent filing of a prohibited practice complaint.

If the issues are not grievable, then an analysis of the merits would be undertaken. Then, as the party alleging a prohibited practice, the Union bears the burden of proving that a prohibited practice has occurred.<sup>17</sup> Union must prove the charges by a preponderance of evidence.<sup>18</sup>

### Health Insurance

The Union alleged the Employer engaged in a prohibited practice by unilaterally changing working conditions with respect to health insurance.

The provision for a medical plan in the MOA provides, in pertinent part, "During the term of this Memorandum, UG agrees to offer the employees of the Department the same medical, dental or other similar welfare benefit plans which are made available to the UG's employees generally."<sup>19</sup>

The evidence presented for this complaint was unambiguous and unchallenged. The UG notified employees of their opportunity to opt out of health insurance benefits under certain conditions, provided clear instructions on how to opt out, and provided a clear deadline in which to opt out.<sup>20</sup>

Taylor, an employee of the Fire Department, testified that he did not read the notices provided by the UG of the employee's responsibility to opt out of health insurance benefits. He did not opt out of health insurance benefits before the deadline for plan year 2019. The Union initially filed a grievance on Taylor's behalf, claiming that Employer unilaterally changed policy when it denied Taylor the opportunity to make health benefit elections that other employees received. There was no evidence that a similarly situated employee was allowed to opt out of health insurance benefits after the deadline expired. There was only evidence that the Employer allowed all UG employees a limited opportunity to elect to create a Health Savings Account after

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<sup>16</sup> K.S.A. 77-526(e).

<sup>17</sup> *PSEU Local 1132 v. Unified Government of Wyandotte County/Kansas City*, KS, No. 75-CAE-7-2003, 2004 WL 5657454 at \*10 (KS PERB, Dec. 20, 2004).

<sup>18</sup> *Id.*

<sup>19</sup> Union Exhibit A, MOA, Article 12 – Medical Plan.

<sup>20</sup> Employer Exhibits 3, 6, and 8.

the enrollment period closed because there was a new provider. The Employer provided testimony why this benefit was extended and sufficiently distinguished it from the opt out benefit. The testimony was uncontroverted that there was no similar allowance given to any employee for the \$150.00 opt out of health insurance per month payment.

After Step 1 of the grievance process affirmed the denial of Taylor's request to allow him to opt out of health insurance benefits after the deadline expired, the Union notified the Employer they were going to file a complaint under the PEERA. The Union received a negative result in the grievance process election of remedies and sought a second chance to achieve a favorable result through a PERB complaint.

The threshold question is whether the health insurance issue is grievable. An issue is grievable for any complaint or grievance arising under the terms and provisions of the MOA, or of any disputes between the parties as to the interpretation or application of the MOA.<sup>21</sup> Health insurance is covered under the MOA and the Union is challenging the application of the medical plan provision on Taylor. Therefore, this ALJ finds and concludes that the health insurance issue in this case is grievable.

The initial election to use the grievance procedure as a remedy simultaneously waived the alternative remedy of a prohibited practices complaint under the PEERA. Thus, the MOA clearly and unequivocally dictates that the initial disposition in this charge, through the grievance procedure, is binding and precludes jurisdiction under the PEERA.<sup>22</sup>

This charge of prohibited practice is dismissed.

#### Out of Title Pay

The Union alleged the Employer engaged in a prohibited practice by unilaterally changing working conditions with respect to Firefighters who were denied out of title pay when they are acting as a driver of a pumper apparatus during a call.

Article 9 of the MOA governs out of title pay.<sup>23</sup> It states, in pertinent part: "Any employee who is required to accept the responsibilities and carry out the duties of a position or rank above that which he normally holds, shall be paid in full at the rate of that position or rank while or acting for each one-half (1/2) shift day or any part thereof so worked. Provided, that a Firefighter I, II or III or a Firefighter/Medical Intensive Care Technician who operates as a driver of Fire Department apparatus for one (1) or more shifts shall receive as compensation his regular per diem rate plus the difference between the per diem rate of a Firefighter I and a Fire Driver."

Union officials testified that because all Firefighters must hold a Class B drivers' license, which allows them to operate a large vehicle with air brakes, any Firefighter can operate a

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<sup>21</sup> Union Exhibit A, MOA, Article 16.1.

<sup>22</sup> Initial Order, International Association of Fire Fighters v. City of Junction City, Kansas, 75-CAE-4-1994, p. 23.

<sup>23</sup> Union Exhibit A, MOA, Article 9 – Working Out of Classification.

pumper or aerial regardless of being broken in. Therefore, all Firefighters acting as a driver of a pumper apparatus should be paid out of title pay.

Employer argues that "Drivers" who are covered under Article 9 of the MOA are required to accept the responsibilities and perform the duties of the "Driver" position in order to be paid out of title. "Drivers" are not only required to drive the pumper or aerial apparatus, but must also be capable of performing all functions of a Driver, which include pumping and aerial functions, and the ability to perform those functions cannot be confirmed without the breaking in process.

Employer asserts a non-broken in Firefighter can drive or operate an apparatus to an out of service call because the Firefighter does not assume the responsibility of the position of driver under Article 9 of the MOA. Employer further asserts that because the Firefighter does not assume the responsibility of the position of driver, he or she is not entitled to be paid for the out of title position of driver.

The threshold question is whether the out of title issue is grievable. An issue is grievable for any complaint or grievance arising under the terms and provisions of the MOA, or of any disputes between the parties as to the interpretation or application of the MOA.<sup>24</sup> The specific issue the parties sought to determine is whether a Firefighter is a "Driver" under Article 9 of the MOA. The determination requires an interpretation of the term "Driver" as used in the MOA. Therefore, this ALJ finds and concludes the issue of out of title pay and whether a Firefighter is a "Driver" is a grievable event. The initial election to use the grievance procedure as a remedy simultaneously waived the alternative remedy of a prohibited practices complaint under the PEERA. Thus, the MOA clearly and unequivocally dictates that the initial disposition of this charge, through the grievance is binding, and precludes jurisdiction under the PEERA.

This charge of prohibited practice is dismissed.

#### Counterclaim

Employer filed a Prohibited Practice Charge with the Public Employee Relations Board (PERB). The complaint alleged the Union refused to negotiate a successor agreement, prior to and after the expiration of the MOA. Employer requested appropriate remedial relief.

Employer recognized that its counterclaim is moot because the parties resumed negotiations and the parties agree the Employer's counterclaim can be dismissed.

The ALJ dismisses the counterclaim as moot.

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<sup>24</sup> Union Exhibit A, MOA, Article 16.1.

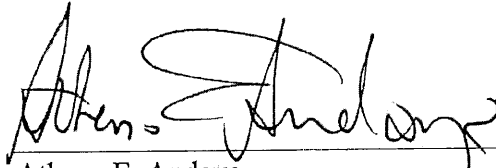


## Conclusion

The health insurance and out of title pay issues presented in the prohibited practice complaints filed in this case are issues that are grievable under the MOA. Because the Union elected to initially file a grievance on these two issues, a prohibited practice complaint on the same issues is barred by the MOA. Therefore, the complaints subsequently filed under the PEERA are dismissed.

The counterclaim is dismissed as moot.

**IT IS SO ORDERED.**



Athena E. Andaya  
Presiding Officer/Administrative Law Judge  
Office of Administrative Hearings

## RIGHT OF REVIEW

Either side may ask for an administrative review of this initial order. To do so, you must file a petition asking that this order be reviewed by the Kansas Public Employee Relations Board. You must file this petition within 15 days from the date this initial order was served. If you fail to timely ask for an administrative review by the Kansas Public Employee Relations Board, you may not be able to obtain judicial review of the case. K.S.A. 77-527.

The petition for review may be mailed or personally delivered to the Kansas Public Employee Relations Board, 401 SW Topeka Blvd., Topeka, KS 66603.

If neither party requests a review by the Kansas Public Employee Relations Board, then pursuant to K.S.A. 77-530, this initial order becomes final and binding on both parties on the 30th day following its service.

**CERTIFICATE OF SERVICE**

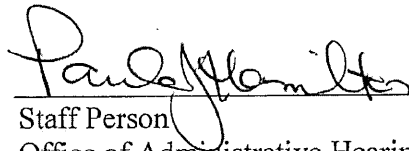
On November 14, 2022, I certify that I caused a copy of the foregoing to be served electronically through OAH's e-filing system to:

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