

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

SERVICE EMPLOYEES)	
INTERNATIONAL UNION, LOCAL 513)	
)	
Petitioner,)	
vs.)	Case Nos.: 75-CAE-1-2006
)	75-CAE-14-2006
CITY OF HAYS, KANSAS,)	
)	
Respondent.)	

INITIAL ORDER OF THE PRESIDING OFFICER

Pursuant to K.S.A. 77-526

NOW on this 31st day of July, 2006, the above-captioned matters come on for decision pursuant to K.S.A. 75-4334(a) and K.S.A. 77-526 before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner Service Employees International Union, Local 513, hereinafter "Petitioner", appears by counsel Lawrence M. Gurney, Law Offices of Wilson, Lee, Gurney, Carmichael & Hess, and by its Business Representative, Mr. Harold P. Schlechtweg. Respondent City of Hays, Kansas, hereinafter "Respondent" or "Employer", appears by its counsel, John T. Bird, of the law firm Glassman, Bird, Braun & Schwartz L.L.P.

PROCEEDINGS

These matters come before the Board on Petitioner's August 22, 2005 and March 28, 2006 Prohibited Practice Complaints. The first of said complaints alleged that

Respondent unilaterally declared that the parties' contract negotiations were at impasse following several months during which the employer engaged in "surface bargaining", "with no intent of reaching an agreement." In addition, Petitioner alleged that:

"On or about July 14, 2005, the City Commission, at its regularly scheduled meeting and as a regularly scheduled agenda item, unilaterally adopted a new pay plan and job classification schedule for bargaining unit employees to be effective December 18, 2005. The pay plan is a radical departure from the current pay plan and is built on a pay for performance plan. Both items were then under negotiation with the union. The new pay plan was enacted without either reaching agreement with SEIU Local 513 or following the impasse, fact finding and hearing procedures required by KSA 75-4332. This action by the employer demonstrates contempt for the process and for employees and their organization and violates the duty to bargain, in violation of KSA 75-4333(b)(1) and (5)."

See Complaint Against Employer, 75-CAE-1-2006, August 22, 2005, attachment (emphasis in original).

In its August 29, 2005 response to the first of Petitioner's complaints, the Employer denied Petitioner's allegations generally, asserted that it was Petitioner who had failed to negotiate in good faith and averred that the Union's real purpose in filing its complaint was to "accomplish indirectly what it cannot accomplish directly, a unilateral contract, imposed upon the City without having to follow the lawful procedure." Respondent's Answer, 75-CAE-1-2006, August 29, 2005, p. 5.

Petitioner's second complaint alleged that Respondent violated sections (b)(1), (5), (6) and (7) of the prohibited practices section of the Kansas Public Employer-Employee Relations Act. See K.S.A. 75-4333. Petitioner alleged that on or about January 1, 2006, the City of Hays, Kansas violated the Act by unilaterally imposing on members of the bargaining unit, new terms and conditions of employment without

bargaining in good faith, that is, by doing so without having participated to completion in the mandatory good faith bargaining, and impasse procedure, i.e., mediation and fact-finding. The new terms and conditions allegedly imposed related to the issues generally of paid time off and pay for performance, the two issues the parties were unable to resolve in negotiations. Petitioner alleges that the bargaining unit employees were advised by a city human resources representative that its actions were permissible because the parties memorandum of agreement had expired as of December 31, 2005 "and no new agreement had replaced it." See Complaint Against Employer, 75-CAE-14-2006, March 28, 2006, attachment. In its request for relief, Petitioner asks that the City be found to have violated the Act, reinstate terms and conditions of employment in effect prior to January 1, 2006, order the City to complete the impasse procedure, order that each unit employee receive a copy of the Board's order and that such be posted prominently on employer bulletin boards, and that the Board "take all necessary and lawful actions to enforce its order." *Id.*

The first of these matters came on for hearing on December 5, 2005 in Hays, Kansas before this presiding officer. In the weeks following the hearing, counsel for the parties met with one another in an attempt to resolve the matter informally. No agreement was reached. Subsequently, the parties agreed to a briefing schedule and submitted their post-hearing legal arguments. See Petitioner's Proposed Findings of Fact and Conclusions of Law, 75-CAE-1-2006, May 8, 2006; Petitioner's Post-Hearing, 75-CAE-1-2006, May 8, 2006; Respondent's Brief to the Public Employee Relations Board, 75-CAE-1-2006, May 8, 2006; Respondent's Proposed Findings of Fact and Conclusions of Law, 75-CAE-1-2006, May 15, 2006; Respondent's Reply to Petitioner's Post-

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Hearing Brief, 75-CAE-1-2006, May 15, 2006; Petitioner's Reply to Respondent's Post Hearing Brief, 75-CAE-1-2006, May 17, 2006.

The second of these matters, inextricably related factually as it is to the earlier-filed matter, was presented by the parties as a legal question following their joint stipulation as to relevant facts. *See Proposed Joint Stipulation As to Facts, 75-CAE-14-2006, June 5, 2006.* Their respective legal arguments have been filed in the matter and it is ripe, along with its predecessor, for determination. *See Brief of Petitioner, 75-CAE-14-2006, July 12, 2006; Respondent's Brief, 75-CAE-14-2006, July 12, 2006; Response Brief of Petitioner, 75-CAE-14-2006, July 25, 2006.* In addition, Respondent filed a Motion to Dismiss as Moot on April 14, 2006 and Petitioner filed its response to said motion to dismiss as moot on May 8, 2006. This writing will address the motion to dismiss as moot following findings of fact set forth immediately below.

FINDINGS OF FACT

1. Respondent is a public employer within the meaning of the Public Employer-Employee Relations Act, hereinafter "PEERA" or the "Act".
2. Petitioner is the certified, formally recognized bargaining representative for a unit of employees employed by Respondent, and has been so recognized since at least 1974.
3. Employer and Petitioner have previously negotiated memoranda of agreement covering terms and conditions of employment for the unit's members, the most recent of which was for the time period January 1, 2003 through December 31, 2005. Said agreement had been modified by mutual agreement of the parties through several Letters of Agreement.

4. By letter dated February 2, 2005, the City was notified of the Union's desire to re-negotiate the then-current Memorandum of Agreement, set to expire on December 31, 2005. The union's negotiating team was led by its business representative Harold Schlechtweg.
5. Negotiations between the parties commenced on March 14, 2005.
6. During said meeting, the parties discussed ground rules, anticipated procedures and an agreement was reached to exchange proposals one day prior to April 14, 2005.
7. At the March 14 meeting, it was also agreed that unless the parties reached agreement on all issues, there would be no agreement and the parties would be at impasse.
8. City of Hays City Manager Randy Gustafson, employed in that capacity since March 1, 2002, was a member of the City's negotiation team, which was led by City Attorney John T. Bird. Mr. Gustafson had not previously participated in negotiations between the parties.
9. The Employer's April 14 proposal offered significant changes including a paid time off system based on similar paid time off policies utilized at other cities at which Mr. Gustafson had previously served as City Manager. The City's proposal did not contain specifics, as it had commissioned a pay plan study which had not yet been completed, nor presented to the City Commission for its review.
10. Details of the City's PTO and Pay for Performance programs were provided to the Union's negotiating team at the parties' May 12, 2005 negotiating session. Although the parties discussed these topics, it is apparent from the testimony at the hearing that the Union did not favor them and the City was insistent upon them. *See generally,*

Transcript, pp. 238-239, 247-248, 257-259.

11. The parties next met and conferred on May 24, 2005 on the issues of PFP and PTO, among others. Although some items appeared to have been tentatively agreed upon, the parties remained unable to reach agreement on the two major issues.
12. The parties met again on May 27, 2005 and the City indicated that if PFP and PTO could not be resolved, it would file a declaration of impasse. The City also requested that the Union take its proposals directly to the union membership for a vote. The City requested, and was granted, permission to write directly to the employees to explain its proposal.
13. Employees met and voted on June 15, 2005 concerning the City's pay plan and PTO proposals. On June 20, 2005, the Union advised the City that its proposals had been voted down by a vote of 17-1. The Union also advised the City that it desired to continue to meet and confer with the hope that if agreements could be reached on other issues, further progress could be made on the PTO and PFP issues.
14. The parties met again on July 13 and July 21, 2005 but were unable to reach agreement on a new contract. The minutes of the last meeting indicate the City's belief that the parties were at impasse.
15. The City of Hays, Kansas mailed a unilateral declaration of impasse on July 29, 2005 which was received by the Public Employer-Employee Relations Board on August 1, 2005.
16. On August 19, 2005, the Union filed a prohibited practice complaint against the City alleging failure to meet and confer in good faith.
17. The parties engaged in mediation on August 30, 2005 and September 19, 2005

without resolving the issues in dispute.

18. The hearing on complaint 75-CAE-1-2006 was conducted by this presiding officer in Hays, Kansas on December 5, 2006.

19. Following the hearing, the parties agreed to meet again and on January 20, 2006 they did so, but were unable to reach an accord on the issues of PTO and PFP.

20. The parties' MOA expired on December 31, 2005.

21. The City of Hays, Kansas unilaterally set terms and conditions of employment for bargaining unit members effective January 1, 2006 as follows:

- A. Unit employees' wages were left at 2005 levels.
- B. The City continued to provide health insurance at 2005 levels at no cost to employees.
- C. Bargaining unit employees no longer accrue sick leave. Previously, bargaining unit employees accrued sick leave according to terms of the MOA that expired December 31, 2005.
- D. Bargaining unit employees no longer accrue vacation. Previously, bargaining unit employees accrued vacation according to terms of the MOA that expired December 31, 2005.
- E. Bargaining unit employees could no longer charge leave to Funeral leave as under the terms of the MOA that expired December 31, 2005.
- F. Unit members could no longer take paid time off charged to floating holidays as was permitted under terms of the MOA that expired December 31, 2005.
- G. Employees who received performance appraisals on their anniversary date do not receive merit pay raises as they would have under terms of the expired MOA.
- H. Requests for vacation time off, funeral leave, personal holidays, and sick leave are charged to vacation and sick leave accrued prior to December 31, 2005, or employees may request time off without pay, but employees do not accrue paid time off.

22. Amounts deducted from sick and vacation leave accrued prior to December 31, 2005, are to be deducted from any payout of accrued leave if there is a transition to Paid Time Off.

23. The City and the Union have not completed the impasse, mediation, fact-finding and public hearing procedures set out in K.S.A. 75-4321 *et seq.*

24. Based upon careful consideration of all the evidence submitted in this matter, it is the finding of the presiding officer that Respondent considered its PTO and PFP proposals to be conditions precedent to any new MOA. *See generally*, Transcript, Testimony of Randy Gustafson.

25. Absent agreement to its proposals, the City's predetermined position in negotiations was that it would proceed to impasse, fact-finding and unilateral imposition of a new contract with the unit's employees. Transcript, pp. 247-248.

MOTION TO DISMISS AS MOOT

In its April 14, 2006 Motion to Dismiss as Moot, Employer City of Hays, Kansas avers essentially that the complaint styled as 75-CAE-1-2006 is moot because following its hearing, the parties again met and exchanged proposals and thus even if Respondent failed to meet and confer in good faith, "there is no meaningful sanction or remedy that could or would be imposed that has not already occurred". Respondent's Motion to Dismiss as Moot, 75-CAE-1-2006, April 14, 2006.

Petitioner responds by noting that the issues surrounding the City's alleged failure to bargain in good faith are still germane to fact-finding, which has yet to occur in this matter. This is so, Petitioner urges, because our state's Supreme Court has instructed that

an appeal will be dismissed as moot "only when it clearly and convincingly appears that an actual controversy has ceased and the only judgment that could be entered would be ineffectual for any purpose." Petitioner's Response to Respondent's Motion to Dismiss as Moot, 75-CAE-1-2006, May 8, 2006 (citing from *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 815 P.2d 89 (1991)).

Petitioner's argument is correct. In view that the parties have yet to participate in the full statutory impasse process, a determination whether Respondent engaged in good faith negotiations is not moot and may have some bearing on that process. Respondent's Motion is denied.

ISSUES OF LAW IN DISPUTE

The primary issues for determination in these matters are whether Respondent violated its statutory obligation to meet and confer with Petitioner in good faith during their 2005 negotiations and whether the City's unilateral imposition of new terms and conditions of employment on January 1, 2006 are likewise a violation of its statutory duty to meet and confer in good faith. Subsidiary issues include whether the City's actions violated other provisions of the Act, specifically K.S.A. 75-4333(b)(1), (2), (6) and (7).

CONCLUSIONS OF LAW/DISCUSSION

As a preliminary matter, the presiding officer will address Respondent's claim that the Board lacks jurisdiction to hear and rule on this complaint. In its brief, the City asserts that because mediation and fact-finding had not been completed when the initial complaint was filed, the Board lacks jurisdiction to hear that matter and the only

appropriate response is to dismiss it for lack of jurisdiction. Brief to the Public Employee Relations Board, 75-CAE-1-2006, May 8, 2006, p. 2. In support of its position, the City cites to a decision of the Kansas Supreme Court, wherein it states:

“[a]lthough the governing body of the public employer ultimately can dictate any mandatory subject of bargaining, it can do so only after the public employer has negotiated in good faith, reached impasse in good faith, and participated in impasse-resolution procedures such as fact-finding and mediation.”

Dep't of Administration v. Pub. Employees Relations Bd. Of the Kansas Dep't of Human Resources, 257 Kan. 275, 894 P.2d 777 (1995)(citing K.S.A. 75-4332.) The City can take no refuge in the case it cites. To the contrary, the cited holding merely recognizes that a governing body subject to PEERA can unilaterally impose conditions of employment on its employees only after exhausting statutory procedures of bargaining to impasse in good faith and the subsequent impasse procedures, mediation and fact-finding. Where either party believes the other has not bargained in good faith, the remedy provided by the Act is the prohibited practice complaint procedure for failure to meet and confer in good faith. K.S.A. 75-4333. Where such complaint is filed, as in the instant matter, a determination thereon must necessarily precede resort to impasse proceedings. The City's assertion that the Board lacks jurisdiction to hear the matter is without merit.

With regard to its initial complaint, Petitioner alleges that Respondent has committed the prohibited practice of refusing to meet and confer in good faith, in violation of the Kansas Public Employer-Employee Relations Act, at K.S.A. 75-4333(b)(5). Although Kansas Courts have not addressed the standard of proof necessary to establish a

prohibited practice,¹ the Kansas Public Employee Relations Board has adopted the federal standard under the National Labor Relations Act. Under this standard, the burden of proving a prohibited practice lies with the party alleging the violation. *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)(“*Adjutant General*”). The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under PEERA, and it is incumbent upon the party alleging the violation to prove the charges by a preponderance of the evidence. See *Boeing Airplane Co. v. National Labor Relations Board*, 140 F.2d 423, 433 (CA 10, 1944). Findings of unfair labor practices must be supported by substantial evidence. *Coppus Engineering Corp. v. National Labor Relations Board*, 240 F.2d 564, 570 (1st Cir. 1957)

Kansas law provides that public employees have the right to form, join and participate in activities of employee organizations for meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The legislative parameters of the duty to meet and confer under the PEERA are found at K.S.A. 75-4327(b):

¹ The Public Employer-Employee Relations Act does not set forth the standard of proof necessary to establish a prohibited practice. The Kansas Supreme Court has indicated that an examination of the federal Labor-Management Relations Act, 29 U.S.C. §141-197, can provide guidance in interpreting PEERA. *U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources*, 247 Kan. 519, 531-32 (1990). 29 U.S.C. §160(c) provides in pertinent part:

“If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.”

“Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer **shall meet and confer in good faith** with such employee organization in the determination of **conditions of employment** of the public employees as provided in this act, and **may** enter into a memorandum of agreement with such recognized employee organization.” (emphasis added)

“This provision is buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer to willfully ‘refuse to meet and confer in good faith with representatives of recognized organizations as required in K.S.A. 75-4327.’” Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 268 (1980).

K.S.A. 75-4322(m) defines “Meet and confer in good faith” and affirms that the meet and confer process centers around bargaining over conditions of employment:

“[T]he process whereby the representatives of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on **conditions of employment.**” (emphasis added)

The Kansas Supreme Court has interpreted these statutes to mean:

“The Act [PEERA] imposes upon both employer and employee representative the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations.” *Kansas Bd. of Regents v. Pittsburgh State Univ. Chap. of K-NEA*, 233 Kan. 801, 805 (1983). Only after the parties have met in good faith, conferred over the mandatory subjects noticed up for bargaining, and have either reached agreement or bargained in good faith, reached an impasse in good faith, and participated in impasse-resolution procedures such as mediation and fact-finding, *see* K.S.A. 75-4332, can it be said that

they have satisfied their statutory obligation under PEERA. *State Department of Administration v. Public Employees Relations Board*, 257 Kan. 275, 287 (1995); *I.A.F.F. v. City of Junction City*, Case No. 75-CAE-4-1994 (July 29, 1994); *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991, p. 29 (Feb. 10, 1992).

The objective the Kansas legislature hoped to achieve by the meet and confer process can be equated to that sought by the Congress in adopting the National Labor Relations Act as described by the U.S. Supreme Court in *H.K. Porter Co.*, 397 U.S. 99, 103 (1970),² and cited with approval in *City of Junction City, Kansas v. Junction City*

² Where there is no Kansas case law interpreting or applying a specific section of the Kansas Professional Negotiations Act, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA, *Oakley Education Association v. USD 274*, 72-CAE-6-1992, p. 17 (December 16, 1992); See also *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991 wherein the same conclusion has been reached under the Kansas Public Employer-Employee Relations Act.

Because the language of K.S.A. 75-4333 is almost identical to the corresponding section contained in the NLRA, we presume our legislature intended what Congress intended by the language employed. See *Stromberg Hatchery v. Iowa Employment Security Comm.*, 33 N.W.2d 498, 500 (Iowa 1948). "[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." *Hubbard v. State*, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. *Peasley v. Telecheck of Kansas, Inc.*, 6 Kan.App.2d 990, 994 (1981)[Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive]; See also *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974).

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task. In particular, as it relates to the case under consideration here, the legislature created a definition, very much like the one in the NLRA, of those characteristics which, if possessed by an

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Police Officers Association, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)(“Junction City”):

“The objective of this Act [NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”

The concept of refusal to bargain means more than simply refusing to discuss a subject. An employer is also deemed to have violated PEERA when it fails to bargain in good faith, or makes unilateral changes in terms and conditions of employment. It is a well established principle of labor law that a unilateral change, by a public employer, in terms and conditions of employment, is a prima facie violation of its public employees' collective negotiation rights. *I.A.F.F. v. City of Junction City, Kansas*, Case No. 75-CAE-4-1994 (July 29, 1994); See also *Service Employees Union v. City of Hutchinson, Kansas*, Case No. 75-CAE-21-1993 (January 28, 1994); *City of Junction City v. Junction City Police Officers Association*, 75-CAEO-2-1992 (July 31, 1992).

K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from refusing to meet and

employee, would disqualify that employee from participation in a bargaining unit.

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, 116, p. 370; 50 Am.Jur., Statutes, 323; 82 C.J.S., Statutes, 371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy. *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, 52.02, p. 329-31 (4th ed. 1973); *Benton v. Union Pacific R. Co.*, 430 F.Supp. 1380 (19) [A Kansas statute adopted from another state carries with it the construction placed on it by that state.]; *State v. Loudermilk*, 208 Kan. 893 (1972).

confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations, that is, over "conditions of employment". The term "conditions of employment" is defined at K.S.A. 75-4322(t) to mean:

"[S]alaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, wearing apparel, premium pay of overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."

Clearly the topics in dispute in this matter, paid time off and the City's proposed pay for performance plan constitute mandatorily-negotiable conditions of employment, as defined by Kansas law set out above and neither party contests this.

Where the parties do differ, however, is over the question whether the City failed to fulfill its statutory obligation to meet and confer in good faith. The Kansas Supreme court addressed the nature of the duty to meet and confer in good faith under PEERA in *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 804 (1983), stating:

"'Meet and confer' acts basically give the public employee organizations the right to make unilateral recommendations to the employer, but give the employer a free hand in making the ultimate decision recommending such proposals. The Kansas Public Employer-Employee Relations Act, on the other hand, imposes mandatory obligations upon the public employer and representatives of public employee organizations not only to meet and confer, but to enter into discussions in good faith with an affirmative willingness to resolve grievances and disputes and to promote the improvements of employer-employee relations.

* * *

We conclude that the Act is not a strict 'meet and confer' act nor is it a 'collective negotiations' act, but as Professor Goetz has stated, it is a hybrid containing some characteristics of each. However it is designated, the important thing is that the Act imposes upon both employer and employee representatives the affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations."

Id. at 804-05.

According to Professor Raymond Goetz in his law review article, *The Kansas Public Employer-Employee Relations Law*, 28 KAN.L.REV. 243, *Emporia State* establishes that under PEERA the public employer and the recognized employee organization meet and confer "as equals for something more than an exchange of views followed by unilateral action, even though the topic of discussion at the moment may be governed by a statute or statewide regulation." Goetz at 283. This interpretation of PEERA was affirmed in the *Adjutant General* case:

"'Meet and confer' as contemplated by the Act is something more than the mere meeting of public employer with the recognized employee representative. The essential element is rather the intent to adjust differences and to reach an acceptable common ground. 'Meet and Confer' is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach agreement and thereby enter into a memorandum of agreement."

Kansas Association of Public Employees v. State of Kansas Adjutant General's Office, 75-CAE-9-1990, August 19, 1990, pp. 17-18.

PEERA does not compel either party to agree to a proposal or make a concession. If honest and sincere bargaining efforts fail to produce an understanding on terms, nothing in PEERA makes illegal the public employer's refusal to accept the particular terms submitted to it, and the public employer's refusal to grant a particular demand or make a counter-

proposal on an issue does not necessarily constitute bad-faith bargaining. The operative words here are "honest and sincere bargaining efforts".

When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the meet and confer process must be considered. *Duval County School Bd. v. Florida Public Employee relations Commission*, 353 So.2d 1244 (Fla. 1978). All the relevant facts of a case are studied in determining whether the public employer or recognized employee organization is bargaining in good or bad faith. *Adjutant General*, supra at 11. The "totality of conduct" is the standard through which the "quality" of negotiations is tested. *N.L.R.B. v. Virginia Elec. & Power Co.*, 314 U.S. 169 (1941). One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in the negotiations, their frequency, progress toward agreement, and the persistence with which the employer offers opportunity for agreement. *N.L.R.B. v. Sands Mfg. Co.*, 91 F.2d 721, 725 (1938). Although PEERA does not require the making of concessions during negotiations, the factual basis for a party's refusal to make a counter-proposal is a factor in determining whether or not that party is negotiating in good faith, see *Edgeley Ed. Ass'n v. Edgely Public School Dist. No. 3*, 256 N.W.2d 348 (N.D. 1977).

Archibald Cox in an article for the Harvard Law Review, *Good Faith Bargaining*, 71 HARV.L.REV. 1401, 1418-19 (1958), provides a summary of the "totality of conduct" test:

"In every case, the basic question is whether the employer acted like a man with a mind closed against agreement with the union. The Board can only judge his subjective state of mind only by asking whether a normal employer, willing to agree with a labor union, would have followed the same course of action."

State of mind is a question of fact, and the Public Employee Relations Board may infer motivation from either direct or circumstantial evidence. In *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1953), the court stated:

“An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries.”

Id., at 48-49. A fact-finding body must have some power to decide which inferences to draw and which to reject. *Radio Officers'*, *supra* at 50.

Justice Frankfurter, in his concurring opinion in *N.L.R.B. v. Truitt Manf. Co.*, 351 U.S. 149 (1956), summarized the “good faith” requirement and the inferences to be drawn from the parties’ conduct:

“These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach agreement in good faith. ‘Good faith’ means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another’s state of mind. The previous relationship of the parties, antecedent events explaining behavior at the table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes the finding of absence of good faith for the judgment of the Labor Board . . .”

Id., at 154-55.

Based upon careful review of all the evidence offered in this matter, and based upon an assessment of the credibility of each of the witnesses through personal observation of their testimony, it is the conclusion of the presiding officer that Respondent did willfully refuse to meet and confer in good faith as required by state law. From the sworn testimony of Respondent's City Manager, the presiding officer infers and concludes that Respondent did not enter into negotiations with the requisite affirmative willingness to resolve disputes contemplated by our state's Supreme Court in its *Pittsburg State University* decision. Particular attention should be paid to the testimony at pages 238-239, 247-248 and 257-259. Of particular note is the City Manager's candid observation that absent the two issues of PFP and PTO raised by the City, no agreement was going to be reached, "even if it required the city to go through impasse, mediation" and "fact-finding". Transcript, p. 248.

K.S.A. 75-4333(b)(1) provides that it is a "prohibited practice for a public employer or its designated representative willfully to interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324. K.S.A. 75-4324 provides 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." In a "comprehensive article examining the nature and operation of PEERA", *State v. Public Employees Relations Bd.*, 894 P.2d 777, 782, 257 Kan. 275 (1995), its author, Raymond Goetz, observed that "[a]ny conduct which would violate [K.S.A. 75-4333(b)] (2) through (8) would also violate [K.S.A. 75-4333(b)] (1)." Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28

KAN. L. REV. 243, 264 (1980). The presiding officer concludes that Respondent's violation of K.S.A. 75-4333(b)(5), detailed above, was also a violation of K.S.A. 75-4333(b)(1).

With regard to the latter filed complaint, Respondent's unilateral change to mandatorily negotiable conditions of employment without first exhausting the statutory requirements to have met and conferred to impasse in good faith and to have in good faith completed the impasse, i.e., mediation and fact-finding, procedures constitutes a *per se* violation of the duty to meet and confer in good faith as well as a violation, for the reasons previously set out, of K.S.A. 75-4333(b)(1).

In its written legal arguments, Petitioner fails to address alleged violation of K.S.A. 75-4333(b)(2), (6) and (7) and same are thus deemed waived.

CONCLUSION

While the Employer maintains that it participated in the meet and confer process in a good faith effort to reach agreement, its conduct in the proceedings persuade the presiding officer that it was engaged in "surface bargaining." The Employer's conduct leads to a reasonable inference that the essential element of intent to adjust differences and reach an acceptable common ground required by K.S.A. 75-4327(b), K.S.A. 75-4322(m) and K.S.A. 75-4328 is missing. Respondent's further action of unilaterally adopting and implementing its proposals constitute a violation of the Act and confirm the preceding conclusion. Accordingly, the employer is found to have committed prohibited practices as defined in K.S.A. 75-4333(b)(5) and (1).

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 meet and confer in good faith with the bargaining unit representative over conditions of employment;
- 3) Post a notice specifically advising all employees in the bargaining unit that the employer shall not unilaterally change terms and conditions of employment applicable to members of the unit without first meeting and conferring in good faith over said conditions;
- 4) Post a notice specifically advising all employees in the bargaining unit that the employer will no longer interfere with, restrain or coerce public employees in the exercise of rights granted by the Act, and;
- 5) Make unit members whole for losses sustained as a result of the Respondent's unlawful conduct.

IT IS SO ORDERED.

DATED, this 31st day of July, 2006.



Douglas A. Hager, Presiding Officer
Office of Labor Relations
427 SW Topeka Blvd.
Topeka, KS 66603-3182

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in these cases. 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 August 21st, 2006, addressed to: Public Employee Relations Board & Labor Relations, 427 SW Topeka Blvd., Topeka, Kansas 66603-3182

CERTIFICATE OF MAILING

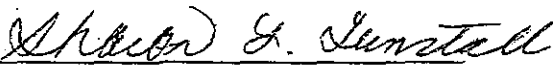
I, Sharon L. Tunstall, Office Manager, Office of Labor Relations, Kansas Department of Human Resources, hereby certify that on the 21st day of August, 2006, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of 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:

John T. Bird, City Attorney
Glassman, Bird, Braun & Schwartz, LLP
200 W. 13th Street
Hays, KS 67601

Lawrence M. Gurney, Attorney at Law
Wilson, Lee, Gurney, Carmichael & Hess
1861 N. Rock Rd., Ste. 320
Wichita, KS 67206

Harold P. Schlechtweg, Business Representative
Service Employees International Union, Local 513
1330 E. 1st Street North, Suite 105
Wichita, KS 67214

And to the members of the PERB on Sept. 8th, 2006.


Sharon L. Tunstall, Office Manager