BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC EMPLOYEES, Petitioner, vs. STATE OF KANSAS, DEPARTMENT OF ADMINISTRATION, Respondent.	)	Case No. 75-CAE-12/13-1991

INITIAL ORDER

ON the 1st day of December, 1991, the above-captioned matter came on for review and determination pursuant to K.S.A. 75-4334(a) and K.S.A. 77-523 upon stipulated facts prepared by the parties. The parties submitted briefs and reply briefs, and were provided an opportunity for oral argument and to address questions of the presiding officer on November 21, 1991.

APPEARANCES

PETITIONER: Appeared by Brad Avery, Counsel, Kansas Association of Public Employees, 1300 Topeka Blvd., Topeka, Kansas 66612.

RESPONDENT: Appeared by Arthur H. Griggs, Staff Attorney, Department of Administration, Room 107, Landon State Office Bldg., 900 Jackson, Topeka, Kansas 66612.

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE "SAVINGS CLAUSE" IS A MANDATORY TOPIC OF MEET AND CONFER PURSUANT TO K.S.A. 75-4321 ET. SEQ.?

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2. WHETHER THE "SAVINGS CLAUSE" RECOGNIZES STATUTORY MANAGEMENT RIGHTS EMBODIED IN THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT THAT CANNOT BE RELINQUISHED.

3. WHETHER THE SECRETARY OF ADMINISTRATION COMMITTED A PROHIBITED PRACTICE BY REJECTING THE MEMORANDUM OF UNDERSTANDING AT PITTSBURG STATE UNIVERSITY OR KANSAS STATE UNIVERSITY.

4. WHETHER THE KANSAS ASSOCIATION OF PUBIC EMPLOYEES FAILED TO BARGAIN IN GOOD FAITH IN VIOLATION OF K.S.A. 75-4333(c)(3) WHEN IT REFUSED TO MEET AND CONFER ON THE "SAVINGS CLAUSE."

SYLLABUS

1. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT -** Nature of Act - Form. The Public Employer-Employee Relations Act is not a strict "meet and confer" act nor is it a "collective negotiations" act but is a "hybrid" patterned after the ACRI model "meet and confer in good faith" act.

2. **DUTY TO BARGAIN** - Good Faith - Duty. PEERA imposes upon both the public employer and the public employee organization 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.

3. **INTERPRETATION OF STATUTE -** Reliance upon decisions from other jurisdictions - When appropriate. Where there is no Kansas case law interpreting or applying a specific section of PEERA, the decisions of the National Labor Relations Board (NLRB) and the Federal courts interpreting similar provisions under the National Labor Relations Act (NLRA) (29 U.S.C. §151 et seq. (1982)), as well as the decisions of state appellate courts 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 PEERA. The Pubic Employee Relations Board is not, however, bound to interpret PEERA as the NLRB or the Federal courts have interpreted the NLRA or other states have interpreted their pubic employee relations laws.

4. **DUTY TO BARGAIN** - Subjects of Negotiations - Past practices. An established practice of bargaining is not determinative of whether an item is a mandatory subject for negotiations. A past practice cannot change the law" and transform a "permissive" subject into a "mandatory" subject of meet and confer negotiations.

5. **DUTY TO BARGAIN** - Other Viable Alternatives To Meet And Confer - Legislative and regulatory process. Where there is a specific statutory protection or right created to protect public employees, the public employer cannot satisfy its duty to meet and confer under PEERA by merely advising public employees to seek redress in the legislative or regulatory process.

6. **DUTY TO BARGAIN** - Overlap of Employee and Management Rights - Balancing test employed. The management rights set forth in K.S.A. 75-4326 must be read in conjunction with the obligation to meet and confer on conditions of employment placed on the parties by K.S.A. 75-4327(b). If a given subject is arguably both a term and condition of employment and a prerogative which should be reserved to management the method utilized to reconcile the conflict is the balancing test. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.

7. **PROHIBITED PRACTICES** - Parties Who May Commit a Prohibited Practice - Definition of employer. K.S.A. 75-4333(b) must be read to apply only to the public employer of the affected employees, or one specifically appointed by the public employer to act on its behalf.

FINDINGS OF FACT[1]

1. Petitioner, the Kansas Association of Public Employees ("KAPE"), is an "*employee organization*" as defined by K.S.A 75-4322(i) and is the exclusive bargaining

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[1] "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburg Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

representative, as defined by K.S.A. 75-4322(j), for service and maintenance employees employed by Pittsburg State University and Kansas State University for the purpose of negotiating collectively, with respect to conditions of employment as defined by the K.S.A. 75-4322(t), of the Public Employer-Employee Relations Act of the State of Kansas.

2. Pittsburg State University and Kansas State University are each a "*public agency or employer*", as defined by K.S.A. 75-4322(f), and come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c) and 75-4322(f).

3. Pittsburg State University and Kansas State University are state educational institutions controlled by, operated and managed under the supervision of the Board of Regents who appoint the chief executive officers pursuant to K.S.A. 74-3201 *et seq.*

4. In accordance with K.S.A. 75-4322(h), Gary Leitnaker, Director of Labor Relations, Department of Administration, was designated by the Secretary of Administration to be the head of each team of persons designated the "representative of the public agency" for meet and confer negotiations at Pittsburg State University and Kansas State University respectively.

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5. The Respondent's designee, Gary Leitnaker, was a member of the employer's meet and confer team at Kansas State University for negotiations with the service and maintenance unit.

6. The meet and confer process for the service and maintenance unit at Kansas State University commenced on December 9, 1988.

7. The parties met on several dates between December 9, 1988, and October 19, 1989, in the meet and confer process.

8. The parties met on October 19, 1989, to discuss Articles at impasse as declared by both parties in separate letters dated July 19, 1989. (App. A, p. 1).

9. In the letter from Petitioner dated July 19, 1989, (App. A., p. 1), Article 49, "Savings Clause," was listed among the items for which Petitioner was requesting mediation. The language of the "savings clause," in pertinent part, as requested by Respondent provided:

> "Any provision of this Agreement which quotes any valid law, or Department of Administration regulation, all or in part, either directly or indirectly, shall be adhered to in its present form or as it may be subsequently amended or changed."

10. At the October 19, 1989 meeting and through correspondence dated October 20, 1989 and November 2, 1989, the Petitioner notified Kansas State University management that it believed the "savings clause" to be a non-mandatory (permissive) subject of bargaining which Petitioner would refuse to include as an item at impasse. (App. B, p. 2; App. C, p. 4).

11. Rosaline Fisher, Director of Personnel Services and chief spokesperson of the university negotiating team for Kansas State University, acknowledged Petitioner's position relative to the "savings clause" through a letter dated November 2, 1989, but sought to request mediation assistance on all remaining issues from the Federal Mediation and Conciliation Service through a letter to the Respondent dated November 16, 1989. (App. C., p. 4; App. D, p. 6).

12. The Petitioner advised the Respondent through a letter dated November 30, 1989, it believed that Article 46 of the current contract (captioned Handling Impasse) had failed to resolve the impasse between the Petitioner and the Respondent and intended to seek the assistance of the Public Employee Relations Board in accordance with K.S.A. 75-4332(b). (App. E, p. 7).

13. Petitioner requested impasse assistance from the Public Employee Relations Board through a letter dated December 4, 1989. (App. F, p. 11).

14. Rosaline Fisher, through a letter dated December 4, 1989, advised the Petitioner that it would not seek to include the "savings clause" in the mediation process. (App. G, p. 12).

15. The Petitioner advised Rosalind Fisher through a letter dated December 11, 1989, that it would now agree to

participate in mediation under Article 46 of the current agreement with the understanding that permissive subjects would not be included in the process. (App. H, p. 14).

16. The Petitioner and the Kansas State University management attended mediation sessions of January 12 and January 31, 1990 with a Federal Mediator from the Federal Mediation and Conciliation Services which resulted in tentative agreements relative to conditions of employment and did not include a "savings clause." (App. I, p. 15).

17. Respondent stated there was no "agreement" ready for ratification, yet Petitioner ratified the agreements referenced above and so notified Kansas State University on May 22, 1990. (App. J., p. 16).

18. Respondent wrote letters dated March 1 and May 22, 1990, which expressed concern that the tentative agreements did not include Articles numbered 3, 43, 49, and 50. (App. I, p. 15; App. K, p. 23).

19. Petitioner, in its May 22, 1990 letter included language on the savings clause that he would agree to include in the "contract" even though no agreement was reached in "bargaining" or during impasse. (App. J, p. 16).

20. The Kansas State University management, through its July 10, 1990 letter, offered modifications to the language offered by Petitioner in its May 22, 1990 letter. (App. L, p. 24).

21. Petitioner, through its July 16, 1990 letter, reasserted its position that meet and confer had concluded, rejected substitute language, and requested the Respondent to ratify the tentative agreements reached in mediation. Petitioner further stated it would add some substitute proposals <u>after</u> management ratification. (App. M, p. 32).

22. The Petitioner, through its letter dated September 24, 1990, notified Kansas State University that the agreement including KAPE's proposed "savings clause" had been ratified and requested Kansas State University commenced its ratification procedures. (App. O, p. 36).

23. Kansas State University and the Board of Regents ratified that the agreement referenced above. (App. P, p. 37).

24. Secretary of Administration, Shelby Smith, through his letter dated November 29, 1990, advised Petitioner he was rejecting the agreement referenced in Findings of Fact #21 and #22 above because it lacked an "adequate savings clause." (App. P, p. 37).

25. Respondent, through a letter dated December 14, 1990, tried to schedule additional meet and confer sessions to arrive at an adequate savings clause. (App. Q, p. 39).

26. Petitioner's response to Respondent's letter was the filing of the prohibited practice complaint, 75-CAE-12-1991.

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27. Petitioner and the representative of the public agency team began meet and confer proceedings on September 13, 1989, and had their last meeting on October 4, 1990.

28. Gary Leitnaker, Director of Labor Relations, Department of Administration, the designee of the Secretary of the Kansas Department of Administration served on the Respondent's meet and confer team at the table.

29. The issue of the "savings clause" had been removed from the table by the Petitioner during the meet and confer session on September 5, 1990. The language of the "savings clause," in pertinent part, as requested by Respondent provided:

> "Any provision of this Agreement which quotes any valid law, or Department of Administration regulation, all or in part, either directly or indirectly, shall be adhered to in its present form or as it may be subsequently amended or changed."

30. During Petitioner's and Respondent's last meeting on October 4, 1990, the parties were able to resolve their differences on, or remove from the table, all outstanding issues. No memorandum of agreement was executed pending resolution of the "savings clause" issue.

31. The Petitioner was advised by letter from Respondent by letter dated November 30, 1990, that Respondent understood Petitioner's position to be that Petitioner refused to enter into a Memorandum of Agreement unless the Department of Administration agreed to Petitioner's

proposed savings clause language or unless the Department elected to delete the savings clause. (App. R, p. 40; App. S, p. 41).

32. The Petitioner was advised by Respondent that the agreements referenced in Finding of Fact # 29 above were contingent upon the ability of Petitioner and the designee of the Secretary of the Kansas Department of Administration to arrive at language on a "savings clause" acceptable to the Secretary of the Kansas Department of Administration.

33. The Petitioner and the designee of the Secretary of the Kansas Department of Administration tried unsuccessfully to arrive at mutually acceptable language on a "savings clause."

34. Neither Pittsburg State University management nor Petitioner ratified the agreement reached in Finding of Fact #30 above.

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE I

WHETHER THE "SAVINGS CLAUSE" IS A MANDATORY TOPIC OF MEET AND CONFER PURSUANT TO K.S.A. 75-4321 ET. SEQ?

Preliminary Issues

The Public Employer-Employee Relations Act ("PEERA") was enacted by the 1971 Legislature and became effective on March 1, 1972. Almost twenty years have past, and there remains a dispute between public employers and public employee organizations as to the true character of PEERA and the appropriate terms to be used in discussing the process. Employee organizations characteristically refer to PEERA as a "*collective bargaining*" act, and typically refer to the process as "*negotiations*" and "*bargaining.*" Public employers maintain PEERA is but a "*meet and confer*" act, and the

process simply requires the public employer to "*meet and confer*" with the public employee organization. This case appears to provide an opportunity to finally establish the true character of PEERA, either as a pure "*meet and confer*" act, a "*collective bargaining*" act, or something in between.

The Public Employer-Employees Relations Act adopted in 1971 was patterned after the Advisory Commission on Intergovernmental Relations ("ACIR") model "*meet and confer in good faith*" act recommended in its 1970 report[2], ("Report"), but included several legislative changes.[3] The distinction between "*meet and confer*" acts and "collective negotiations" acts is discussed in the Report by the Commission in reaching its conclusion that "*another approach is more appropriate, given contemporary and evolving conditions in State and local employment.*" Report at p. 101:

> *"Existing legislation which deals comprehensively with public employer-employee relations takes one of two basis forms: collective negotiations or meet and confer. . . . Both types of statute may deal extensively, or sketchily, with the rights of employees, the strike question, and coverage by level of government or occupation. But meet and confer laws generally are less comprehensive than those governing collective negotiations. In particular, they usually treat more superficially the questions of representation, administration machinery, dispute settlement, and unfair practices. Moreover, they usually accord a different*

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[2] Report on Labor-Management Polices for State and Local Government by the Advisory Commission on Intergovernmental Relations, 1969. (Superintendent of Documents, U.S. Government Printing Office, Washington D.C. 20402). The ACIR Model Act was reprinted in Gov't Empl. Rel. Rep., (BNA) 51:211.

[3] For a full discussion of the differences between the ACIR Model Act and PEERA see Goetz, The Kansas Public Employer-Employee Relations Law, 28 Kansas L.Rev. 243 (1980).

status - a superior one - to the public employer vis-a-vis employee organizations.

"While both systems involve continuing communication between the employer and employee representative, under collective negotiations both parties meet more as equals. The employee organization's position is protected by statutory provisions relating to organization rights, unfair practices, third party intervention in disputes, and binding agreements. The labor and management negotiators hopefully will arrive at a mutually binding agreement which is a byproduct of bilateral decisions. If they reach an impasse, the law generally sets forth a range of procedures to be followed, including such third-party assistance as mediation, fact-finding, and arbitration. The strike ban and the practical difficulties in making agreements binding, however, sometimes produces a system that is much less than bilateral.

"Under a meet and confer system, the outcome of public employer-employee discussions depends more on managements determinations than on bilateral decisions by 'equals.' . . . Most meet and confer laws also give the employer the final 'say' in the adoption and application of rules for employee organization recognition and of methods for settling disputes and handling grievances. Legislative criteria relating to these matters are usually lacking."

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"Those supporting the meet and confer approach to public employer-employee relations stress the differences between public and private employment, and consequently seek to maximize managerial discretion. Those favoring collective negotiations recognize these differences, but find them no major or insuperable barrier to meaningful bilateral relations among 'equals.'

". . . [The collective negotiation] procedure generally imposes a mutual obligation on the public manager and the exclusive bargaining representative to meet at reasonable times and to negotiate in good faith, and that the results of negotiations over grievance procedures and other personnel matters - including wages, hours, and working conditions - must be reduced to a binding written agreement."

* * * * *

"To a greater degree than collective negotiations, the meet and confer approach is protective of public management's discretion. To a greater extent, it seeks a reconciliation with the merit system since agreements reached through the merit system since agreements reached

> *through the discussional process and actions taken as an implementary follow-up can not contravene any existing civil service statute. To a far greater degree than collective negotiations, it is candid and squarely confronts the reality that a governmental representative cannot commit his jurisdiction to a binding agreement or contract, and that only through ratifying and implementing legislation and executive orders can such an agreement be effected."* Report, at p. 100-02.

After discussing the pros and cons of each form of public employer-employee relations, the Commission posed the question: *"What kind of system can be established which will bring about real progress in ensuring employee and employer rights; in promoting the position, pay, and prestige of public employees; and in preventing work disruptions?"* It concludes that neither the "*meet and confer*" nor "*collective negotiations*" form is appropriate:

> *"At this point in time, the crying need in a majority of situations is for a general statue that balances management rights against employee needs, recognizes the crucial and undeniable differences between public and private employment, and establishes labor-management relationships in which the public-at-large and their elected representatives have confidence.*
>
> *"The Commission believes that legislation embodying the essentials of a meet and confer in good faith system constitutes this kind of statute. 'Meet and confer in good faith,' as we view it, means the obligation of both the public employer and an employee organization to meet at reasonable times, to exchange openly and without fear information, views, and proposals, and to strive to reach agreement on matters relating to wages, hours, and such other terms and conditions of employment as fall within the statutorily defined scope of the discussion. The resulting memorandum of understanding is submitted to a jurisdictions governing body, and it becomes effective when the necessary implementary actions have been agreed to and acted on by pertinent executive and legislative officials."*
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> *"'In good faith' has a number of important connotations as it applies to the meet and confer*

process. It obligates the governmental employer and a recognized employee organization to approach the discussion table with an open mind. It underscores the fact that such meetings should be held at mutually agreeable and convenient times. It recognizes that a sincere effort should be made by both parties to reach agreement on all matters falling properly within the discussion's purview. It signifies that both sides will be represented by duly authorized spokesmen prepared to confer on all such matters. It means that reasonable time off will be granted to appropriate agents of a recognized employee organization. It calls for a free exchange to the other party, on request, of non-confidential data pertinent to any issues under discussion. It implies a joint effort in drafting a non-binding memorandum of understanding setting forth all agreed upon recommendations for submission to the jurisdiction's appropriate governing officials. It charges the governmental agent to strive to achieve acceptance and implementation on these recommendations by such officials. It affirms that failure to reach agreement or to make concessions does not constitute bad faith when real differences of opinion exist. It requires both parties to be receptive to mediation if bona fide differences of opinion produce an impasse. Finally, it means that the State public labor-management relations law should list as an unfair practice failure to meet and confer in good faith, thereby providing a basis for legal recourse.

"These special obligations convert the system into something broader and more balanced than the usual 'meet and confer' setup, but still something less than the glittering and often unfulfilled promises of a collective bargaining statute."

* * * * *

"The meet and confer in good faith system of public labor-management relations clearly seeks in various ways to recognize the distinctive, dependent, and exposed position of the governmental employer and the concomitant need to provide some safeguards. At the same time, this approach recognizes certain basic employee rights, establishes orderly methods of communication between employers and employees, provides dispute resolution machinery, and places certain obligations on both parties with respect to the consultative process." Report at p. 102-03.

[1] Raymond Goetz, in his law review article[4], indicates that PEERA uses the euphemisms "*meet and confer*" and "*meet and confer proceedings*" to describe the process that takes place when an employee organization attempts to represent employees in dealing with a public employer. He notes, terms like "*bargain collectively*," "*negotiate*," and "*collective bargaining*," customary in the private sector, were "*studiously avoided*." As Professor Goetz concludes:

> "*Thus, the distinguishing feature of this pristine brand of meet and confer discussions is not just its failure to culminate in a binding contract, but more important, the reservation to the public employer of unilateral decision-making after the formality of some communication process in which the union functions essentially as an information gather and supplicant. If this is what the Kansas Legislature contemplated when it adopted the Public Employer-Employee Relations Act, it missed the mark. Despite its consistent use of "meet and confer" nomenclature, the Act in substance provides for a "hybrid" combining some characteristics of pure meet and confer with other characteristics of collective bargaining.*"

The "*hybrid*" referred to by Professor Goetz is the "meet and confer in good faith" form proposed in the ASCI Model Act, with certain legislative changes. The Kansas Supreme Court addressed the nature of PEERA in Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 804 (1983), ("Pittsburg State"), and adopted Professor Goetz's "*hybrid*" characterization of the Act.

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[4] See footnote #3, supra.

> *"Professor Raymond Goetz, in his most informative analysis of the Act, The Kansas Public Employer-Employee Relations Law, 28 Kan. L.Rev. 243, 282-87 (1980), describes both types of proceedings ["meet and confer" and "collective negotiations"] and concludes that 'the Act in substance provides a 'hybrid' combining some characteristics of pure meet and confer with other characteristics of collective bargaining.' We agree. '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 the 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 improvement of employer-employee relations. K.S.A. 75-4321(b); K.S.A. 1982 Supp. 75-4327(b); K.S.A. 75-4333(b)(5) and (c)(3). 'Meet and confer in good faith' is defined in K.S.A. 75-4322(m) as follows:*
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> > *'Meet and confer in good faith' is the process whereby the representative 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).'*
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> *"We concluded 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 be designated, the important thing is that the Act imposes upon both employer and employee representatives 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."*

Professor Goetz finds further support for the proposition that PEERA cannot be interpreted as a pure "*meet and confer*" act by the attempt to amend PEERA in 1976. As Professor Goetz points out:

> *"A Special Committee on Public Employer-Employee Relations in that year reported out a bill 'to make it clear that this [PEERA] is a 'meet and confer' and not a 'collective bargaining act,' as well as to make a number of technical revisions. Among the extensive amendments proposed was a restatement of the purpose of the Act to provide that nothing therein should be construed 'to authorize the substitution of negotiations or collective bargaining for meeting and conferring.' In addition, the definition of 'meet and confer' would have eliminated the crucial obligation "to reach agreement,' and the definition of 'conditions of employment' about which the parties must meet and confer in good faith would have expressly excluded each of the management rights specified in section 75-4326. No memorandum of agreement was to include any subject fixed by state law; every proposed memorandum of agreement pertaining to employees of the state would have to be approved by the Secretary of Administration (or by the Board of Regents in certain cases) and returned to the parties for further discussions if disapproved."* Goetz at p. 283-84.

The legislation was not adopted. Professor Goetz opines that having argued that PEERA needed to be amended to make it clear that it does not provide for anything resembling collective bargaining and having failed, the sponsors of the legislation could not avoid the inference that without such "*clarification*" PEERA does not so provide. As Professor Goetz concluded:

> *"In other words, the legislature has tacitly said that the Act as it existed should not necessarily be construed along the lines the amendment would have required. Consequently, it would now be difficult to maintain that the Act confines public employee representation to a 'cap in hand' receipt of information and a plaintive expression of views of the type sometimes envisions by devotees of traditional 'meet and confer.' In addition to this inference drawn from legislative history, express provisions of the Act defining 'meet and confer in good faith,' 'conditions of employment,' and 'memorandum of agreement' - along with provisions delineating the scope of a memorandum of agreement and prescribing the obligations of a public employer with respect to a certified employee organization - preclude any such*

restrictive view of public employee representation under the Act." Goetz at p. 284.

[2] It is clear the Kansas Public Employee Relations Act is a *"meet and confer in good faith"* act.[5] Employers and employee

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[5] **COMPARISON OF FORMS OF LABOR RELATIONS ACTS**

Meet and Confer	Collective Bargaining	Meet and Confer In Good Faith	Public Employer-Employee Relations Act
Superior Status to Public Employer in employment relations.	Employer and Employee Organizations meet more as equals.	Employer and Employee Organizations meet more as equals.	Employer and Employee Organizations meet more as equals. (K.S.A. 75-4327, 75-4322(m)).
Employer determines rules for Employee Organization recognition and rights	Employee Organization position protected by statutes on recognition, negotiations, dispute resolution and prohibited practices.	Statutes recognize differences between public and private employment relations but provides protection for basic employee and employee organization rights.	Statutes recognize differences between public and private employment relations but provides protection for basic employee and employee organization rights. (K.S.A. 75-4321(s), 75-4328).
Unilateral decision-making by employer after receiving recommendations from employee organization.	Agreement reached through bilateral negotiations.	Obligation on both parties to meet and confer in good faith at reasonable times to exchange information and proposals and to strive to reach agreement.	Obligation on both parties to meet and confer in good faith at reasonable times to exchange information and proposals and to strive to reach agreement. (K.S.A. 75-4327).
Outcome of decisions depends more on management determinations	Negotiations result in binding agreement.	Negotiations result in non-binding memorandum of understanding subject to governing body approval and implementation.	Negotiations result in non-binding memorandum of understanding subject to governing body approval and implementation. (K.S.A. 75-4331).
Employer has final say so no impasse procedure.	Statutory impasse procedures include mediation and fact-finding resulting in binding agreement.	Statutory impasse procedures include mediation and fact-finding with final say in employer.	Statutory impasse procedures include mediation and fact-finding with final say in employer. (K.S.A. 75-4332).
Managerial discretion maximized	Employee rights recognized and protected by statute.	Balances management rights and employee needs.	Balances management rights and employee needs. (K.S.A. 75-4326, 75-4327, 75-4328, 75-4331).
Strikes prohibited.	Depending on jurisdiction, strikes not prohibited.	Strikes prohibited.	Strikes prohibited. (K.S.A. 75-4333(c)(5)).

(continued...)

organizations place importance on the terms used to describe the employer-employee relations process. The public employer representative objects to the use of the terms "*negotiate*" or "*bargain*" to describe the "*meet and confer in good faith*" process. However, as quoted above, the Kansas Supreme Court in Pittsburg State stated:

> "*However it be designated, the important thing is that the Act [PEERA] imposes upon both employer and employee representatives 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.*" Id. at p. 805.

Throughout Pittsburg State the court speaks of "*employer-employee negotiations pursuant to the Act*," Id. at p. 802; "*mandatory negotiations*," Id. at p. 802; "*negotiate*," Id. at p. 801; "*negotiating team*," Id. at p. 819; "*negotiations*," Id. at p. 813; "*precondition to negotiations*," Id. at p. 813; "*mandatory negotiability*" of subjects, Id. at p. 814; and "*NEGOTIABILITY*," Id. at p. 821.

Black's Law Dictionary, 5th ed., defines "*Negotiation*" as:

> "*[The] process of submission and consideration of offers until acceptable offer is made and accepted. Gainey v.*

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			[5](...continued) Conditions of employment more specifically defined by statute. K.S.A. 75-4322(t).
			Management rights section included in Act. (K.S.A. 75-4326).

> *Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. & Station Emp., D.C. Pa., 275 F.Supp. 292, 300. The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction."* Id. at p. 935.

"*Bargain*" is further defined as "*to negotiate over the terms of a purchase or contract. To come to terms.*" Id. at p. 136. Finally, "*collective bargaining*" is defined as:

> *"a procedure looking toward making of collective agreements between employer and accredited representative of employees concerning wages, hours and other conditions of employment, and requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction to free flow of commerce prevented. . . . Negotiation between an employer and organized employees as distinguished from individuals, for the purpose of determining by joint agreement the conditions of employment."* Id. at p. 238-39.

The Kansas Supreme Court in State v. Howat, 109 Kan. 376, 416 (1921) defined "*collective bargaining*" as "*bargaining by an organization or group of workmen, on behalf of its members, with the employer.*"

The terms appear interchangeable and each adequately describe the process to be undertaken in the "*meet and confer in good faith*" form of public employer-employee relations. But regardless of the term used, the obligation upon both employer and employee remains the same; "*to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes.*" Pittsburg State, 233 Kan. at p. 805.

Reliance Upon NLRB Decisions and Case Law From Federal and State Courts

In its briefs KAPE cites National Labor Relations Board ("NLRB") decisions, federal court decisions interpreting the National Labor Relations Act, and decisions from other states interpreting their public sector labor law. Respondent objects to the use of NLRB decisions and other jurisdiction case law because of the alleged differences between employment in the public and private sectors, and between the various state and federal laws. As Respondent argues:

> *"Petitioner's reliance on such cases, without careful evaluation of the language, history or the underlying statutes from these other areas, is inconsistent with the Public Employer-Employee Relations Act (PEERA) and Kansas case law."* Respondent's Reply Brief, p. 2.

A careful reading of Respondent's brief and examination of Respondent's oral argument reveals a position that unless the language and philosophy of National Labor Relations Act, ("NLRA"), or state legislation are consistent with PEERA, reliance upon NLRB decisions and other jurisdiction case law is misplaced. Respondent emphasizes the "*uniqueness*" of PEERA provisions, in particular K.S.A. 75-4321(a) and K.S.A. 75-4333(e).

> 75-4321(a). *"The legislature hereby finds and declares that:*
>
> * * * * *
>
> *"(4) there neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority*

> *derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil services rules, regulations and resolutions; and*
> *(5) the difference between public and private employment is further reflected in the constraints that bar any abdication of bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship."*
>
> K.S.A. 75-4333(e). "*In the application and construction of this section [regarding prohibited practices], fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent."*

Given the uniqueness of some of the PEERA statutes and taking Respondent's argument to its logical conclusion, the use of NLRB decisions and other jurisdiction case law in interpreting PEERA would be prohibited. Such a conclusion is too restrictive. Rather than comparing PEERA as a whole with other legislation as a whole, the inquiry must be on a statute by statue basis to determine if the language and philosophy is analogous, not identical.

Respondent's reliance upon K.S.A. 75-4321 is misplaced. K.S.A. 75-4321 can best be described as "*legislative dictum.*" "*Dictum*" is defined in Black's Law Dictionary, 5th ed., as "*a mere assertion; an assertion without proof. An opinion.*" Id. at 408. While it may express a philosophy of the legislature, it does not mean such is necessarily a correct statement of law, nor controlling on the administrative agency or courts in interpreting PEERA. For example, according to K.S.A. 75-4321 "*constitutional*

provisions as to contract, property, and due process do not apply to the public employer and employee relationship." Such is, in fact, an incorrect statement of the law. In Cleveland Bd. of Educ. v. Loudermill, 105 S.Ct. 1487 (1985) the United States Supreme Court held the due process clause protection of the 14th Amendment to the U.S. Constitution provides protection to permanent state employees requiring pre-termination notice and an opportunity to respond. *See also* Board of Regents v. Roth, 408 U.S. 564, 573, 577 (1972) which recognized a property interest in a public job. The Kansas Supreme Court in Darling v. Kansas Water Office, 245 Kan. 45 (1989) similarly accepted that a classified state employee has a property right to continued employment cognizable under the Fourteenth Amendment to the United State Constitution to which due process rights apply. Id. at 48-49.

The Kansas Supreme Court had the opportunity to address the application of K.S.A. 75-4333(e) in Kansas Ass'n of Public Employees v. Public Service Employees Union, 218 Kan. 517 (1976):

> *"KAPE cites us a number of decisions under the National Labor Relations Act to the effect that material misrepresentations, particularly concerning wages won by a union in other contracts, made just prior to a representation election when the opponent has no opportunity to refute them, may constitute such an interference with the voting employees' free choice as to require setting the election aside. Our act, in K.S.A. 1975 Supp. 75-4333(e), points to the 'fundamental distinctions' between private and public employment and admonishes us that 'no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent.' We nevertheless see no reason why the rule announced in the federal cases should not be applicable to a*

representation election among public employees . . ." Id. at 517.

The court reached a similar decision in U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531-32 (1990), wherein it recognized the NLRA differs from the Kansas statute but determined "*the federal cases which have dealt with this statute provide guidance in the present case.*"

At least twenty-two state appellate courts have relied upon NLRB decisions or federal court decisions interpreting the NLRA in interpreting their own state public employee relations laws.[6] Appellate court decisions of fourteen states were found that cited the decisions from other state courts.[7] More thorough research would certainly reveal additional states.

Respondent cites National Education Association v. Board of Education, 212 Kan. 741, 749 (1973) as dispositive of the Kansas

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[6] Alaska, Public Safety Employees Ass'n v. State, 799 P.2d 315, 318 (1990); California, Fire Fighters Union, Local 1186, Etc. v. City of Vallego, 526 P.2d 971 (1974); Connecticut, West Hartford Ed. Ass'n v. DeCourcy, 295 A.2d 526 (1972); District of Columbia, WTU v. District of Columbia, 126 LRRM 2650 (1987); Delaware, State v. American Fed. of State, Ct., M. Emp., Local 1726, 298 A.2d 362 (1972); Florida, School Bd. of Dade City v. Date Teachers Ass'n, 421 So.2d 654 (1982); Illinois, Sev. Emp. Int'l v. Ill. Educ. labor Rel. Bd., 153 Ill. App.3rd 861 (1987), Rockford Twp. Highway Dep't v. ISLRB, 153 Ill.App.3rd 863 (1987); Iowa, Mt. Pleasant Sch. Dist. v. PERB, 121 LRRM 2968 (1984); Massachusetts, Kerrigan v. City of Boston, 278 N.E.2d 287 (1972); Michigan, Detroit Police Officer's Ass'n v. City of Detroit, 214 N.W.2d 803 (1974); Minnesota, Intern. Bro. of Tmstrs., Etc. v. City of Mpls., 225 N.W.2d 254 (1975); Montana, Young v. City of Great Falls, 112 LRRM 2789 (1972); Missouri, Baer v. St. Louis Police Officers, 128 LRRM 2343 (1989) citing Missouri NEA v. Missouri State Bd. of Mediation, 695 S.W.2d 894; Nebraska, Larson v. Transit Auth. of Omaha, 120 LRRM 2550 (1985); New Jersey, New Jersey v. Council of N.J. College Locals, 92 LRRM 323 (1976); Oklahoma, Stone v. Johnson, 120 LRRM 2816 (1984); Oregon, AFSCME Local 2623-A v. State of Oregon, 113 LRRM 2580 (1981); Pennsylvania, Commonwealth v. PLRB, 113 LRRM 3052 (1983); South Dakota, Aberdeen Ed. Ass'n v. Bd. of Ed., 85 LRRM 2801 (1974); Vermont, Vt. Faculty Fed. v. State Colleges, 107 LRRM 2626 (1980); Washington, Public Employees Ass'n v. Community College, 114 LRRM 2762 (1982); Wisconsin, Racine Sch. Dist. v. WERC, 87 LRRM 2489 (1977).

[7] Alaska, Public Safety Employees Ass'n v. State, 799 P.2d 315, 321 (1990); Delaware, State v. American Fed. of State, C & M. Emp., Local 1726, 298 A.2d 263 (1972); Illinois, Decatur Bd. of Educ. v. Ed. Labor Rel., 536 N.E.2d 743 (1989); Iowa, Mason City v. PERB, 113 LRRM 3354 (1982); Minnesota, Foley Educ. Ass'n v. School Dist. No. 51, 120 LRRM 2367 (1983); North Dakota, Rapid City Ed. Ass'n v. School Dist., 120 LRRM 3424 (1985); New Hampshire, Appeal of Berlin Ed. Ass'n, 121 LRRM 3521 (1984); New Jersey, Patterson Police Local 1 v. City of Patterson, 112 LRRM 2367 (1981); Oklahoma, Stone v. Johnson, 120 LRRM 2205 (1981); Oregon, AFSCME Local 2623-A v. State of Oregon, 113 LRRM 2580 (1981); Pennsylvania, Fire Fighters v. City of Scranton, 113 LRRM 3622 (1981); South Dakota, Rapid City Ed. Ass'n v. Rapid City Area Sch. Dist., 376 N.W.2d 562 (1985); Washington, Spokan Educ. Ass'n v. Barnes, 85 LRRM 2604 (1974); Wisconsin, City of Beloit, Etc. v. Wisc. Employment, Etc., 242 N.W.2d 231 (1976).

Supreme Court's position on the "*relative lack of utility of public sector case law.*" (Respondent's Reply Brief at 4).

> "*We note in closing that we have examined a wealth of material dealing with the new and rapidly evolving field of collective negotiations in public employment. Cases from other jurisdictions proved to be of little value in construing our own statute because each state has its own philosophy and each statute has its own peculiar phraseology; none has the legislative history of our act.*" Id. at p. 757.

However, since the decision in National Education Association, the Kansas Supreme Court has looked to court opinions from other states in attempting to interpret Kansas public employee relations legislation, U.S.D. 352 v. NEA-Goodland, 246 Kan. 137, 143 (1990); Liberal-NEA v. Bd. of Education, 211 Kan. 219, 228 (1973); Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 835 (1983). In Pittsburg State, Id. at p. 819, the court specifically cited the Nevada case of Clark Co. Sch. Dist. v. Local Gov't, 530 P.2d 114 (1974), as being "*persuasive precedent*" although admitting the public employee relations "*statutes of the two state are of course different.*" Id. at 821. The court then proceeded to cite decisions from Wisconsin and New Jersey as further support for its conclusion without setting forth in the opinion an evaluation of whether "*the language, philosophy and history of the statutes underlaying these cases is comparable to PEERA before relying on them*" as Respondent maintains is a precondition to reliance on such decisions. (Respondent's Reply Brief at p. 8.)

The National Labor Relations Act far predates PEERA and the collective bargaining laws of those states authorizing public employee collective bargaining. It is not surprising, therefore, that public employee labor law has been influenced by the private sector labor movement. Historically, many benefits secured by the public sector resulted from the fact that the private sector labor union had already secured such benefits. Project: Collective Bargaining and Politics in Public Employment, 19 U.C.L.A. L.Rev. 887, 893 (1972). As noted in The Ohio SERB and Representation Campaign Issues, 18 Univ. of Toledo L.Rev. 339, 341 (1987):

> *"Following the private sector model, which has evolved over the past fifty years, has many advantages. In a state which has only recently enacted a comprehensive bargaining bill, following NLRB precedent would give the system predictability and some certainty of application. Parties would be able to plan their actions with some degree of confidence. Further, the NLRB and federal courts have generally developed an expertise based on familiarity with labor law issues and experience. One would expect that a state new to collective bargaining could benefit from this experience and expertise."*

[3] To the extent that a state public sector labor relations law is patterned after the NLRA, it is logical and appropriate for the state administrative agency responsible for implementing the law and the state courts to refer to federal case law as instructive in resolving public sector labor law questions. The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Review 511, 564 (1990). The Illinois Education Labor Relations Board addressed the issue of

reliance upon NLRB decisions in Hardin County Educ. Ass'n v. IELRB, 174 Ill.App.3d 168, 174 (1988):

> *"The decisions of the National Labor Relations Board (NLRB) and the Federal courts interpreting similar provisions under the National Labor Relations Act (NLRA) (29 U.S.C. §151 et seq. (1982)) are persuasive authority. The Labor Board [IELRB] is not, however, bound to interpret the Act as the NLRB or the Federal courts have interpreted the NLRA."*

The Kansas Supreme Court appears to have adopted this reasoning in its interpretation of public employee relations statutes under the Professional Negotiations Act ("PNA"). In its decisions the court recognized the differences between collective negotiations by public employees and collective bargaining as it is established in the private sector but determined those differences did not prevent use of federal decisions, only prohibited them being regarded as "*controlling precedent.*" NEA-Wichita v. U.S.D. 259, 234 Kan. 512, 518 (1983). In U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources, 247 Kan. 519, 531-32 (1990), the court concluded an examination of the federal Labor-Management Relations Act "*provides us with guidance*" in interpreting public sector legislation. *See also* NEA-Topeka Inc. v. U.S.D. 501, 225 Kan. 445, 448 (1983); Liberal-NEA v. Bd. of Education, 211 Kan. 219, 232 (1973).

There is no reason to believe the Kansas Supreme Court will establish a different standard when interpreting PEERA. *See e.g.* Kansas Ass'n of Public Employees v. Public Service Employees Union, 218 Kan. 509, 517 (1976); Kansas Bd. of Regents v. Pittsburg State

Univ. Chap. of K-NEA, 233 Kan. 801 (1983). This standard is consistent with K.S.A. 75-4333(e) as both the statute and the statements of the court make it clear that NLRB decisions and other jurisdiction case law are not controlling precedent, i.e. statements of law which must be followed in deciding an issue.

In summary, where there is no Kansas case law interpreting or applying a specific section of PEERA, the decisions of the National Labor Relations Board (NLRB) and the Federal courts interpreting similar provisions under the National Labor Relations Act (NLRA) (29 U.S.C. §151 *et seq.* (1982)), as well as the decisions of state appellate courts 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 PEERA. The Pubic Employee Relations Board ("PERB") is not, however, bound to interpret PEERA as the NLRB or the Federal courts have interpreted the NLRA or other states have interpreted their pubic employee relations laws. Reference to and consideration of such opinions can enrich PERB orders. In some instances PERB will find support for its positions, either in decided cases, dissenting opinions, or critical scholarship. In other situations, reference to and familiarity with foreign jurisdiction decisions will assist PERB consideration of alternatives. The fact that the language or philosophy of other jurisdiction public employee relations laws differs from PEERA is only a factor to be considered in determining the degree of

persuasion or guidance the decisions provide in interpreting PEERA, and not a prohibition to its use.

The "Savings Clause"

The pivotal issue of these prohibited practice complaints is whether the "savings clause" is a mandatory subject for bargaining. The language of the "savings clause," in pertinent part, as requested by Respondent provided:

> *"Any provision of this Agreement which quotes any valid law, or Department of Administration regulation, all or in part, either directly or indirectly, shall be adhered to in its present form or as it may be subsequently amended or changed."*

Petitioner argues the "savings clause" is a permissive subject of bargaining, and neither an employee organization nor public employer can require the other party to negotiate, or make agreement upon a memorandum of understanding dependent upon, a permissive subject of negotiation. Respondent maintains the "savings clause" is a mandatory subject of negotiation because it directly pertains to subjects specifically enumerated in K.S.A. 75-4322(t) definition of "*conditions of employment*" since it sets out the effect of changes in statutes or regulations quoted, paraphrased or referenced in the memorandum of agreement.

It may be helpful at this time to review the differences between "*mandatory*," "*permissive*" and "*illegal*" subjects of bargaining. Once a specific subject has been classified as a

"*mandatory*" subject of bargaining, the parties are required to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent completion of the impasse procedure set forth in K.S.A. 75-4332. *See* Detroit Police Officers Ass'n v. City of Detroit, 214 N.W.2d 803, 808 (Mich. 1974). A "*permissive*" subject of bargaining falls outside of the K.S.A. 75-4322(t) definition of "*conditions of employment.*" The parties may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to the point of impasse. *See* National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958). An "*illegal*" subject of bargaining is a provision that is unlawful under PEERA or other applicable statute. The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a memorandum of agreement provision embodying an illegal subject is unenforceable. Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich.L.Rev. 885, 895 (1973).

The legislative parameters of the duty to bargain under PEERA are found in K.S.A. 75-4327(b):

> *"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."*

K.S.A. 75-4322(m) defines "*Meet and confer in good faith*" as:

> "*the process whereby the representative 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.*"

As set forth above, the Kansas Supreme Court has interpreted this to mean:

> "*the Act [PEERA] imposes upon both employer and employee representatives 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.*" Pittsburg State, 233 Kan. at p. 805.

After the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. *See* National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952). If the parties are not able to agree on the terms of a mandatory subject of bargaining they are said to have reached "*impasse*." West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526, 541-423 (Conn. 1972). Under PEERA when good faith bargaining has reached impasse and the impasse procedures set forth in K.S.A. 75-4332 have been completed, the employer may take unilateral action on the subjects upon which agreement could not be reached.

A party's refusal to negotiate a mandatory subject of bargaining is a prohibited practice pursuant to K.S.A. 75-4333(b)(5) and (c)(3), although the party has every desire to reach agreement upon an overall memorandum of agreement, and earnestly

and in all good faith bargains to that end. *See* 48 Am.Jur.2d, Labor and Labor Relations, § 998 at p. 812. A party, regardless of its good faith in bargaining, commits a prohibited practice when it insists to impasse upon the inclusion of a permissive bargaining subject in a memorandum of agreement. *See e.g.* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958), ("Borg-Warner").

Both KAPE and the Department of Administration cite Pittsburg State as setting forth the test to be used to determine if an item is a mandatory subject for negotiations. The Kansas Supreme Court in Pittsburg State announced the adoption of a "*balancing test*" to be used to determine mandatory negotiability under PEERA. This is the same balancing test it had previously applied to subjects under the Professional Negotiations Act.[8] The test, as enumerated by the court is as follows:

> *"PERB, in order to determine whether a particular item is or is not mandatorily negotiable, has developed and employs a balancing test: If an item is significantly related to an express condition of employment, and if negotiating the item will not unduly interfere with management rights reserved to the employer by the law, then the item is mandatorily negotiable."*

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[8] National Education Association v. Board of Education, 212 Kan. 741, 753 (1973):
"It does little good, we think, to speak of negotiability in terms of 'policy' verses something which is not 'policy.' Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can. The similar phraseology of the N.L.R.A. has had a similar history of judicial definition. See Fiberboard Corp. v. Labor Board, 279 U.S. 203, 13 L.Ed.2d 233, 85 S.Ct. 398 and especially the concurring opinion of Steward, J., at pp. 221-22."

PERB in Kansas Association of Public Employees v. Adjutant General's Office, Case No. 75-CAE-9-1990, explained the procedure to be followed in employing the balancing test:

> *"To determine whether a subject is negotiable, the Board [PERB] must balance the competing interests [of public employer and employee] by considering the extent to which the meet and confer process will impair the determination of governmental policy. Use of a three-prong test provides a meaningful standard by which to determine claims of negotiability.*
>
> *"First, a subject is negotiable only if it intimately and directly affects the work and welfare of public employees. Examples of subjects which are included here are rates of pay and working hours. Any subject which does not satisfy this part of the test is not negotiable.*
>
> *"Second, an item is not negotiable if it has been preempted by statute or regulation. . .*
>
> *"Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. As quoted above, this prong of the test rests on the assumption that most decisions of the public employer affect the work and welfare of public employees to some extent, and that negotiation will always impinge to some extent on the determination of public policy. The two conflicting interests cannot be reconciled by focusing solely upon the impact or effect of managerial decisions but instead the nature of the terms and conditions of employment must be considered in relation to the extent of their interference with management rights as set forth in K.S.A. 75-4326.*
>
> *"The requirement that the interference be "significant" is designed to effect a balance between the interest of public employees and the requirements of democratic decision making. A weighing or balancing must be made. Where the employer's management prerogative is dominate, there is no obligation to negotiate even thought the subject may ultimately affect or impact upon public employee terms and conditions of employment.*
>
> *"The basis inquiry therefore, must be whether the dominant concern involves an employer's managerial prerogative or the work and welfare of the public employee. The dominant concern must prevail. Since the*

> *line which divides these competing positions is often indistinct, it must be drawn on a case by case basis.*
>
> *"To the extent that subjects do not involve substantive governmental discretion and responsibility, but merely the procedural aspects of reaching and effectuating such determinations, they concern terms and conditions of employment ordinarily subject to negotiation. (citation omitted)."*

The initial inquiry is whether the "savings clause" **intimately and directly affects** the work and welfare of the employees in the service and maintenance units at Pittsburg State University and Kansas State University. Respondent cites a number of statutes and regulations relating to conditions of employment that apply to all classified employees and are mandatorily negotiable.[9] Because the "savings clause" directly pertains to and affects conditions of employment during the term of the memorandum of agreement, Respondent argues, the "savings clause" is properly viewed as a mandatory topic for meeting and conferring.

There is no question that if it is determined necessary to adopt or amend a statute or regulation such a change could ultimately impact a condition of employment. However, unlike management decisions that are almost exclusively a matter of concern between the public employer and the employee, the "savings clause" has as its focus the unencumbered ability of Respondent or the employer to amend rules and regulations and thereby unilaterally change conditions of employment; "*a concern wholly*

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[9] For example, K.A.R. 1-9-1, hours of work; K.A.R. 1-9-2, holidays; K.A.R. 1-9-4, vacations; K.A.R. 1-9-5, sick leave; K.A.R. 1-5-24, overtime; K.A.R. 1-5-28, shift differential.

apart from the employment relationship." *See* First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).[10]

It is important to note the dominate reason for Respondent's insistence upon inclusion of the "savings clause" language in the memorandum of agreement. While on its face the "savings clause" "*identifies the effect subsequent amendments have on these conditions of employment which have been included in a memorandum of agreement,*" as Respondent argues, an examination of the statements of Respondent's counsel during oral arguments, however, reveals the true import of this provision is that it would allow Respondent or the employer to amend a regulation affecting a condition of employment addressed in the memorandum of agreement without the necessity of prior meet and confer negotiations with the certified employee representative. According to counsel, to require Respondent to meet and confer with each certified employee representative whose unit employees may be affected by adopting or amending a regulation would, at best, hamper its ability to administrate personnel policy in a timely and efficient manner, and at worst, be unworkable.[11]

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[10] In First National the court acknowledged that the employer's decision to cancel the contract "had a direct impact on employment, since jobs were inexorably eliminated . . ." But unlike management decisions that are exclusively a matter of concern between employer and employees, the decision to cancel the contract, according to the court, "has as its focus only the economic profitability of the contract with [the customer], a concern under these facts wholly apart from the employment relationship.

[11] Respondent asserts that to be required to meet and confer concerning regulations that effect terms and conditions of employment will encumber the regulation adoption process and extend the time before which needed regulations take effect. According to the Policy and Procedure Manual for the filing of Kansas Administrative Regulations, (12/88), prepared and distributed by the Department of administration, the minimum time required for adoption of a regulation is "118 to 174 days" or "17 to 24 weeks", Id. at p. 49, App. T, p. 43). There is no requirement that the meet and confer process be complete prior to the commencement of the regulation (continued...)

It is clear the dominate concern of the "savings clause" focuses on the Respondent's needs rather than on the affected employees. The benefits the employees may reap from inclusion of the "savings clause" in the memorandum of agreement are "*speculative and insubstantial at best.*"[12] Allied Chemical & Alkali Workers Local 1 v. Pittsburg Plate Glass Co., 404 U.S. 157 (1971). In Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), Stewart, J. concurring with the majority, explained:

> *"In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. . . . [I]t surely does not follow that every decision which may affect [a condition of employment] is a subject of compulsory bargaining. . . . In many of these areas the impact of a particular management decision upon [a condition of employment] may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not 'with respect to . . . conditions of employment.' . . .*
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> *. . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon [a*

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[11](...continued)
adoption process. In fact, it would appear to fit particularly well with the requirement of time for public comment and the public hearing.

It should be noted that the employer's obligationation to meet and confer in good faith may be satisfied in two ways. Where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. The Respondent here could simply notice the affected employee organizations as part of the regulation notice procedure, and then allow them to request the opportunity to negotiate. If no request is received, the regulation adoption process can proceed. If a request is received, both processes can proceed together since the regulation policy contemplates the need to make changes during the adoption process and provides accordingly. It would also appear appropriate, if needed, that a party could request PERB to expedite the mediation and fact-finding process.

While there is no question that the meet and confer in good faith obligation could interfer with what Respondent views as the need for expeditious rule-making authority, the Kansas Legislature must be assumed to have been aware that by placing the obligation upon public employers some freedom of operation would be sacrificed, but determined that the public interest was best served through the meet and confer process rather than unfettered rule-making authority.

[12] There is no assurance that there will be any change in the regulations during the term of the memorandum of agreement. Respondent cites an example whereby the savings clause would result in an increase in benefits over that recited in the memorandum of agreement, e.g. a new paid holiday authorized by the legislature. It must be kept in mind however that a change in regulation could equally result in a diminution of benefits.

condition of employment] would be excluded [as a subject of compulsory collective bargaining]."[13]

Accordingly, the "savings clause" cannot be said to "*intimately and directly*" affect the work and welfare of public employees, and therefore is not a mandatory subject of negotiation.

Assuming, arguendo, that the "savings clause" does directly pertain to and affect conditions of employment set forth in the memorandum of agreement as Respondent argues, thereby satisfying the first prong of the three prong test, it nevertheless fails the second prong. The second prong provides that an item is not negotiable if it has been preempted by statute or regulation. Here the applicable statute is K.S.A. 75-4327(b), employer obligation to meet and confer on conditions of employment, read in conjunction with K.S.A. 75-4322(m), definition of "*meet and confer in good faith,*" and K.S.A. 75-4333(b)(5) which makes it a prohibited practice for an employer to refuse to meet and confer on conditions of employment. Together these provisions establish the statutory obligation of the employer and certified employee representative, as stated repeatedly above, "*to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes.*"

Unilateral changes by a public employer concerning matters which are mandatory subjects of negotiation are normally regarded

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[13] While Justice Stewart's comments are contained in a concurring opinion, it is significant that the court has subsequently referred to his concurring opinion with approval in Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Co., 404 U.S. 157, 178 (1971).

as per se refusals to bargain where undertaken without negotiation and achieved through bypassing the certified employee representative. NLRB v. Katz, 369 U.S. 736 (1962). A prohibited practice can be found despite the absence of bad faith, and even where there is a possibility of substantive good faith. *See* Morris, The Developing Labor Law, Ch. 13, at p. 564. As the court stated in West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526, 539 (Conn. 1972):

> *"Thus, if the employer insisted on retaining for himself absolute unilateral control over wages, hours and other conditions of employment in effect requiring the union to waive practically all of its statutory rights his good faith is suspect."*

K.S.A. 75-4330 states in pertinent part:

> *"The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to (1) any subject preempted by federal or state law . . ."*

There is no question that the Kansas Legislature can adopt or amend statutes which relate to the terms and conditions of employment without first providing the opportunity for negotiation by employee organizations representing affected public employees. Where a statute has been adopted or amended which conflicts with a provision of a memorandum of agreement, the existing provision of the memorandum of agreement is unenforceable, and the provisions must be read in a manner consistent with the new statute or amendment. *See* 2 Restatement of the Law of Contracts 2d, §264 at p. 331.

In Local 1357, Service and Maintenance Unit, AFSME v. Emporia State University, Case No. 75-CAE-6-1979, the PERB's order examined the issue of negotiability of subjects governed by rule or regulation. After noting there "*is a conspicuous absence of any mention of matters set by administrative rule and regulation*" in K.S.A. 75-4330, the Board concluded the "*representative of the public agency has the obligation to meet and confer or to engage in good faith give and take negotiations over all subjects defined at K.S.A. 75-4322(t) regardless of administrative rules and regulations.*" The Board then held "*to refuse such negotiations because the subjects are governed by rule and regulation is to commit an act of bad faith.*"

By the "savings clause" Respondent seeks to circumvent its obligation to meet and confer in good faith by reserving to itself the ability to unilaterally determine terms and conditions of employment through the adoption or amendment of regulations covering the subject. While Respondent exercised such prerogatives prior to the adoption of PEERA, with its adoption a public employer's freedom to act has been restricted by the statutory obligation set forth in K.S.A. 75-4327(b). PEERA divests public employers of some of the discretion which they otherwise could exercise under K.S.A. 75-4326, since it imposes on the public employer the duty to negotiate certain matters with the certified employee representative. The legislature by enactment of PEERA expressed the view that the state's best interest will be served by

according public employees the right to negotiate in accordance with the terms and conditions of PEERA.

Here, if the "savings clause" was determined a mandatory subject of negotiations, upon the parties reaching impasse on its language and completing the impasse resolution procedures of K.S.A. 75-4332, the Board of Regents or Respondent could unilaterally set the terms and conditions of the employment agreement which would presumably include the "savings clause" language it sought to include in the memorandum of understanding. In this manner it could then adopt or amend rules and regulations that change those terms and conditions of employment without the further obligation to meet and confer with the certified employee organization on those changes; in affect potentially giving Respondent ultimate unilateral control over conditions of employment. Such is clearly contrary to K.S.A. 75-4327(b) and the purpose of PEERA to develop harmonious and cooperative relationships between government and its employees, Pittsburg State, 233 Kan. at p. 812, and its stated policy that the "*refusal by some [public employers] to accept the principle and procedure of full communication between public employers and public employee organizations can lead to various forms of strife and unrest,*" K.S.A. 75-4321(a)(2).

In Kansas Association of Public Employees v. Adjutant General, Case No. 75-CAE-9-1990, PERB held:

> "*However, it seems unthinkable that the Kansas legislature would have gone to the trouble establishing the Public Employer-Employee Relations Act, with its*

> *detailed procedures for recognition of employee representatives, meet and confer, impasse, and resolving prohibited practices, and would then have provided that the existence of a statute or regulation would automatically preclude the negotiability of all items, even mandatorily negotiable subjects, within the scope of PEERA.*" Id. at p. 28.

It is likewise unthinkable that the Kansas legislature would have gone to such trouble only to allow the employer to circumvent its statutory obligation through alleging the mandatory negotiability of the "savings clause." For this reason, the "savings clause" is preempted by the statutory obligation to meet and confer, and therefore not a mandatory subject of negotiation.

A similar conclusion was reached by the court in Palm Beach Junior College v. United Faculty, 468 So.2d 1089 (Fla.App. 1985). There the court upheld the Florida Public Employee Relations Commission determination that the college had bargained in bad faith. In addition to a management's right provision, the college had sought a clause covering the impact of the exercise of all management rights. The employee union had refused to agree to this proposal, but the College unilaterally imposed this provision through the statutory impasse resolution procedures. The Florida court affirmed the determination of the Commission that the College failed to bargain in good faith by insisting on the clause, reasoning that while a union may contractually waive its statutory guaranteed right to collective bargaining such waivers are normally used to maintain the status quo of a contract and not to allow an employer to make unilateral changes in working conditions without

bargaining. The court found the blanket impact bargaining clause was such a drastic waiver of rights guaranteed to public employees to engage in collective bargaining that it evidenced bad faith bargaining. The court concluded where public employees are guaranteed by statute a right under the public employees relations act, the waiver of such statutory right cannot be a mandatory subject of bargaining. Id. at Syl. #1, p. 1089.

> *"The waiver of such a statutory right cannot be a mandatory subject of bargaining. See National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). Consequently, the commission held that the disputed provision -- which called for a waiver of this statutory right -- was not a mandatory, but rather a permissive, subject of bargaining."* Id. at p. 1090.

Finally, having failed to meet the requirements of either of the first two prongs of the three prong test for negotiability, it is unnecessary to consider the third prong; whether negotiating on the subject of a savings clause would significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. Without undertaking a complete evaluation of this prong, suffice it to say Respondent's own arguments support a conclusion that to mandate negotiation of a "savings clause" could "*significantly interfere*" with the exercise of management prerogatives. According to Respondent:

> *"'Ongoing legislative discretion' is a critical element of that flexibility and managerial prerogative [to assure orderly and uninterrupted operations and functions of government]. By stating that the memorandum of agreement is to be interpreted to conform to changes in regulation or statutes referred to in the memorandum, the savings*

clause preserves the ongoing legislative discretion of the state." Respondent's Brief at p. 19.

The negotiations at both Pittsburg State University and Kansas State University resulted in agreement on all subjects on the table except the "savings clause." Final agreement was made contingent by Respondent upon inclusion of Respondent's proposed "savings clause" language. Since the "savings clause" is not a mandatory subject of negotiation, a party cannot block ratification of the agreements because they do not contain the "savings clause" language the Secretary of Administration prefers. To so insist constitutes a refusal to meet and confer in good faith in violation of K.S.A. 75-4333(b)(5) or (c)(3), even thought the party has every desire to reach agreement upon an overall memorandum of agreement.

The United States Supreme Court provided an excellent summary of the law in Borg-Warner:

> "*The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.*" Id. at p. 349.

Past Practices

[4] Respondent argues the "savings clause" was routinely included in prior memorandums of agreement between Petitioner and Kansas State University:

> *"Standard language labeled as a "savings clause" has been included in every existing and past memorandum of agreement between an employee organization and one or more state agencies. This clause [is] found in the existing memorandum of agreement between Kansas State University and the Kansas Association of Public Employees . . . "* (Respondent's Brief at p. 7).

Apparently it is Respondent's position that Petitioner's past acquiescence to negotiate the "savings clause" and include it in the resulting memorandums of agreement prevents Petitioner from denying the mandatory negotiability of the "savings clause." Respondent's argument is without merit. In rejecting a similar argument raised by the employer in Allied Chem., 404 U.S. at p. 175-76, the Court determined an established practice of bargaining would not be determinative. "Common practice cannot change the law" and transform a "permissive" subject into a "mandatory" subject of meet and confer negotiations. Id.

Alternative Processes

[5] Respondent further argues that while the savings clause would allow it to amend regulations without first submitting the proposed changes to the certified employee representative for meet and confer negotiations, other means are available to allow

employee input into this decision making process, thereby satisfying the employers obligation under PEERA. According to Respondent:

> *"As a practical matter, changes to personnel statutes and regulations typically enhance benefits and protections available to state employees. However, in any isolated instances in which a proposed change to a statute or regulation incorporated in a memorandum of agreement is perceived as being adverse to the interests of the state employees, the due process elements of the legislative process and the process for promulgating regulations provide for representation and consideration of their concerns."* Respondent's Brief at p. 15.

Respondent explains the alternative due process protections available as follows:

> *"Similarly, there are protections available to state employees and their certified representatives with respect to changes in statutes and regulations that have been incorporated (directly or indirectly) into a memorandum of agreement. Each regulation and amendments to it must be adopted under an elaborate statutory process that is designed to be responsive to the concerns and recommendations of affected persons. See K.S.A. 77-414 et. seq. These provisions include a 30-day public comment period, a public hearing, as well as opportunities to address comments to the Governor with respect to approval of regulations subject to K.S.A. 75-3706, to the State Rules and Regulations Board, if the regulation is proposed on a temporary basis, and to the Joint Committee on Administrative Rules and Regulations or any other appropriate legislative committee. State employees and employee organizations have successfully used these mechanisms to obtain revisions in proposed or existing regulations. Similar opportunities are available to state employees and public employee organizations in the legislative process."* Respondent's Brief at p. 14-15.

A similar argument was made in Darling v. Kansas Water Office, 245 Kan. 45 (1989), and rejected by the court as "*illogical.*" The court concluded that where there is a specific statutory protection

or right created to protect public employees, being required instead to seek redress in the legislative or regulatory process is not a viable alternative. Appearing before a legislative or regulations hearing is analogous to participating in the pure meet and confer process.[14] The hearing provides the employee organization only the opportunity to present recommendations. There is no opportunity to "*enter into good faith give and take negotiations over these subjects in an effort to reach agreement with a recognized employee organization*" as required under PEERA, Local 1357, Service and Maintenance Unit, AFSME v. Emporia State University, Case No. 75-CAE-6-1979, nor an opportunity to submit the issues to impasse resolution procedures provided in PEERA. The legislative committee or public employer retains the final say over adoption. Obviously, the "*procedures*" advanced by Respondent are not sufficient to meet its obligations or protect the employee rights established by PEERA.

ISSUE II

WHETHER THE "SAVINGS CLAUSE" RECOGNIZES STATUTORY MANAGEMENT RIGHTS EMBODIED IN THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT THAT CANNOT BE RELINQUISHED.

[6] Respondent maintains that the K.S.A. 75-4321(a)(3) philosophy that "*the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted*

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[14] See footnote #5, supra for the characteristics of a pure meet and confer act.

operations and functions of government" is reflected in PEERA's reservation of management rights in K.S.A. 75-4326:

> *"Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:*
> *(a) Direct the work or its employees;*
> *(b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency;*
> *(c) Suspended or discharged employees for proper cause;*
> *(d) Maintain the efficiency or governmental operations;*
> *(e) Relieve employees from duties because of lack of work or for other legitimate reasons;*
> *(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and*
> *(g) Determine the methods, means and personnel by which operations are to be carried on."*

According to Respondent:

> *"This statement of management rights demonstrates further legislative recognition of the need of public employers for flexibility and management prerogatives in order to assure 'orderly and uninterrupted operations and functions of government.' 'Ongoing legislative discretion' is a critical element of that flexibility and managerial prerogative. By stating that the memorandum of agreement is to be interpreted to conform to changes in regulations or statutes referred to in the memorandum, the savings clause preserves the ongoing legislative discretion of the State."*

As stated previous, the management rights set forth in K.S.A. 75-4326 are not absolutes. They must be read in conjunction with the obligation to meet and confer on conditions of employment placed on the parties by K.S.A. 75-4327(b). On occasion these two provisions create an overlap problem. By this is meant a given subject is arguably both a term and condition of employment and a prerogative

which should be reserved to management. When faced with resolving this overlap problem the New Jersey Supreme Court observed:

> *"Logically pursued, these general principles - management prerogatives and items and conditions of employment - lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by public employers involve some managerial function, ending the inquiry at that point would all but eliminate the legislative authority of the union representative to negotiate with respect to 'terms and conditions of employment.' Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives."* Woodstown-Pilegrove Bd. of Ed. v. Woodstown-Pilegrove Ed. Ass'n, 410 A.2d 1131 (N.J. 19).

The difficulty of making bright-line distinctions between mandatory and nonmandatory subjects of negotiation was acknowledged by the Florida Public Employee Relations Commission in Duval Teachers United v. Duval County School Board,(quoted in 19 Stetson L.Rev., The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, p. 511 (1990)):

> *"Conceptually, the scope of bargaining can be viewed as a continuum. The management rights of a public employer . . . are at one pole; the bargaining rights of the employees . . . are at the other. Each proposed provision for the collective bargaining agreement falls somewhere along that continuum. At some point in the negotiating process it will be determined that the employer has an absolute obligation to negotiate regarding certain proposals. By the same standard, at some point in the negotiating process it will be determined that the employer's discretion in respect to certain proposals is beyond question."*

As the Illinois court noted in Decataur Bd. of Ed. v. Ed. Labor Bd., 536 N.E.2d 743 (Ill.App. 4 Dist. 1989):

> *"Too many factors in school operations overlap, requiring a method for deciding between managerial exclusivity and employee participation through bargaining."*

The method utilized to reconcile the conflict is the balancing test. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. Local 1052 v. Public Emp. Rel. Com'n, 778 P.2d 32, 35 (Wash. 1989). Such a method recognizes the statutory management rights embodied in PEERA, as Respondent maintains is necessary, but not to the exclusion of the rights granted public employees and employee organizations, as Respondent's interpretation would require.

The Pennsylvania court in Dept. of Transp. v. Labor Relations Bd., 543 A.2d 1255 (Pa. 1988) explained the balancing test in this manner:

> *"[W]here an item of dispute is a matter of fundamental concern to employees' interest in wages, hours and other items and conditions of employment, it is not removed as a matter subject to good faith bargaining . . . simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole."* Id. at 1256-57.

Here it is necessary to weigh the right of the public employee and employee representative to meet and confer over conditions of employment before changes are made by adoption of rule or regulation against the need of public employers for flexibility and management prerogatives in order to assure "orderly and

uninterrupted operations and functions of government" through the inclusion of the "savings clause" in the memorandum of agreements. For the reasons set forth previously in examining the issue of negotiability of the "savings clause," the interests of the public employees in this issue outweighs the effect non-mandatory negotiability will have on managerial rights.

ISSUE III

WHETHER THE SECRETARY OF ADMINISTRATION COMMITTED A PROHIBITED PRACTICE BY REJECTING THE MEMORANDUM OF UNDERSTANDING AT PITTSBURG STATE UNIVERSITY OR KANSAS STATE UNIVERSITY.

Petitioner alleges Respondent's rejection of the memorandum of agreement ratified by Kansas State University and Petitioner, and its refusal to allow execution of a memorandum of understanding between Pittsburg State University and Petitioner because neither agreement contained a "savings clause" acceptable to the Secretary of Administration constitutes a violation of K.S.A. 75-4333(b)(5) and (6).

The pertinent sections of PEERA involved in this issue are set forth below:

> **K.S.A. 75-4333(b).** *"It shall be a prohibited practice for a public employer or its designated representative willfully to:*
>
> * * * * *
>
> *"(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327;*
>
> *"(6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328; . . ."*

K.S.A. 75-4328. *"Recognition of right of employee organization to represent employees. A public employee shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition."*

K.S.A. 75-4331. *"Memorandum of understanding; financial report; consideration and action; rejection. If agreement is reached by the representatives of the public agency and the recognized employee organization, they jointly shall prepare a memorandum of understanding and, within fourteen (14) days, present it to the appropriate governing body or authority for determination. The governing body or authority . . . shall consider the memorandum and take appropriate action . . . If a settlement is reached with an employee organization and the governing body or authority, the governing body or authority shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum, the matter shall be returned to the parties for further deliberation."*

K.S.A. 75-4322(f). *"'Public agency' or 'public employer' means every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies."*

K.S.A. 75-4322(e). *"'Governing body' means the legislative body, policy board or other authority of the public employer possessing legislative or policy making responsibilities pursuant to the constitution or laws of this state."*

K.S.A. 75-4322(h). *"'Representative of the public agency' means the chief executive officer of the public employer or his or her designee, except when the governing body provides otherwise, and except in the case of Kansas and its state agencies. . . . In the case of the state of Kansas and its agencies, 'representative of the public employer' means a term or persons, the head of*

> *which shall be a person designated by the secretary of administration and the heads of the state agency or state agencies involved or one person designated by each such state agency head."*

The initial issue is *"Who is the 'governing body' in these cases; Pittsburg State University or Kansas State University, the Board of Regents, the Department of Administration, or some combination thereof?"* Fortunately, at least as to regents institutions, that issue has been resolved by the courts. In Pittsburg State, 233 Kan. at p. 810-12, the Board of Regents raised the affirmative defense against the prohibited practice complaints that it was not the public employer of the affected employees for purposes of K.S.A. 75-4333(b). The Board of Regents argued that each individual institution was the ultimate employer of the public employees in its employment.[15] The Public Employee Relations Board determined the Board of Regents was the "*ultimate employer*" and that its negotiating team consisted of its designated representatives. Id. at p. 810.

The Kansas Supreme Court reviewed the authority of the Board of Regents[16] and concluded:

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[15] It should be noted that the Board of Regents was represented by the State Attorney General. A review of the Board of Regent's arguments at the PERB, District Court and Supreme Court levels uncovers no allegation by the Board of Regents that the Department of Administration was the "public employer" or "governing body."

[16] As the court explained: "Article 6, section 2, of the Constitution of the State of Kansas provides:

> "'(b) The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education. Public institutions of higher education shall include universities and colleges granting baccalaureate or post baccalaureate degrees and such other institutions and educational interests as may be provided by law. The state board of regents shall perform such other duties as may be prescribed by law.'

(continued...)

> *"Without detailing the evidence, we think it is clear beyond question that the Board of Regents is the ultimate authority. It must direct and be responsible for negotiations with the employee teams at the several state educational institutions under its jurisdiction, and it, as the employer and "the appropriate governing body," must approve any proposed agreement in order to make it binding and effective. K.S.A. 75-4331. . . . We conclude that PERB and the district court were correct in holding that the Board of Regents is the appropriate employer under the Act."* Id. at p. 812.

Noticeably missing in this statement is any reference to the authority of the Department of Administration to direct or be responsible for negotiations at the regents institutions, or to approve or reject any proposed agreement. These responsibilities were vested solely in the Board of Regents, and only its approval is required to make a memorandum of understanding into a binding memorandum of agreement.[17]

Respondent places importance upon the fact that K.S.A. 75-4322(h) provides for the Secretary of Administration shall designate the head of the negotiating team serving as the "*representative of the public agency*." Here, the negotiating team

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[16](...continued)
By K.S.A. 1982 Supp. 74-3201 et seq., the legislature created a nine-member state board, to be known as the Board of Regents. Specific powers and duties of the Board are set forth in the following sections of the statutes. The Regents appoint the chief executive officers of all state educational institutions under their jurisdiction, including Pittsburg State University. These state educational institutions are controlled by, operated, and managed under the supervision of the Board of Regents. The Regents are authorized by statute to make contracts and adopt orders, policies, or rules and regulations and to do or perform such other acts as are authorized by law or are appropriate for such purposes. K.S.A. 76-711, -712, -714. The Board of Regents may be sued and may defend any action brought against it or against any state educational institution; state educational institutions also may be sued and may defend actions brought against them. K.S.A. 76-713. The chief executive officer of each state educational institution is authorized by the Board of Regents; employees in unclassified service serve at the pleasure of the chief executive officer, subject to policies approved by the Board of Regents. The Regents determine the programs which shall be offered and the degrees which may be granted at each state educational institution. K.S.A. 76-715, -716."

[17] For a detailed explanation of the difference between a "memorandum of understanding" and a "memorandum of agreement" see the PERB order in Emporia State, supra.

in question is the representative of the Board of Regents, not the Department of Administration or Secretary of Administration. The Secretary's designee is only one member of the team, and the designee's presence on the team does not transform the Respondent into the employer of the service and maintenance employees at Pittsburg State University and Kansas State University. Reasonably, the main reason the legislature provided for a Secretary's designee on the public employer's negotiating team is to provide an expertise in meet and confer negotiations. Logically, the representative(s) appointed by the public employer may have no experience in negotiating a memorandum of agreement or only limited experience from negotiating every year or so, as compared to the expertise available from a representative of the Secretary of Administration whose main responsibility is the negotiation of agreements. The presence of the Secretary's designee on all negotiating teams for state agencies also provides some "*consistency between classified employees covered by a memorandum of agreement and other classified employees covered by a different memorandum of agreement.*" (Respondent's Brief at p. 17). It cannot be argued that the Supreme Court was unaware of the Secretary of Administration's designatee serving as head of the negotiating team because it sets out in its entirety the statutory definition of "*representative of the public agency*" immediately before stating its conclusion cited above.

Clearly, in the cases under consideration here, the Board of Regents is the "*public employer*" and "*governing body*" of the service and maintenance employees at Kansas State University and Pittsburg State University. Since, as the court concluded in Pittsburg State, the Board of Regents is "*the appropriate governing body*" for purposes of K.S.A. 75-4331, the Secretary of Administration had no authority to reject the memorandum of understanding submitted by the Kansas State University and Petitioner to the Board of Regents, or to return it to the parties for further deliberation in accordance with K.S.A. 75-4331.[18]

This conclusion finds further support in the attempt to amend PEERA in 1976. Included among the proposed amendments, as noted by Professor Goetz,[19] was a provision requiring approval of all memorandums of agreement by the Secretary of Administration before they became affective.[20] The inferences to be drawn from the inclusion of this proposal among the amendments and the ultimate

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[18] This should not be interpreted to mean that public employers are free from any restraints to enter into memorandums of agreement. PEERA provides a system of checks upon provisions included in a memorandum of agreement by suspending the effectiveness of such provisions until necessary legislative or finance council action has been taken. K.S.A. 75-4330(c) provides:

> "Notwithstanding the other provisions of this section and the act of which this section is a part, when a memorandum of agreement applies to the state or any state agency, the memorandum of agreement shall not be effective as to any matter requiring passage of legislation or state finance council approval, until approved as provided in this subsection. When executed, each memorandum of agreement shall be submitted to the state finance council. Any part or parts of a memorandum of agreement which relate to a matter which can be implemented by amendment of rules and regulations of the secretary of administration or by amendment of the pay plan and pay schedule **may be approved or rejected** by the state finance council, and if approved, shall thereupon be implemented by it to become effective at such time or times as it specifies. Any part or parts of a memorandum of agreement which require passage of legislation for the implementation thereof shall be submitted to the legislature at its next regular session, and if approved by the legislature shall become effective on a date specified by the legislature." (emphasis added).

[19] See, footnote # 3, supra., and the Order, at p. .

[20] Senate Bill 629, Kan. Legis. §10(a) (1976).

failure of the legislation to be enacted into law are two-fold; there was concern that PEERA, as written, contained no such requirement, and the legislature saw no need to include it.

Respondent argues that it meets the definition of "*governing body*" as it relates not only to the service and maintenance employees at the regents institutions, but to all units involving classified state employees, and therefore has authority to reject a memorandum of understanding, (Respondent's Brief at p. 22):

> *"Petitioner takes the view that the Secretary of Administration cannot act as or on behalf of a 'governing body' in rejecting a savings clause (see Petitioner's 'Answer to Respondent's Counter Claim' Paragraph 5). However, the Act defines 'governing body' as follows:*
>
> > *"(g) 'governing body' means the legislative body, policy board or other authority of the public employer possessing legislative or policy-making responsibilities pursuant to the constitution or laws of this state. (Respondent's emphasis).*
>
> *"Under the above-quoted definition the question then becomes whether or not the Secretary of Administration possesses policy making responsibilities regarding employees [at Pittsburg State University and Kansas State University] represented by Petitioner."* Id.

Respondent then outlines its authority as a policy-maker as it relates to the classified employees, and in particular under the Kansas Civil Service Act. From this Respondent concludes it meets the "*or other authority . . . possessing . . . policy-making responsibilities*" standard it maintains in the appropriate test to be used in determining who is the "*appropriate governing body*" under K.S.A. 75-4331.

There is no question the Department of Administration, as a state agency, can be a "*public employer*" and a "*governing body*" pursuant to the definitions in PEERA, or that it possesses "*policy-making responsibilities.*" However, the standard proposed by Respondent overlooks one very important phrase; "*of the public employer.*" According to K.S.A. 75-4322(g) a "*governing body*" is the "*legislative body, policy board or other authority* ***of the public employer*** . . ." In essence, the legislative body, policy board or other authority must be an integral part of the public employer, i.e. the ultimate authority responsible for negotiations with the employee teams. It does not refer to just any public employer who possesses policy-making responsibilities.

As determined previously, the Board of Regents is the "*public employer*" of the service and maintenance employees at Pittsburg State University and Kansas State University. If "*Board of Regents*" was substituted for the phrase "*public employer*" in K.S.A. 75-4322(g) the pertinent part of that statute would read:

> "*'Governing body' is the legislative body, policy board or other authority of the Board of Regents . . .*"

Neither Respondent nor the Secretary of Administration is a legislative body, policy board or other authority of the Board of Regents, but instead the Department of Administration is a separate and distinct agency of the State of Kansas. It therefore cannot here be considered the governing body for purposes of K.S.A. 75-

4331. The Board of Regents is the "*public employer*" and its nine member board the appropriate "*governing body*."

The conclusion that Respondent is not the "*governing body*" contemplated by K.S.A. 75-4331 finds further support upon examination of the employer-employee relationship of concern here. If one is not the "*employer*" of public employees, then one is not truly a "*public employer*" even though meeting the requirements of K.S.A. 75-4322(f). To be an "*employer*" a person must be in an employer-employee relationship. *See* United Ass'n of Journeymen and Apprentices v. Flamegas Detroit Corp., 217 N.W.2d 131 (Mich. 1974). General characteristics of "*employers*" are that they select and hire employees, that they pay wages, and that they have power and control over employee conduct. Saginaw Stage Employees, Local 35 v. City of Saginaw, 387 N.W.2d 859, 860 (Mich. 1986). The most important test of the existence of an "*employer-employee relationship*" is whether the employer has the right to control and direct the employee. Yellow Cab Co. v. Magruder, 49 F.Supp. 605 (1943).

Under the set of facts here, only the Board of Regents meets the criteria set forth above for an "*employer*" for the service and maintenance employees at Pittsburg State University and Kansas State University. While Respondent may have some control over the conduct of the employees through the regulatory process, such control is remote and not on a day to day basis, and therefore not sufficient to make Respondent an "*employer*" of these employees

since it exhibits none of the other characteristics of their employer.

[7] K.S.A. 75-4333(b) provides a prohibited practice can be committed only by a "*public employer or its designed representative.*" "*Public employer*" must be read to mean the employer of the employees in the unit filing the complaint. A prohibited practice complaint may be filed then against that employer or "*its designated representative.*" Webster's II, New Riverside University Dictionary, at p. 367, defines "*designate*" to mean "*To indicate or specify: point out. . . . To select for a duty, office, or purpose: Appoint.*" Black's Law Dictionary, 5th ed., defines "*Representative*" as "*One who represents or stands in the place of another.*" K.S.A. 75-4333(b) then appears to apply only to the public employer of the affected employees, or one specifically appointed by the public employer to act on its behalf.

Having determined Respondent is not the "*public employer*" of the service and maintenance employees at Pittsburg State University and Kansas State University, Respondent can only have committed the prohibited practice complained of by Petitioner if it was acting as the Board of Regent's "*designated representative*" when the Secretary of Administration insisted on negotiating the "*savings clause.*" Because the fact situations are different, the two cases must be considered individually.

KANSAS STATE UNIVERSITY

In 75-CAE-12-1991 the Board of Regents ratified the memorandum of understanding submitted by Petitioner and Kansas State University which did not contain the "savings clause" language required by the Secretary of Administration. It must be assumed the Board of Regents was aware of the importance placed on the "savings clause" since the Secretary's designee, Mr. Lietnaker, served on the Kansas State University negotiating team and surly would have made the Secretary's position known to the other members of the negotiating team.

The stipulated findings of fact contain no evidence that the Secretary of Administration, in rejecting the memorandum of understanding and insisting the parties continue to negotiate the language of the "savings clause" was acting as the "designated representative" of the Board of Regents. In fact, the ratification of the memorandum by the Board of Regents despite the Secretary's objection raises the inference that no such delegation occurred.[21]

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21 An administrative agency empowered to determine whether statutory rights have been violated may infer within the limits of the inquiry from the proven facts such conclusion as reasonably may be based upon the facts proven. Republic Aviation Corp. v. N.L.R.B., 324 US 793, 800 (1944). In Radio Officers', 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 experience 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.

(continued...)

Since Respondent was not the "public employer" of the service and maintenance employees at Kansas State University, nor serving as the Board of Regents' designated representative when the Secretary of Administration attempted to reject the memorandum of understanding, it could not commit a prohibited practice as set forth in K.S.A. 75-4333(b)(5) and (6). Accordingly, Petitioner's complaint must be dismissed.

PITTSBURG STATE UNIVERSITY

In 75-CAE-13-1991 the negotiating teams for Pittsburg State University and Petitioner either reached tentative agreement on all issues in dispute or removed the subjects from the negotiating table; all except the "savings clause." Pittsburg State's representative explained to Petitioner's representative that the tentative agreement was conditioned upon Petitioner reaching agreement with the Secretary of Administration over acceptable language for a "savings clause" to be included in the memorandum of understanding. Although discussions were held to attempt to find mutually acceptable language, no agreement was forthcoming. The tentative agreements were not put in the form of a memorandum of understanding, nor submitted to, or ratified by, the Board of

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[21](...continued)
A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers', supra at 50.

Regents, thus distinguishes this fact situation from the Kansas State University case.

Here, since the Board of Regents, through its representative to the negotiations, allowed the Secretary of Administration to continue to negotiate on its behalf, and conditioned the final agreement upon the success of those negotiations, the Secretary must be considered to have acted as the Board of Regents' designated representative. The fact that the Board of Regents took no action to rescind that designation, reject the Secretary of Administration's insistence on the "savings clause" or reduce the tentative agreement to a memorandum of understanding for ratification, further supports the conclusion that the Secretary of Administration was acting as its representative. Having determined that the "savings clause" is not a mandatory subject of negotiations, and that insisting upon inclusion of a permissive bargaining subject in a memorandum of agreement constitutes a prohibited practice, Respondent, as the "designated representative" of the Board of Regents, committed a prohibited practice as set forth in K.S.A. 75-4333(b)(5) and (6).

ISSUE IV.

WHETHER THE KANSAS ASSOCIATION OF PUBIC EMPLOYEES FAILED TO BARGAIN IN GOOD FAITH IN VIOLATION OF K.S.A. 75-4333(c)(3) WHEN IT REFUSED TO MEET AND CONFER ON THE "SAVINGS CLAUSE."

Having determined that the "savings clause" is not a "*mandatory*" subject for meet and confer negotiations, Petitioner was under no obligation to return to the bargaining table to continue to meet and confer with the employers over language Respondent insisted be included in the memorandum of understanding. Therefore, Petitioner did not refuse to meet and confer in good faith on the issue of the "savings clause" in violation of K.S.A. 75-4333(c)(3).

ORDER

IT IS THEREFORE ADJUDGED that in this case the "savings clause" as proposed by Respondent is not a mandatory subject of meet and confer negotiations under the Public Employee Relations Act.

IT IS FURTHER ADJUDGED that K.S.A. 75-4326, management rights statute, is not controlling in the determination of mandatory negotiability of subjects but must be weighted against the rights granted to public employees by K.S.A. 75-4324 and the obligations placed upon the public employer by K.S.A. 75-4327(b), K.S.A. 75-4323(m) and K.S.A. 75-4323(t).

IT IS FURTHER ADJUDGED that as to Case No. 75-CAE-12-1991 the Respondent is not a "public employer or its designated representative" as required by K.S.A. 75-4333(b) and therefore cannot be determined to have committed a prohibited practice as set forth in K.S.A. 75-4333(b)(5).

IT IS FURTHER ADJUDGED that as to Case No. 75-CAE-13-1991 the Respondent was acting as the "designated representative" of Pittsburg State University and therefore committed a prohibited practice as set forth in K.S.A. 75-4333(b)(5) when it insisted upon negotiation of a "permissive" subject, the "savings clause," and its inclusion in the memorandum of understanding as a condition to final agreement on all other subjects tentatively agreed to for inclusion in the memorandum of understanding.

IT IS FURTHER ADJUDGED that as to Respondent's counterclaim, Petitioner did not commit a prohibited practice in violation of K.S.A. 75-4333(c)(3) when it refused to negotiate the issue of the "savings clause" since it is a "permissive" subject of meet and confer negotiations under the Public Employee Relations Act.

IT IS THEREFORE ORDERED that Case No. 75-CAE-12-1991 be dismissed, the memorandum of agreement ratified by Petitioner and the Board of Regents for Kansas State University be implemented, and the Secretary of Administration cease and desist his interference with the agreement.

IT IS FURTHER ORDERED that the counterclaim filed by Respondent against the Petitioner in 75-CAE-12-1991 be dismissed.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Supervisor for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 10th day of February, 1992, a true and correct copy of the above and foregoing Initial Order was hand delivered to:

Brad Avery, Counsel
Kansas Association of Public Employees
1300 Topeka Blvd.
Topeka, Kansas 66607.

Arthur H. Griggs, Staff Attorney
Linda Fund, Staff Attorney
Department of Administration, Room 107
Landon State Office Bldg.
900 Jackson
Topeka, Kansas 66612.

Gary E. Leitnaker
Director of Labor Relations
Department of Administration
Landon State Office Building, Room 951-South
900 Jackson
Topeka, Kansas 66612

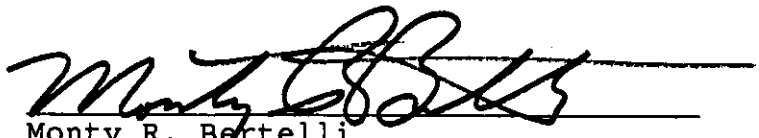
and deposited in the U.S. mail, first class, postage prepaid, addressed to the members of the PERB.

Sharon Tunstall

IT IS FURTHER ORDERED that as to Case No. 75-CAE-13-1991 the Respondent shall cease and desist violating K.S.A. 75-4333(b)(5) by insisting upon inclusion of "savings clause" language at issue in this case in the memorandum of understanding as a condition to final agreement on all other subjects tentatively agreed upon for inclusion in the memorandum of understanding.

IT IS FURTHER ORDERED that as to Case No. 75-CAE-13-1991 the tentative agreement reached between Petitioner and Pittsburg State University, excluding the "savings clause" language at issue in this case, be reduced to writing and submitted to the Board of Regents for ratification and implementation.

Dated this 10th day of February, 1992.



Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final order fifteen (15) days from the date of service listed below in the Certificate of Service, 18 days if service is by mailing, unless a petition for review pursuant to K.S.A. 77-527(b) & (c) is filed within that time with the Public Employee Relations Board, Department of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, Topeka, Kansas 66603.

APPENDIX

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ATTACHMENT C

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

October 20, 1989

RECEIVED
DEC 17 1990
Kansas Dept. of Human Resources
(ES & LR)

Rosalind Fisher
Personnel Services
Kansas State University
Anderson Hall
Manhattan, Kansas 66506

Dear Rosalind:

To avoid any confusion I have chosen to reduce to writing the position I took at today's meeting relative to impasse.

It is my position, and the position of KAPE, that of the eight issues listed in our letter of July 19, 1989, only four of those articles involve statutorily defined terms and conditions of employment. Those are articles 10 (stand-by), 26 (health insurance), 28 (longevity), and 45 (pay plan). As items included in the statutory laundry list of terms and conditions of employment they constitute subjects over which either party ~~now~~ may demand to meet and confer (i.e., manditory subjects of bargaining).

It is also my position that the other four articles address statutory rights which are otherwise granted to the parties. Those articles are articles 3 (management rights), 43 (rules and regulations), 49 (savings clause) and article 50 (duration and termination). As rights which the legislature has granted statutorily, the parties may agree to a provision which conditions those rights or limits them, but may not be required to meet and confer in their regard (i.e., permissive subjects of bargaining). In addition, if no agreement is reached in their regard, neither party may impose its position on the other. The parties simply revert to the statutory language. The fact that one of the parties saw fit, for some reason, at some point in time in the past, to agree to a limitation on their statutory rights does not serve to forever waive those rights. Only during the life of, and to the extent provided by the agreement, are they altered.

B

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

2

Attachment A

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

RECEIVED
JUL 25 1989
AGENCY SERVICES
PLANNED ASSISTANCE
DIVISION OF PERSONNEL SERVICES

MEMO

TO: Rosalind Fisher, Personnel Director

FROM: Dave Suttle

RE: Notice of Impasse, Article 46

DATE: July 19, 1989

As per Section 1, Article 46, I am requesting mediation on the attached issues. Articles 3, 10, 26, 28, 43, 45, 49, and 50. The enclosed articles represent Chapter 11's present positions as presented to Kansas State University at our last meet and confer session on July 18, 1989.

Further communication from you regarding this notice and Chapter 11 negotiations should be directed to this office in care of Mr. Paul Dickhoff.

Also, for your information I have provided a copy of the impasse procedure.

cc: Charles Dodson
John Province
Wilmer Allen
Myrlene Kelley
Don Kuehn

A

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506
913-532-6277

November 2, 1989

Mr. Paul Dickhoff
Kansas Association of Public
Employees
400 W. 8th Ave., Suite 103
Topeka, KS 66603

Dear Paul:

In regard to your letter of October 20, 1989, perhaps we too need to put our position in writing so that there will not be any confusion.

As you state in your letter, on July 19, 1989, KAPE notified KSU that an impasse had been reached on remaining articles for meet and confer. KAPE listed all the remaining articles on which agreement had not been reached, whether mandatory or non-mandatory. On the same date, July 19, 1989, KSU sent the same notification to KAPE, also listing all articles, both mandatory and non-mandatory, on which agreement had not been reached. Subsequently, no counter-proposals were submitted to the other by either party.

In submitting both mandatorily negotiable and permissible items, it was not our intent to demand mediation on non-mandatory items, and we assumed that that was not KAPE's intent either. Moreover, our conclusion that impasse had been reached was not based on failure to reach agreement on non-mandatory items. We cannot, of course, know which items motivated KAPE to declare impasse and request mediation. In short, despite your having listed the permissible items in your letter of July 19, 1989, we will certainly honor your present position that you will not participate in mediation of such issues.

C

4

I realize that you don't agree with my position on this issue and for that reason I offered to join with you in approaching the PERB board for an opinion regarding negotiability on these articles. As you will recall, you refused to join me in such a request. I therefore reiterate the position I took at the table that KAPE may not, and will not, be required to enter into mediation regarding anything other than manditory subjects of bargaining. KAPE will, likewise, view any effort by the University to force mediation in regard to permissive subjects as a serious infringement on our rights and a violation of KSA 75-4333.

I do not seek such a confrontation with the University and, therefore, strongly encourage the elimination of permissive subjects from any request for mediation and/or any successor agreement. I can also understand your interest in seeing certain articles included in our memorandum of agreement. I can assure you that KAPE has similar interests. That is the very reason the legislature has sent us both to the bargaining table, "to endeavor to reach agreement". Simply put, if that endeavor is unsuccessful the University may dictate relative to manditory subjects but has no right to, in any way, unilaterally amend KAPE's statutory rights. That is a long standing principle of labor relations whose violation is inexcuseable. As stated earlier, it is my hope that we do not find ourselves on opposite sides of litigation over this matter, but I can assure you that I am prepared to take whatever steps are necessary to protect the rights of those I represent.

If this communication is unclear to you I encourage you to contact me at any time.

Sincerely,

Paul K. Dickhoff, Jr.
Director of Negotiations

cc: Dorothy Thompson
Gary Leitnaker
John Province
PERB

PKD/gcd

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506
913-532-6277

November 16, 1989

Paul Dickhoff, Jr.
Director of Negotiations
KAPE Organizing Project, FSE/AFT
400 W. 8th Avenue, Suite #106
Topeka, KS 66603

Dear Paul:

Article 46, Impasse, of our memorandum of agreement states that "If, after discussion between the parties of a counter-proposal, either party concludes that the impasse still exists, it may notify the other party in writing and jointly the parties shall request mediation." This article does not require prior agreement as to which issues will be mediated or even agreement between the parties that impasse exists. This provision simply requires that both parties must jointly request mediation. Therefore, I have attached to our joint letter to the FMC all of the correspondence relative to Impasse to provide a neutral history of what has transpired.

Although we may both agree not to insist that the other party mediate a permissive item, the University believes that agreement to mediate all outstanding issues would be helpful in this case. The articles which you have questioned as appropriate for mediation were all opened by your organization through proposed modifications, both teams have spent considerable time discussing these items, and at one time both parties had agreed to mediate these items as well. In the alternative, both parties should elect to withdraw all outstanding proposals on these articles with the effect of continuing the current language in any successor agreement. As these articles were opened by your organization and no agreement has yet been reached, it should be noted that if neither of these alternatives is followed, these matters will remain of concern to the University.

After signing the joint mediation requestion, please forward the letter and attachments to the FMC in accord with Article 46 of our memorandum of agreement.

Sincerely,

Rosalind Fisher

Rosalind Fisher
Director of Personnel
Spokesperson
Attachments
cc: KSU Team Members
John Province

D

If our position in this matter is in any way unclear to you, please don't hesitate to ask for further clarification.

Sincerely,

Rosalind Fisher
Director

/np

cc: Dorothy Thompson
Gary Leitnaker
John Province
PERB

(ATTACHMENT E)

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

November 30, 1989

Rosalind Fisher
Director of Personnel
Anderson Hall KSU
Manhattan, Kansas 66506

Dear Rosalind:

I am in receipt of your November 16 letter regarding negotiations and its accompanying attachments. After reading that letter it is obvious to me that we are vastly separated in our opinions regarding the next steps to be taken in attempting to resolve this impasse.

To begin with, Article 46 of our own agreement may or may not even be valid as one reads the requirements of KSA 75-4332(a). But that hurdle aside, there are still many technical points on which we disagree. Primary among them is the effect of our current Article 50 on the future of the agreement.

It is the position of KAPE that when notice was given to Kansas State University in December of 1988 that KAPE wished to change certain portions of the agreement that those articles were destined to one of three fates: first, agreement; second, unilateral establishment by the employer after bargaining <u>if</u> the article could qualify as a "condition of employment"; and third, elimination for the successor agreement if it could not so qualify and agreement could not be reached.

I have arrived at that conclusion based on the statutory language which defines "meet and confer in good faith" and the list of "conditions of employment". KSA 75-4324 gives employees the right to "meet and confer" over "conditions of employment". Current law <u>requires</u> KAPE and Kansas State University to negotiate only those subjects listed under "conditions of employment" in PEERA and those meeting the "Pittsburg" test. Neither KAPE nor Kansas State University has the right to compel negotiations, mediation or fact finding on any other subject. I'm sure we both realize that there are a good many articles within our agreement which are not listed in the statute as "conditions of employment", but appear in the agreement nonetheless because we have <u>agreed</u> that they <u>should</u> appear there.

E

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

Those are not subjects which we are mandated to negotiate but are permitted to negotiate if we both so desire. In addition, those articles are automatically continued from year to year pursuant to our memorandum of agreement unless notice is given that one party wants to change the agreement. Now that notice has been given there is no way, barring agreement by KAPE, that those articles which are other than manditory, may be continued in a successor agreement. If that type of situation were permissable under the act, neither KAPE nor Kansas State University would ever be well advised to discuss anything they were not mandated to discuss and the primary purpose of the act, full and open communication, would be thwarted. Similarly, if such a situation were permissable, you can rest assured that KAPE would not file a notice to change articles under Article 50, but would rather file a notice to terminate the entire agreement and start over from scratch each year. You have already acknowledged that annual negotiations are less than desirable in your opinion but your current posture leaves KAPE with no alternative but to approach bargaining from that perspective. I'm sure neither KAPE nor Kansas State University intended Article 50 to create such a situation but neither did KAPE intend to forever give up its rights relative to permissive subjects of bargaining.

Another shortcoming of dealing with the current impasse under the provisions of Article 46 is the inconsistance within that article. Certainly at some point as we approach the condition of impasse I believe we need to list all of the outstanding issues and our positions on each. I believe Article 46 does that within Section 1 and I believe KAPE has fulfilled the requirements of Section 1. The problem we are now experiencing does not arise as a dispute that we need mediation but rather in regard to the issues which may go to mediation.

Article 46 has not been exercised in several years and we have agreed on a procedure which will be used henceforth, hopefully to everyone's advantage. Both the new procedure and the current Article 46 are procedures arising from the language of KSA 75-4332, and the mediation referenced in those articles is statutorily defined as applicable to disputes regarding "conditions of employment", not permissively negotiable subjects. The point is this; your letter of November 16 indicates that Article 46 "...does not require prior agreement as to which issues will be mediated...", and with that statement I fully agree. No "prior agreement" is necessary since the law limits mediation to "conditions of employment". It only stands to reason that if I can't be required to meet and confer over a particular subject I certainly can't be required to proceed to mediation or fact finding over that subject.

I also totally disagree with your opinions outlined in paragraph 2 of your November 16th letter. I contend, in reply to your first sentence, that I don't need your concurrance to eliminate a permissive item from mediation, the law does that.

In regard to your second sentence, I contend that the only way to legally remove articles from the agreement is through the procedures KAPE has agreed to under Article 50 and complied with in this case. I do take exception to your statement that KAPE had at one time agreed to mediate these issues. KAPE had rather tried to follow the imperfect provisions of Article 46, suggested substitute priovisions to better comply with the act, and has finally tried to act in a sensible way within the paramenters of Article 46 and its shortcomings.

In regard to your third sentence I couldn't disagree more. I believe that if we are unable to reach an agreement on manditory subjects (conditions of employment), the employer is empowered, after mediation and fact finding, to make unilateral decisions on those subjects. I further believe, however, that permissive subjects (all employment matters which do not qualify as "conditions of employment") which are noticed, negotiated, and not agreed upon are eliminated from successor agreements.

Under any set of circumstances I believe it is obvious that we still have vast differences of opinion over how Article 46 is to be interpreted and/or applied. Normally when such a situation arises, a grievance may be filed under the agreement. Negotiability, however, is an issue within the purview of the PERB rather than FMCS or any other arbitrator and for that reason KAPE has continued to avoid that avenue. Neither does KAPE wish to charge Kansas State Univerity with bad faith bargaining as evidenced by their refusal to drop permissive sujects from their request for mediation or even to approach the PERB for a ruling on the negotiability of the four articles in question.

Fortunately I believe I have found an answer to our mutual dilemma within KSA 75-4332(b). Specifically I am referring to the language in the first sentence of that section which states:

> "In the absence of such memorandum of procedures, <u>or upon the failure of such procedures resulting in an impasse,</u> either party may request the assistance of the public employee relations board or the board may render such assistance on its own motion,"

That portion of Subsection (b) would apply to the four topics upon which we both agree may go to impasse. In addition, the statute states, "In either event, if the board determines impasse exists. . . ." The board is therefore charged with making its own judgment regarding the state of negotiations.

Since "impasse", as used in PEERA, inherently includes mediation and fact-finding, I believe the board will be required to make a determination that those two processes may not be required when permissive subjects are involved.

In my opinion the procedures we agreed upon in Article 46 have certainly failed to resolve our impasse and I don't believe we are making much progress toward that resolution in our current course of action.

You may, therefore, accept this correspondence as your official notice of my request for impasse assistance from the PERB in accordance with KSA 75-43321 I'm confident that the PERB in their investigation regarding determination of the existance of impasse will answer many, if not all, of the questions which have arisen. In addition, through this process neither party will be the respondent in a prohibited practice charge, which I believe is otherwise unavoidable, and finally, PERB will be in a perfect position to address the question of negotiability.

I hope the value of this approach is as apparent to you as it is to me and if I have been unclear on any point please contact me. In the alternative I will await contact from PERB.

Sincerely,

Paul K. Dickhoff, JR.
Director of Negotiations

cc: Gary Leitnaker ✓
Dorothy Thompson
John Province

PKD/gcd

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

KAPE Organizing Project, FSE/AFT
400 WEST 8TH AVE. SUITE #106 TOPEKA, KANSAS 66603
(913) 233-1956

Copy

December 4, 1989

Monty Bertelli
1430 Southwest Topeka Boulevard
Topeka, Kansas 66608

Dear Mr. Bertelli:

As you know, KAPE and Kansas State University have been engaged in negotiations regarding an agreement to succeed the existing memorandum of agreement relative to the Service and Maintenance Unit at the University. The prior agreement was noticed for change in accordance with its own Article 50 in December of 1988. A copy of that article is enclosed.

In October of this year KAPE concluded that bargaining had reached a stalemate and wished to move the process toward a timely conclusion. The procedure through which one accomplishes that end is spelled out in the agreement in Article 46 which is included in the agreement pursuant to KSA 75-4332. A copy of Article 46 is also included.

In my opinion Article 46 has many shortcomings but I also believe I was required to attempt to use it in order to maintain "good faith". The process outlined in our Article 46, however, has failed to resolve our impasse. We are unable to even agree on the issues which should be subject to mediation and/or fact finding. For that reason, and in accordance with KSA 75-4332(b), I am hereby requesting the assistance of the Public Employee Relations Board in resolving this dispute. The four "conditions of employment, which I believe are in need of mediation assistance are Articles 10, 26, 28 and 45, which are Stand-by, Health Insurance, Longevity Pay and Salary, respectively. The four Articles which I do not believe qualify as "conditions of employment" are Articles 3, 43, 49 and 50, which are Management Powers and Rights, Rules and Regulations, Savings Clause and Duration and Termination respectively.

I appreciate your assistance in this matter and if questions should arise, or if more information is required, please feel free to contact me as needed.

Sincerely,

Paul K. Dickhoff, Jr.
Director of Negotiations

cc: Rosalind Fisher
Dorothy Thompson
Gary Leitnaker
John Province

Enc.

ATTACHMENT G

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506
913-532-6277

December 4, 1989

Mr. Paul Dickhoff
Director of Negotiations
Kansas Association of Public Employees
400 W. 8th Avenue, Suite 103
Topeka, KS 66603

Dear Paul:

This is in reply to your letter of November 30, 1989. It appears from that letter that KAPE is, without any legitimate justification, refusing to comply with the terms of Article 46, "Handling Impasse," of the current Memorandum of Agreement between the State of Kansas, Kansas State University and the Kansas Association of Public Employees. We base that conclusion on the following undisputed facts:

1. K.S.A. 75-4332(a) states that "public employers may include in memoranda of agreement concluded with recognized employee organizations a provision setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of meet and confer proceedings." Article 46 constitutes such a provision.

2. On July 19, 1989, KAPE notified Kansas State University that, in accord with Article 46, it was requesting mediation on Articles 3, 10, 26, 28, 43, 45, 49, and 50. On the same date, KSU sent the identical notice to KAPE.

3. The July 19, 1989, notice of impasse under Article 46 from KAPE came from Dave Suttle and directed us to address further communication on this notice to you as the new spokesperson for the KAPE team for Chapter 11.

4. By mutual agreement, KAPE and KSU held an additional meet and confer session to determine whether agreement on outstanding issues could be reached. No such agreement was reached, and the prior KAPE notices off impasse and requests for mediation remained valid.

G

5. In a letter of October 20, 1989, you insisted that KSU was requiring you to enter into mediation regarding non-mandatory subjects of meet and confer.

6. On November 2, 1989, we expressly advised you that, despite your having listed permissive items in your letter of July 19, 1989, we would honor your present position that you will not participate in mediation of such issues.

As you know, the permissive subjects in question were contained in KAPE's notice of articles on which it desired to meet and confer. Those permissive subjects have been subjects of meet and confer discussions over a period of several months. Just as we can agree to meet and confer regarding permissive subjects, we can certainly submit them for mediation. KAPE has now indicated that it does not wish to mediate permissive items. As we have clearly stated, we do not intend to force mediation of permissive items. Thus, the provisions of Article 46 have not failed. It does appear, however, that KAPE is refusing to go forward with mediation of mandatory items under the agreement. Any attempt to circumvent the impasse procedure in Article 46 is not acceptable.

We are again requesting that you sign and forward the joint request for mediation, which I sent you on November 16, 1989, to the Federal Mediation and Conciliation Service.

Sincerely,

Rosalind Fisher

Rosalind Fisher
Director

np

cc: Dorothy Thompson
Gary Leitnaker
John Province

(ATTACHMENT)

Copy

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

December 11, 1989

Rosalind Fisher
Personnel Service
KSU Anderson Hall
Manhattan, Kansas 66506

Dear Rosalind:

I am writing in reply to your letter of December 4, 1989. Within that letter you indicate that it is not the intention of Kansas State University to attempt to force KAPE to participate in mediation over permissive subjects of bargaining. I believe that is the appropriate approach to our current impasse. You also indicate in your letter that you communicated that information to me at some other point in time and if that is so, either I misunderstood you or your message was not clearly communicated. I have reviewed all of the "neutral" documentation you have proposed for submission to a federal mediator and have been unable to locate the message that permissive subjects are inappropriate for mediation therein. Be that as it may, I don't believe anything will be gained at this point in time by trying to assign blame. I do believe that we are both interested in seeing these negotiations along through the process and share the conclusion that further delays would be counter-productive.

In light of my new understandings, I will sign and forward the request for mediation assistance under Article 46 of our agreement to the Federal Mediation and Conciliation Service. By copy of this letter I do also hereby ask the Public Employee Relations Board to place my statutory request for assistance at impasse in abeyance only to be re-activated upon notice from me that the contractual impasse procedures contained in Article 46 between KAPE and Kansas State University have failed to resolve our impasse.

I am pleased that we have been able to resolve these misunderstandings so easily and am hopeful that we are as successful on the issues going to mediation.

Sincerely,

RECEIVED
DEC 17 1990
Kansas Dept. of Human Resources

Paul K. Dickhoff, Jr.
Director of Negotiations

cc: PERB
FMCS

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

H

14

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506
913-532-6277

March 1, 1990

Paul Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees, FSA/AFT
400 W 8th Avenue, Suite #106
Topeka, KS 66603

Dear Paul:

I have attached for your review all the tentative agreements for our Memorandum of Agreement.

As indicated in my November 16th letter to you, although we may both agree not to insist that the other party mediate a permissive item, these articles remain of concern to the university. Now that we have reached tentative agreement on all the mandatorily negotiable items, it is suggested that we go back to the table for the purpose of meeting and conferring on Articles 3, 43, 49 and 50. In an effort to reach a resolution of this matter, attached are KSU's counter proposals to Articles 3, Management Powers & Rights and Article 42, Rules and Regulations.

Please advise me as soon as possible with regard to a meeting date. It is believed that a resolution of these outstanding issues can be obtained at the table.

Sincerely,

Rosalind Fisher
Director

Attachments

cc: KSU Team ✓
Tom Rawson
John Province

llw

I

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

May 22, 1990

RECEIVED
MAY 17 1990
Kansas Dept. of Human Resources
(ES & LR)

Rosalind Fisher
Kansas State University
Anderson Hall
Manhattan, Kansas 66506

Dear Rosalind:

I am happy to advise you that the Service and Maintenance Bargaining Unit at Kansas State University has ratified the tentative agreements we reached at the table. That action, however, did nothing to resolve your concerns relative to the four articles on (1) Management Powers and Rights, (2) Rules and Regulations, (3) Savings Clause and (4) Duration and Termination.

As you know, it is my position that those matters fail to qualify as statutory "conditions of employment" but may be discussed in the meet and confer process and included in a memorandum of agreement if the parties reach agreement over their terms. If, however, they are noticed for negotiations and no agreement is reached, the articles die and we revert to applicable law in those subject areas. It is in that way, as well as some others, that they differ from manditory subjects of bargaining. I do, however, understand your interest in seeing them included in the contract and I would suspect that you will notice them for bargaining in a successor agreement. For that reason I have included language which I will agree to be contained in our contract despite the fact that no agreement was reached in bargaining or during impassé resolution. In short, the language I have agreed to include simply recognizes the existing legal rights of the parties in these subject areas.

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

I am hopeful that your approval process may be completed in a timely fashion so we may re-convene at an early date for final execution of the agreement. I appreciate your co-operation and look forward to meeting with you in the near future. As always, if questions or problems should arise please feel free to contact me at any time.

Sincerely

Paul K. Dickhoff, Jr.
Director of Negotiations

PKD/gcd
Enclosures

ARTICLE 3

MANAGEMENT POWERS AND RIGHTS

Management powers and rights shall be those provided by state and/or federal law and/or constitution.

ARTICLE 42

RULES AND REGULATIONS

General rules and regulations pertaining to the performance of work and conduct of employees will be available to employees in the appropriate unit in accordance with applicable law.

ARTICLE 48

SAVINGS CLAUSE

If any provision of this Agreement is found to be or is subsequently declared by the proper legislative or judicial authority to be unlawful, unenforceable, or not in accordance with applicable statutes, all other provisions of this Agreement shall continue in effect as provided by law.

ARTICLE 49

DURATION AND TERMINATION

Section 1. This Memorandum of Agreement, once approved by KSU and KAPE, shall be submitted to the Board of Regents in accordance with Article 7 of this Agreement. The Agreement shall become effective upon execution of the document by all parties as required by law.

Section 2. When approval is obtained, this Agreement shall remain in effect for one year from execution.

Section 3. The entire Agreement shall be automatically renewed from year to year thereafter unless either party shall notify the other in accordance with applicable law that it desires to modify or terminate this Agreement, as the case may be.

In witness thereof. KSU and KAPE hereto have set their hands this _____ day of _____.

State of Kansas

Kansas Association of Public Employees

Rosalind Fisher, KSU Appointing Authority Chief Spokesperson	John Province President Chapter 11, KAPE	DATE
Gary Leitnaker Division of Personnel Services Representative	President, Kansas Association of Public Employees	DATE
Dorothy Thompson Associate University Attorney	Paul K. Dickhoff, Jr. KAPE Director of Negotiations	DATE

Team Members

Team Members

		DATE
		DATE
		DATE
		DATE

(ATTACHMENT 5)

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506-0109
913-532-6277

May 22, 1990

Paul Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees, FSA/AFT
400 W. 8th Street, Suite 106
Topeka, Kansas 66603

Dear Paul:

I am writing to follow-up on my last letter to you dated March 1, 1990 in which I requested another opportunity for the KSU Management team and KSU KAPE team to meet and confer on the remaining four articles, #3, 43, 49 and 50, on which no agreement has been reached. I have not gotten any response from you and would like to know if you intend for us to meet again in an effort to reach a resolution of this matter. We do believe that a resolution of these outstanding issues can be reached at the table.

I look forward to hearing from you soon.

Sincerely,

Rosalind

Rosalind Fisher, Director
Personnel Services

RF/mlu

cc: Dr. Tom Rawson
Mr. Ted Ayres
KSU Management Team

ATTACHMENT K

KSU
KANSAS STATE UNIVERSITY

**Vice President
for Administration and Finance**

Anderson Hall
Manhattan, Kansas 66506-0116
913-532-6226

July 10, 1990

Mr. Paul Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees, FSA/AFT
400 W. 8th Street, Suite 106
Topeka, Kansas 66603

Dear Paul:

I am writing to you in lieu of Rosalind Fisher, who left the University on July 1 to assume a position at another university. I am pleased to report that the KSU Management team and I have met to review the four articles remaining on the table: specifically, the language changes you suggested and included with your memo of May 22, 1990 dealing with Article 3, Management Powers and Rights; Article 42, Rules and Regulations; Article 48, Savings Clause; and Article 49, Duration and Termination. We have made a concerted effort to include language that will provide a clear understanding of the purpose of each article and also adheres to the statutory language as closely as possible. We believe that this is consistent with your stated desire to recognize the existing legal rights of the parties. Our suggested language is attached.

In Article 3, suggested changes from our KSU Counter of 2/22/90 include the addition of the words "and the university" in the first sentence of the first paragraph to indicate that both parties are in agreement with the information in this article. We also recommend deleting the last sentence from the first paragraph that appeared in our 2/22/90 counter.

In Article 42, the only changes from the language you propose is to include the words "of the employer" and delete "in accordance with applicable law" at the end of the sentence. The focus of this article is University work rules and conduct, and we are not aware of a law that specifically addresses work rules.

The last sentence in Article 48 has been revised from the KSU Counter of 6/26/89 that was sent to you on March 1, 1990 for your consideration.

We accept your language in Article 49 relative to a year to year agreement and have added language that we feel will clearly identify the time frames for duration and renewal. We think time frames will be helpful to both parties.

1

Paul, we are optimistic that with the suggested language in the four articles submitted herewith, both parties can reach final agreement. However, if necessary, we are available to meet and confer further in an effort to reach agreement. I look forward to hearing from you.

Sincerely,

Tom Schellhardt

Thomas G. Schellhardt
Associate Vice President
Administration and Finance

cc: Vice President Thomas M. Rawson
Mr. John Province
KSU Team Members

Management Powers and Rights

It is agreed by KAPE and the University that nothing in this Memorandum of Agreement is intended to circumscribe or modify the existing right of the University to manage and operate its facilities; direct the work of its employees; hire, promote, demote, transfer, assign and retain employees in positions with the University; suspend or discharge employees for proper cause; maintain the efficiency of governmental operations; relieve employees because of lack of work or for other legitimate reasons; take actions as may be necessary to carry out the mission of the University; and to determine the method, means and personnel by which operations are to be carried on.

It is further understood and agreed that the provisions of this Agreement are intended to extend to such matters relating to conditions of employment enumerated in this Agreement except any subject preempted by federal or state law, or the authority and power of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence, from which appointments or promotions may be made to positions in the competitive division of the classified service of the University served by such civil service commission or personnel board.

Rules and Regulations

Section 1. General rules and regulations of the employer pertaining to the performance of work and conduct of employees will be available to employees in the appropriate unit.

ARTICLE 48
SAVINGS CLAUSE

If any provision of this Agreement is found to be or is subsequently declared by the proper legislative or judicial authority to be unlawful, unenforceable, or not in accordance with applicable statutes, all other provisions of the Agreement shall continue in effect as provided by law.

Kansas State University and the State of Kansas wish to continue maintaining uniformity and equity in the benefits and protections afforded employees. In order to maintain uniformity and to provide benefits that may hereafter be secured for employees by state regulations adopted pursuant to KSA 75-3706 this Agreement will be deemed to be adjusted to conform with changes in State regulations.

Savings Clause

If any provision of this Agreement is found to be or is subsequently declared by the proper legislative or judicial authority to be unlawful, unenforceable, or not in accordance with applicable statutes, all other provisions of this Agreement shall remain in effect for the duration of the Agreement. Any provision of this Agreement which quotes any valid law, or Department of Administration regulation, all or in part, either directly or indirectly, shall be adhered to.

SHOULD BE PULLED PER Lauralee Cox PHONE CALL REC'D 7-16-90!

KJ/PKD

Duration and Termination

Section 1. This Memorandum of Agreement, once approved by KSU and KAPE, shall be submitted to the Board of Regents in accordance with Article 47 of this Agreement. The Agreement shall become effective upon execution of the document by all parties as required by law.

Section 2. When approval is obtained, this Agreement shall remain in effect for one year from the date of execution.

Section 3. The entire Agreement shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing, by registered or certified mail, sixty (60) days prior to the anniversary date of the Agreement or any anniversary date thereafter that it desires to modify or terminate this Agreement, as the case may be. If notice of desire to modify is given, it shall contain a statement of all specific changes desired, and meet and confer meetings shall begin not later than thirty (30) days after said notice is received.

In witness thereof, KSU and KAPE hereto have set their hands this _____ day of _____, 1990.

State of Kansas

Thomas M. Rawson
Vice President for
Administration and Finance

Jon Wefald
President
Kansas State University

Jack Sampson
Chair
Kansas Board of Regents

Shelby Smith
Secretary of Administration

Kansas Association of Public Employees

John Province
President
Chapter 11, KAPE

Charlie Dodson
President
Kansas Association of Public Employees

Paul Dickhoff, Jr.
Chief Negotiator for KAPE

(ATTACHMENT L)

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

July 16, 1990

Thomas G. Schellhardt
Associate Vice President
Administration and Finance
Anderson Hall - KSU
Manhattan, Kansas 66506-0116

Dear Mr. Schellhardt:

I am in receipt of your letter of July 10, 1990, relative to negotiations at Kansas State University pertaining to the Service and Maintenance employees at the University. Before we proceed, there are certain understandings we need to reach in order to avoid any unnecessary problems in the conclusion of this bargaining process. I have attempted on several occasions to make my position known to everyone who appeared at the table in behalf of the University and/or the State of Kansas, but in the interest of harmony I will engage in the exercise one more time.

First, pursuant to KSA 75-4327(b) the legislature mandates the University's participation in the "meet and confer" process. KSA 75-4322(m) then defines "meet and confer in good faith" as

> "the process whereby the representative 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)

"Conditons of employment" are defined at KSA 75-4322 (t) as;

> "Salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures. . . ."

RECEIVED
JUL 17 1990
Kansas Dept. of Human Resources

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

m

There are certainly other issues which could qualify generically as conditions of employment but are not included in the statutory list. The legislature mandates both parties with the "mutual obligation" to meet and confer over the statutory "conditions of employment", giving rise to the use of the term manditory subjects of meet and confer or manditory subjects of bargaining. There are other subjects which we may not change even if both parties have the desire to do so since these subjects are "fixed by statute or by the constitution of this state". Those are normally referred to as illegal subjects of meet and confer or bargaining. Discussion is not illegal nor is it mandated. It is change, which is illegal. Finally, there are subjects which neither party is mandated to discuss or prohibited from changing but may discuss and change if mutual agreement is reached. Those subjects are all other employment related issues which are neither mandatory nor illegal subjects. They are referred to as permissive subjects of bargaining. Of critical importance is the element of option in discussing the subjects in the first place, and the necessity for agreement before the subject may be included in any agreement.

It is my position that the four subjects at issue here are permissive and not manditory subjects of bargaining. If anyone can show me where they are defined as statutory "conditions of employment" over which KAPE is required to bargain, I will comply with the law and bargain. It is my further position that those subjects were included in the old agreement through mutual agreement and once noticed for change may only be included in the successor agreement through mutual agreement, a condition which does not exist. Finally, it is my position that for the University to delay ratification of our agreement relative to manditory subjects of bargaining, until and unless we accept and include permissive subjects in the agreement, is and always has been historically declared a coercive and illegal act of bad faith. I believe, therefore, that I would be perfectly within my rights to insist that the University proceed with ratification without further mention of said four subjects. I do not intend to nor have I taken such a clinical or restrictive position. I recognize that there are benefits in having as much reduced to writing as possible, but not simply for sake of having a comprehensive document. On these subjects, however, I believe it is infinitely more important that agreement be reached on substance, and if not attainable, that we each revert to the rights granted to us elsewhere in law and omit them from the agreement.

Fortunately I do not believe we are completely polarized at this point. I have offered some alternatives to try to address your concerns which I don't believe I had any obligation to offer. I have also considered the replies contained in your letter and I think we may be close to agreement but I do not intend to be held hostage by my own efforts to be conciliatory.

At this point I suggest that the agreement be ratified by the University in the form it was in when mediation concluded. Once ratified, I will agree to the inclusion of Articles 3, 42 and 49 as written and the first paragraph of Article 48 as written. I will not agree to include language in a savings clause or anywhere else in this contract which would allow its provisions to be altered and/or rendered meaningless by unilateral changes in regulations enacted by one of the parties to this contract. I would, however, also be willing to include the language in paragraph two of Article 48 if the following words were added to the end of that paragraph:

"to the extent that those changes improve the benefits and/or protections afforded."

Language of that type would permit improvements but prohibit reductions in benefits and if the University finds either alternative relative to Article 48 to be acceptable, please so notify me.

KAPE has been quite patient awaiting ratification but I encourage you to consider and act upon your options as soon as possible to avoid further ill will on this issue. In addition, if you need any clarification on my position, or anything else, I have stated in this letter, please contact me at your convenience.

Sincerely,

Paul K. Dickhoff, Jr.
Director of Negotiations

PKD/gcd

KSU
KANSAS STATE UNIVERSITY

Personnel Services

Anderson Hall
Manhattan, Kansas 66506
913-532-6277

Attachment

DATE: July 19, 1989

TO: Mr. Charles Dodson, President, Kansas Association of Public Employees (KAPE)
Cammie Stephens, Field Representative for KAPE
John Province, President of KAPE, KSU Chapter 11

FROM: Rosalind Fisher, Director of Personnel, KSU Management Team Spokesperson. R. Fisher

In accordance with Article 46 of the Memorandum of Agreement between the State of Kansas, Kansas State University and the Kansas Association of Public Employees, I am notifying you by copy of this letter than an impasse has been reached on the remaining articles for Meet and Confer. The articles we have been unable to reach agreement on and the University's position on each are attached.

In those situations where it is possible a counter has been offered in the interest of compromise. Please submit any counter proposals you have within five days of this notice. Failure to submit counter proposals will necessitate us proceeding to mediation.

Thank you in advance for your prompt response to this matter.

Attachments

cc: George Miller
Susan Irza
Dorothy Thompson
Tom Schellhardt
Gary Leitnaker
Tom Frith
Shirley Marshall
Dave Gronquist

RF:llw

N

(ATTACHMENT

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

September 24, 1990

Tom Shellhardt
Administration and Finance
KSU - Anderson Hall
Manhattan, Kansas 66506-0116

Dear Mr. Schellhardt:

I am pleased to report that the KSU/KAPE Service and Maintenance agreement has now been ratified by the bargaining unit. I have enclosed the agreement complete with the signature page for university action. When the appropriate signatures have been affixed, please send me a copy of the entire agreement with a copy of the signature page attached and a separate page of original signatures of those signing in behalf of the university, which will be attached to my copy.

I can't imagine why it would take more than a few days to complete the signing process. I will, therefore, anticipate receiving my copy of the agreement from you by October 10. If for some reason you won't be finished by that date, I would appreciate a call and an explanation of the delay.

Thank you for your cooperation and if questions should arise please feel free to contact me.

Sincerely,

Paul K. Dickhoff, Jr.
Director of Negotiations

Enc.

cc: John Province
Gary Leitnaker

400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

(ATTACHMENT N)

STATE OF KANSAS

DEPARTMENT OF ADMINISTRATION
State Capitol
Topeka 66612-1572
(913) 296-3011

Shelby Smith, ***Secretary***

November 29, 1990

Mr. Stanley Z. Koplik
Executive Director
Kansas Board of Regents
Suite 609, Capitol Tower
400 S.W. 8th Street
Topeka, Kansas 66603

Mr. Jon Wefald
President
Kansas State University
110 Anderson Hall
Manhattan, Kansas 66506

Mr. Paul K. Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees
400 West 8th Avenue, Suite 103
Topeka, Kansas 66603

Dear Sirs:

I am writing to notify you that, in accordance with K.S.A. 75-4331 and 75-4322(g), the memorandum of understanding between the State of Kansas, Kansas State University and the Kansas Association of Public Employees, FSE/AFT, AFL-CIO covering the Service and Maintenance Unit of the University has been presented to me for determination. The memorandum was previously ratified by the employee organization and approved by Kansas State University management and the Kansas State Board of Regents.

Standard language labeled as a "Savings Clause" has been included in every existing and past memorandum of agreement between an employee organization and one or more state agencies. Moreover, this savings clause has been included routinely in prior memorandums of agreement between KAPE and Kansas State University. This clause states, in pertinent part:

> Any provision of this Agreement which quotes any valid law, or Department of Administration regulation, all or in part, either directly or indirectly, shall be adhered to in its present form or as it may be subsequently amended and changed.

The goal of the savings clause is to provide uniform application of statutes and Department of Administration regulations concerning civil service employees that are referred to or paraphrased in the memorandum of agreement. In particular, the clause ensures uniform, consistent application of the statutes and regulations in instances when they are amended after the memorandum has been signed. However, the proposed savings clause in the KSU-KAPE memorandum of understanding does not adequately address these interests and rights of employees and management.

For these reasons, I am rejecting the memorandum of understanding presented to me. Pursuant K.S.A. 75-4331, this memorandum of understanding is being "returned to the parties for further deliberation." If an adequate savings clause can simply be added to this memorandum, my approval will not be withheld, barring any other significant changes to the agreement.

I understand this particular meet and confer process has been lengthy, and I encourage both parties to make this change in the memorandum of understanding. I will direct my designee to assist the parties in scheduling such a meeting at the earliest possible date.

Sincerely,

Shelby Smith
Secretary of Administration

0404W

cc: Chairman, Board of Regents
Tom Schellhardt
Susan Irza
Linda Fund
Gary Leitnaker
Ted Ayres

STATE OF KANSAS

DEPARTMENT OF ADMINISTRATION
Division of Personnel Services

MIKE HAYDEN,
Governor

SUSAN IRZA,
Director of Personnel Services

Room 951-South
Landon State Office Building
900 S.W. Jackson Street
Topeka, Kansas 66612-1251
913-296-4278
FAX 913-296-6793

December 14, 1990

Mr. Paul K. Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees
400 W. 8th Avenue, Suite #103
Topeka, Kansas 66603

Dear Paul:

Pursuant to Secretary Smith's letter of November 29, 1990, I would like to schedule an additional meet and confer session(s) between your organization and the management team at Kansas State University.

The purpose of this session(s) will be to arrive at an adequate savings clause, thereby enabling us to implement the memorandum of understanding, benefiting all parties: university employees and management, the State of Kansas and the Kansas Association of Public Employees.

I have met with representatives of the management team from KSU and they are willing and anxious to get back together as soon as possible, as schedules allow. Please give me a call and we'll coordinate some future dates. Thank you.

Sincerely,

Gary E. Leitnaker
Director of Labor Relations

cc: KSU Management Team
Stan Koplik
Shelby Smith
Susan Irza
Linda Fund ✓

STATE OF KANSAS

DEPARTMENT OF ADMINISTRATION
Division of Personnel Services

MIKE HAYDEN,
Governor

SUSAN IRZA,
Director of Personnel Services

Room 951-South
Landon State Office Building
900 S.W. Jackson Street
Topeka, Kansas 66612-1251
913-296-4278
FAX 913-296-6793

November 30, 1990

Mr. Paul K. Dickhoff, Jr.
Director of Negotiations
Kansas Association of Public Employees
400 West 8th Ave., Suite #103
Topeka, Kansas 66603

Dear Paul:

Thank you for your recent letter regarding our relative positions on the "savings clause." I was pleased to read we have been able to reach agreement on all other remaining issues or that you have dropped them from the table. In addition, I appreciated your willingness to attempt to reach an agreement on the savings clause with me, to no avail.

My understanding of our problem in coming to an agreement on a savings clause is different from yours. My understanding is that KAPE will not enter into a memorandum of agreement unless the Department of Administration agrees with KAPE's proposed savings clause language or unless the Department elects to delete the savings clause. Therefore, I believe KAPE has shown bad faith and subsequently committed a prohibited practice.

While I can appreciate your position, I obviously disagree. I look forward to a quick resolution in this matter.

Sincerely,

Gary E. Leitnaker
Director of Labor Relations

cc: Linda Fund

R

KANSAS
ASSOCIATION OF
PUBLIC EMPLOYEES

December 6, 1990

Gary Leitnaker
Department of Administration
Landon State Office Building
Topeka, Kansas 66603

Dear Mr. Leitnaker:

I am writing relative to the meet and confer process at Pittsburg State University for the service and maintenance employees there.

I am somewhat disturbed by your apparent misunderstanding of my letter of November 15, 1990 as indicated by your statement that you were "pleased to read we have been able to reach agreement on all other remaining issues or that they had been dropped from the table." When last we met at P.S.U. I recall that you and I went to lunch together to attempt to work out language on the "savings clause" which I understood to be the last issue keeping us from a comprehensive agreement. Perhaps that wasn't your understanding, but it certainly was mine. For the record, I will attempt to again communicate, as I did on 10-4-90, the package settlement offer the negotiations team has authorized me to make on every remaining open issue:

1. Complaints -- Sect. 3 -- Drop
2. Representation -- Sect. 5 -- Drop
3. Contracting Out -- Sect. 9 -- Drop
4. Payroll Deduction/PEAC -- Sect. 9 -- Drop
5. Leave of Absence Pool -- Sect. 10 -- Drop, with the side agreement that P.S.U. will provide to KAPE chapter president with twenty (20) days of administrative leave for unit members with no more than five (5) days to be used by any individual.
6. New Hire Orientation -- Sect. 2 --TA our counter of 9-5-90.

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400 West 8th Ave. Suite #103 Topeka, Kansas 66603 913-235-0262

7. Wages -- Sect. 1 -- TA your counter of 11-8-89.
8. Term Life Insurance -- Sect. 3 -- TA your counter of 11-8-89, with side agreement that a joint letter would be submitted to the benefits committee requesting increase of this coverage.
9. Longevity -- Sect. 6 -- TA your counter of 11-8-89.
10. Position Reclassification -- Sect. 7 -- TA your counter of 8-23-90.
11. Vacation Leave -- Sect. 1 -- TA your counter of 11-8-89.
12. Jury Duty -- Sect. 4 -- TA our counter of 12-6-89.
13. Job Injury Leave -- Sect. 5 -- TA your counter of 11-8-89.
14. On-the-job Injury/Workers Comp. -- Sect. 6 -- TA your counter of 11-8-89.
15. Training -- Sect. 1 -- TA your counter of 11-8-89.
16. Tuition Reimbursement -- Sect. 3 -- TA your counter of 11-8-89.
17. Training Advancement -- Sect. 4 -- Drop.
18. Grievance Procedure -- Article XII - All Sections -- TA your counter of 11-8-89.
19. Parking -- Sect. 6 -- Drop, with agreement that if current parking availability is proposed to change, KAPE would be notified for discussion.
20. Duration -- Article XVII -- TA your counter of 11-8-89.
21. Regents Approval --Article XVI -- TA your counter of 11-8-89.

As you should recall, the issues of (1) No Strike - No Lockout, (2) Rules and Regulations and (3) Savings Clause were removed from the table by KAPE during the meet and confer session held on 9-5-90. At the subsequent meeting on 10-4-90 was when the above agreements were discussed and then I was advised that those agreements were contingent upon the ability of KAPE and the Department of Administration to reach agreement on a "savings clause". As you should also recall, we met at some length in an effort to arrive at mutually agreeable language on that issue to no avail. While we were unable to reach agreement on the "savings clause" it is still my opinion that it is a prohibited practice to hold the agreement on "conditions of employment" hostage until the organization agrees to a "savings clause" which would render the agreement virtually meaningless. The fact that I attempted to work with you on the savings clause should not be interpreted as an alteration of my position but rather an indication of my continuing good faith. KAPE is willing to drop the issue of a savings clause as evidenced by my actions on 9-5-90. It is the State of Kansas and particularly the Department of Administration that insists on, not only its inclusion, but also on its repressive language, actions which I encourage you to reconsider.

If the state is ready to enter into a memorandum of understanding in accordance with the twenty-one (21) items of the package settlement outlined above, KAPE will continue to work with you in an effort to arrive at "savings clause" language to which we can both agree. If not, KAPE is prepared to file the appropriate charges necessary to resolve this matter.

If further questions should arise please feel free to contact me by no later than December 20, 1990.

Sincerely,

Paul K. Dickhoff, Jr.
Director of Negotiations

cc: Keith Carr
Michelle Sexton

PERMANENT REGULATIONS

Step 1
Submit regulations to Sec. of Administration

1 to 3 Weeks

Step 2
Submit regulations to Attorney General

1 to 3 Weeks

Step 3
Submit notice to Kansas Register

8 to 16 Days

Step 4
Notice published in Kansas Register

32-Day Minimum

Step 5
Hold public hearing

1 to 3 Weeks

Step 6
Obtain approval for revisions; adopt; file with Sec. of State

10 to 23 Days

Step 7
Regulations published in Kansas Register

47 Days

Step 8
Regulations take effect

Total Time: 118 to 174 days
17 to 24 weeks