BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

OF THE STATE OF KANSAS

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 96, Complainant, vs. CITY OF KANSAS CITY, KANSAS, Respondent.	CASE NOS: 75-CAE-17-1980 and 75-CAE-18-1980

ORDER

Comes now on the 31st day of October, 1980 the above captioned case for consideration by the Public Employee Relations Board.

APPEARANCES

Complainant, appeared by Mr. Walter Pearson, Executive Director, Service Employees International Union Local 96 and Mr. Harry Spring, Union Representative, Service Employees International Union Local 96.

Respondent, the city of Kansas City, Kansas, appeared by and through its counsel, Mr. A. B. Howard, Assistant City Attorney.

FINDINGS OF FACT

1. That the city of Kansas City, Kansas is an appropriate employer within the meaning of K.S.A. 75-4321 et seq.

2. That Service Employees International Union Local 96 has been recognized to represent certain employees of the city of Kansas City, Kansas. (Joint Stip. #1)

3. That Kevin Downing was carried on the Kansas City, Kansas payroll as a Building Engineer in the Custodian Department as of November 2, 1978. (Ex. #2 of Joint Stip. #1)

4. That Mitch Delich was carried on the Kansas City, Kansas payroll as employed in the Parking Control Department as of December 14, 1978. (Ex. #1 Joint Stip. #1 - T 87)

5. That the labor agreement between the city of Kansas City, Kansas and Service Employees International Union Local 96 states at Article II recognition, "the employer agrees to recognize the union as the sole and exclusive bargaining agent for maintenance employees". (Ex. #7 - Joint Stip. #1)

6. That the salary of Mitch Delich was reduced from $9.016 to $6.50 on September 27, 1979. (Ex. #1 - Joint Stip. #1)

7. That the salary of Kevin Downing was reduced from $9.016 to $7.75 on September 27, 1979. (Ex. #2 - Joint Stip. #1)

8. That Kevin Downing was asked by Maurice Lawson how much of a pay cut he (Mr. Downing) would take and that Mr. Downing responded $8.00 or $7.75 at the least. (T 76-81)

9. That Mitch Delich was asked by Roger Gnolfo how much of a pay cut he (Mr. Delich) would take and that Mr. Delich responded $7.50 would be what he would expect.

10. That both Mr. Downing and Mr. Elich were informed by management personnel that they were "not in the Union". (T 89, 76)

11. That both Mr. Downing and Mr. Delich were told that they would be terminated if they did not take the pay cuts. (T 77-90)

12. That both Mr. Downing and Mr. Delich were raised in pay to $9.016 on June 1, 1979 with the approval of Commissioner Hanlon.

13. That a meeting was held in Mr. Lawson's office in the latter part of the summer of 1979 in which Mr. Lawson informed Mr. McCarty, Mr. Mootz, and Mr. Downing that they would have to take pay cuts. (T 73)

14. That Mr. McCarty referred Mr. Lawson to the labor agreement during the meeting reference in finding number 13.

15. That both Mr. Downing and Mr. Delich worked approximately six (6) months at the reduced salary. (T 31)

16. That Mr. Delich was in his third year of service with the city. (T 33)

17. That the City did not contact the union concerning a reduction of wages. (T 34)

18. That Mr. Delich and Mr. Downing did not contact the union concerning the reduction in salary until approximately six (6) months after the reduction was made. (T 36)

19. That Mr. Justice's testimony states, "Mr. Hanlon indicated a willingness to keep the employees working at the reduced rate but if they insisted upon being represented by the union they would have to be terminated. (T 43, 50, 51)

20. That Mr. Schoneman believed Mr. Downing to be covered by the contract. (T 56)

21. That payroll records of both Mr. Downing and Mr. Delich indicate salary increases because of "contract raise". (T 60, Ex. 1 & 2 of Stip. #1)

22. That normal procedures were utilized by Mr. Schoneman to bring Mr. Downing and Mr. Delich under the contract and raise their salaries. (T 68-69)

23. That Mr. Delich and Mr. Downing approached the union concerning their pay cuts after reading that other city employees had received pay increases. (T 77)

24. That Commissioner Hanlon had two meetings with union officials in which he explained the city's position. (T 110)

25. That the city has no complaint about Mr. Downing or Mr. Delich's work. (T 114)

26. That Commissioner Hanlon approved the pay increases for both Mr. Downing and Mr. Delich. (T 115, Comp. Ex. #3)

27. That Commissioner Hanlan does not recall a conversation with Mr. Schoneman regarding extending coverage of the labor agreement to include Mr. Downing and Mr. Delich. (T 122)

28. That Mr. Lawson intended to follow the principle of senority in the lay off of employees of the maintenance department. (T 133)

29. That Mr. Lawson devised the plan to work the employees at a reduced rate in lieu of a lay off. (T 133-134)

30. That Mr. Lawson does not recall telling Mr. Downing and Mr. Delich to "get out of the bargaining unit" rather that the employees were simply informed that they were not part of the bargaining unit. (T 137)

31. That Mr. Lawson does not recall making a statement concerning taking action on the termination in order to keep from having further liability. (T 140)

32. That Mr. Lawson is not aware of any contact with the union by the city regarding the budget problems. (T 144)

33. That Mr. Downing was "terminated" and rehired on at least three previous occasions. (Ex. #2 - Joint Stip. #1)

34. That Building Engineer is a job classification in the Maintenance Department. (T 153)

35. That Commissioner Hanlon knows of no requests by the union or the city to reopen, cancel, terminate, or renew the existing labor agreement. (T 159)

36. That the union sent a letter to Mayor Reardon dated April 25, 1978 requesting to reopen the agreement on the subject of salary. (T 162)

37. That the union requested to reopen the contract on wages in 1979. (T 162)

CONCLUSION - DISCUSSION

75-CAE-17-1980 alleges that the city engaged in prohibited practices by unilaterally removing Mr. Downing and Mr. Delich from the bargaining unit and by cutting their salaries. The union has alleged violations of K.S.A. 75-4333 (b) (1), (3), and (4). Complainant argues that it is unimportant if not improper for the Public Employee Relations Board to concern itself, at this point in time, with the description of the appropriate unit. The examiner takes exception to this argument and in fact believes the unit question to be an intergral part of the determination regarding 75-CAE-17-1980. If Mr. Downing and Mr. Delich are not included within the appropriate unit, the employer is free to take any action necessary to carry out the mission of the agency. In the event that either or both of the gentlemen were bargaining unit members the city is obligated to follow procedures within the labor agreement.

The labor agreement between the city and local 96 does not specify which employees are covered by the contract. One can simply speculate whether the contract covers employees of the Maintenance Department or employees doing maintenance work. Which ever the case, it appears that Mr. Downing was within the appropriate unit. That is, Mr. Downing was carried on the city payroll as a Building Engineer in the Maintenance or Custodian Department. Mr. Michael McCarty carries the same job classification and is employed in the same department. There is no dispute that Mr. McCarty is covered by the agreement. Mr. Delich, however, was employed in the parking control department and only assisted the Building Engineers approximately one-third of his workday. Complainant's exhibit number one (1), the letter from Mr. Gwin, requests that Mr. Delich be given wages as set forth in the agreement. That letter does not make any request that the provisions of the labor agreement be extended to cover Mr. Delich. It is therefore the examiners conclusion that the labor agreement covered Mr. Downing but excluded Mr. Delich.

The union alleges that the city errored by its failure to notify the union of the anticipated lay-off and by negotiating a reduction in wages with individual unit members in leiu of the lay-off. The union did not argue the employer's right to lay-off employees. Section 2 of Article III of the labor agreement provides for the employer to recognize standard seniority rules in the event of a

lay-off. During late summer 1979 a meeting was conducted with Mr. Lawson, Mr. McCarty, Mr. Mootz, and Mr. Downing in attendance. In that meeting Mr. Lawson informed the three maintenance men that they would have to take a cut in pay. Mr. McCarty referred Mr. Lawson to the labor agreement and informed Mr. Lawson that he was covered by the agreement. Mr. Lawson's memos dated September 6, 1979 and September 29, 1979 indicated an adherence to the principle of seniority even though the city contends Mr. Downing was not covered by the labor agreement.

The question then goes to the obligation of an employer to "negotiate" or discuss with the union the effects of a lay-off on "bargaining unit members". The employer's obligation regarding lay-off is to follow any provisions contained in the labor agreement. The employer of course, may choose to explore with the union possible alternatives to a lay-off. These alternatives might include a reduction in pay or transfer of employees. While the employer might choose to "discuss" such alternatives with the union there is no obligation to "bargain", at least in the traditional sense. When there is no question that a lay-off will occur, and in the absence of an agreement to work for reduced wages or other provisions, the employer does have the right to reduce the work force. The usual procedure in labor-management situations for such discussions is for the employer to contact the union and request meetings. The examiner, however, is hard pressed to call the labor-management relationship between the city of Kansas City and Service Employees International Union Local 96 "usual". This observation is made in light of the ambiguous recognition clause in the agreement, past salary negotiations, and the absence of a contractual mechanism for resolving disputes. Testimony shows that Mr. Downing was asked the amount of a pay reduction he would be willing to take. Mr. Downing responded that he would accept $7.75 per hour at the least. Mr. Downing's salary was subsequently reduced to $7.75 per hour. When Mr. Downing was first informed of the city's dilemma he was free to contact the union to intervene in his behalf. He chose to accept the reduced wages and continue his employment without contacting the union.

While the procedure of contacting the individual employee regarding working conditions is normally recognized as bad faith, the circumstances in this case are most unusual. The examiner believes that the city had a "good faith" doubt that Mr. Downing was covered by the agreement. This belief is based upon the ambiguous language in the contract, Mr. Schoneman's memo dated May 23, 1978, and the discussions held in the late summer 1979 meeting. One must assume that not only the emloyer

but also the individual employee and the union representative incur obligations in a formal labor-management relationship. Mr. Downing was free to contact the union at the time of the initial meeting regarding his status within the bargaining unit and the pay reduction. The union could have questioned the bargaining unit makeup on its own volition at any time. The city by its action of wage reduction had not interfered, restrained or coerced the employee in the exercise of rights granted at K.S.A. 75-4324. The employee (Mr. Downing) choose not to exercise any rights. Nor has the city by this action encouraged or discouraged membership in an employee organization. The city could not have discriminated against Mr. Downing because he filed an affidavit or gave testimony under the act since Mr. Downing engaged in neither of these activities.

It is the examiner's opinion that the employer, the employee, and the union did not act or react in the "usual" or "accepted" manner. The examiner, however, finds no evidence of willful bad faith as alleged in 75-CAE-17-1980.

At the point in time when the union became involved with the employees and the city, the questions were relatively simple. That is, are the employees within the appropriate unit? If so does the employer have an obligation to meet with the union? Those questions were previously addressed in this order. At the point in time that the employees were terminated the question changes. Now the examiner must address the questions raised by 75-CAE-18-1980. The union alleges that the employees were terminated because of their association with the union and their desire to seek a determination of their representation status from the Public Employee Relations Board. The city contends that the employees were not covered by the contract and that the employees were terminated as a result of a financial problem which necessitated a reduction in the work force. The examiner has stated that he has no argument with management's right to reduce the work force. The concern is rather directed at whether the employees refused to work at the reduced rate or whether they simply sought an opinion of their representation status. Both Commissioner Hanlon and Mr. Lawson testified that Mr. Downing and Mr. Delich could remain on the payroll at the reduced rate. The record is unclear with regard to the employees' refusal to accept the reduced rate. Rather complainants testify that the City conditioned their offer of continuing employment at the reduced rate with an mandate that the employees and union agree that complainants were not part of the bargaining unit. The testimony of Mr. Justice corroborates complainant's testimony. Mr. Lawson's testimony states that he does not recall saying, "If you get out of the bargaining unit."

The Public Employer-Employee Relations Act provides a mechanism for resolving

labor/management disputes. The appropriate mechanism for resolving the dispute over the reduction of wages may have been the Public Employee Relations Board via the unit determination process, or the Public Employee Relations Board via the prohibited practice process. The union choose to pursue the solution via the prohibited practice process. Certain activities by public employees are protected by law. The choice to utilize the prohibited practice mechanism for a determination regarding the reduction in wages, is a protected activity. Any public employee has the right to seek such determinations regardless of the employees status as a union member or his/her bargaining unit status. An employer must recognize and respect this right without regard to the employees bargaining unit status. To do otherwise is a direct violation of K.S.A. 75-4333 (b) (4).

In this case it was some six (6) months after the effective date of the wage reduction when the employees questioned management's decision. The employees were, nevertheless, engaging in a protected activity. It seems apparent that the city's financial problem then became secondary to the employees status under the contract. A preponderance of the testimony indicates that the city, by the actions of its agents, conditioned future employment upon an agreement that the contract was not applicable to Mr. Downing and Mr. Delich.

While the examiner respects the right of the employer to reduce the work force, he finds the conditional continued employment to constitute a violation of the rights of the employees as granted in the act. The employer's motivation for the action is not an issue of primary concern. The mere existance of such an action lies at the heart of every practice prohibited by K.S.A. 75-4333 (b) sections 1 thru 4. It must be remembered that the Public Employer-Employee Relations Act establishes a frame work within which a public employer and public employees may engage in communications as equal entities in an effort to resolve disputes. There is no latitude in that act for the employees to strike or similarly intimidate the employer, likewise there is no latitude for an employer to coerce his employees. The employer in this case would have been totally within his rights to follow the letter of the contract and lay the employees off. He chose however to discuss alternatives to the lay-off. A reduction in wages would have been a legitimate alternative. A reduction in wages coupled with an agreement that the contract did not apply was not. Applicability of the contract is a distinct question which the parties should have resolved through discussion or should have brought before the Public Employee Relations Board for determination.

The city continually points to the budget as the determining factor the lay-off. The city commended the value of the complainants services, offered to retain the employees at the reduced rate, and received no refusal on the part of the employees to continue their employment at the reduced rate pending a Public Employee Relations Board determination of the contract application. The city on one hand agrees that the budget will allow their continued employment if the employees abdicate their right to determine their contractual status and lacking such an abdication contends that the budget alone prohibited their continued employment.

This examiner is unable to accept budget restraints as the sole reason prompting the terminations. The dollar amount of the budget is not affected by the employees inclusion or exclusion from the bargaining unit. The examiner finds rather that the employees refusal to agree that they were not covered by the contract prompted their terminations. This is not to say that the budget problems alleged by the city were not very real. This is further not to say that the city did not truly believe that the employees were excluded from coverage under the labor agreement. It is to say that the law establishes a frame work for the resolution of disputes. Whether the employees in question in this case were covered by the contract or not, the fact remains that they have the right to pursue answers to their questions without fear of reprisal. The examiner finds that the employees insistance and efforts, to prove that they were covered by the labor agreement brought about their termination and that such action by the employer constitutes the commission of a prohibited practice. Further the examiner finds the terminations were a direct result of the filing of Public Employee Relations Board complaint, 75-CAE-17-1980 and the employees' choice to join and participate in union activities as outlined at K.S.A. 75-4333 (b) 4. The examiner finds that Mr. Downing and Mr. Delich should be reinstated to their former positions and that they receive full benefits and back pay, less any income or unemployment benefits received during that time, from the date of their termination to the date of this order. The rates of pay for Mr. Downing and Mr. Delich shall be calculated as $9.016 and $6.50 per hour plus any increment given to like employee classification. The examiner is aware of the fact that the $9.016 rate may exceed the rate specified in the agreement. However, in light of the provision found at Article IV, Section 6, the examiner believes Mr. Downing should be paid at the $9.016 rate. The examiner also finds that Mr. Downing's seniority should reflect uninterrupted service. The examiner wishes to emphasis that this order does not preclude or dictate any future actions by the city necessary to operate within the restraints of their budget. If the city finds that action is necessary they are free to take such action as they see fit in regard to Mr. Delich. In regard to Mr. Downing they must follow the provisions of the contract or negotiate an alternative solution.

Strictly as an observation, this examiner believes that the dispute spoken to in this order could have been avoided if the scope of the bargaining unit had been more clearly defined by the parties. If other such ambiguous units exist within the city they should be clarified immediately to avoid similar problems in the future.

It is so recommended to the Public Employee Relations Board this 31st day of October, 1980.

Jerry Powell, Hearing Examiner

It is ordered that the recommendations of the hearing examiner be adopted as a formal order of the Public Employee Relations Board this 31st day of October, 1980.

James J. Mangan, Chairman, PERB

ABSENT
Louisa A. Fletcher, Member, PERB

Urbano L. Perez, Member, PERB

Lee Ruggles, voted "Aye" in the open meeting
Lee Ruggles, Member, PERB

Art Veach, Member, PERB