

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

PSU/KNEA)
)
 Petitioner)
)
 v.)
)
 Kansas Board of Regents/)
 Pittsburg State University)
)
 Respondents)

Case No.: 75-CAE-23-1998

INITIAL ORDER

ON the 21st day of December, 1999, the above-captioned matter comes on for consideration pursuant to K.S.A. 75-4334(a) and K.S.A. 77-523 before presiding officer Douglas A. Hager.

A formal hearing on this prohibited practice complaint was conducted by presiding officer George M. Wolf on April 1, 1999. Petitioner, Pittsburg State University/Kansas National Education Association, a labor bargaining unit representing professors at Pittsburg State University, appeared by and through counsel, Menghini & Menghini by Mr. C. A. Menghini, and counsel, Mr. David Schauner. Respondent, Kansas Board of Regents/Pittsburg State University, appeared by and through counsel, Mr. Scott Hesse, Assistant Attorney General. In addition to the testimony adduced at hearing, additional deposition testimony has been filed and received into evidence in this matter.

This presiding officer was assigned responsibility for the matter in May of this year. See K.S.A. 77-514(e). The parties submitted post-hearing briefs and, pursuant to provision of the Kansas Administrative Procedure Act, K.S.A. 77-526(e), oral arguments were held in mid-

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September. The presiding officer considers this matter to be fully submitted and ripe for a determination.

ISSUE PRESENTED FOR DETERMINATION

The primary issue presented here is whether under the facts and circumstances of this matter, the Respondent committed a prohibited practice as set forth in Kansas law by failing to meet and confer in good faith with Petitioner with regard to the topic of intellectual property. Resolution of this question will turn on other secondary issues which will be explored in more detail below.

FINDINGS OF FACT

1. The Kansas Board of Regents is a constitutional agency of the state of Kansas with the authority to supervise and control institutions of higher education within the state.
2. Pittsburg State University is a member institution of the Kansas State Board of Regents.
3. Kansas Board of Regents/Pittsburg State University is the employer of college professors at Pittsburg State University. (Transcript, p. 196).
4. Professors at Pittsburg State University have three major responsibilities: teaching, scholarship, and creative endeavor and service. (Transcript, p. 199).
5. Pittsburg State University provides its professors with office space, equipment, research facilities, supplies, and secretarial help. (Transcript, pp. 7, 18, 20, 100).
6. Among other responsibilities, Pittsburg State University professors conduct research, write scholarly articles, publish scholarly articles, create songs or artwork and other forms of intellectual property. (Transcript, pp. 39, 196-197).
7. Professors who publish scholarly works receive better performance evaluations and receive a higher level of compensation from the employer. (Transcript, p. 39-40).

8. Professors' promotions are based on production of books and articles and on presentation of information at conferences. (Transcript, pp. 95-96).

CONCLUSIONS OF LAW/DISCUSSION

Petitioner alleges that Respondent has committed a prohibited practice as set forth in the Public Employer-Employee Relations Act, (PEERA), at K.S.A. 75-4333(b)(5). More specifically, Petitioner alleges that Respondent "failed and refused to collectively bargain and negotiate the topic of 'intellectual property'". Complaint Against Employer, filed March 13, 1998.

The significance of this charge is fully explained in Petitioner's post-hearing brief and will be repeated in pertinent part here.

"PEERA is the . . . statute which sets forth the parameters of public sector bargaining for employees of Kansas state agencies, including KBOR/PSU. . . . Following recognition of the employee organization by the public employer, it is required that the organization and the public agency meet and confer in a good faith effort to reach a memorandum of agreement **relating to conditions of employment** (K.S.A. 75-4321(b) and K.S.A. 75-4322(m) and (t)). It does not require that the parties arrive at an agreement. If no agreement is reached **the recourse the public employees have to resolve the dispute is extremely limited.** First, the public employees cannot withhold their services and engage in a strike. (K.S.A. 75-4333(c)(5)). Second, the public employees, absent authority in a memorandum of agreement, cannot force the public employer to arbitrate the dispute. Third, if the public employees do participate in a strike, the Public Employee Relations Board (PERB) can declare an emergency and proceed as provided by K.S.A. 77-536, with a strike expressly determined to be an emergency (K.S.A. 75-4334(a)). **So, what avenue does the public employee organization have with respect to the dispute?** The only path is to declare a bargaining impasse thereby initiating mediation and fact-finding procedures (K.S.A. 75-4332). And, after exhausting these procedures the public employees have to live with whatever the public agency deems to be in its best interest, including the issuance of a unilateral contract of employment (K.S.A. 75-4332(e)(f)).

When the statutory framework is clearly understood, it is evident why PSU/KNEA wants to make certain that the topics negotiated at the bargaining table are mandatory ones. Otherwise, the only avenue public employees have to prove that the employer's position is unsound and unwarranted (mediation and fact-finding) is unavailable, reducing the public employee organization to the status of a 'debating club.' A 'club' that agrees to discuss 'permissive' topics, running out of air when

the employer refuses to agree; ending the matter without any statutory recourse.”
(emphasis in original)

PSU/KNEA's BRIEF, SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW, pp. 1-3, June 15, 1999. At its meeting of November 19, 1998, the Kansas Board of Regents adopted an intellectual property policy which gives property rights to persons employed at Regents' institutions in intellectual property created by those employees while working at Regents' institutions. The Board then directed the Pittsburg State negotiating team to discuss implementation of its new intellectual property policy with Petitioners as a permissive subject outside the scope of "conditions of employment" as that term is defined by law. *See* K.S.A. 75-4322(t). Petitioner nevertheless maintains this administrative action, seeking a ruling on the question whether the topic is a mandatory "condition of employment" for the reasons stated above.

Burden of Proof

Although Kansas Courts have not addressed the standard of proof necessary to establish a prohibited practice, the Kansas Public Employee Relations Board ("PERB") has adopted the federal standard under the National Labor Relations Act ("NLRA"). Under this standard, the burden of proving a prohibited practice lies with the party alleging the violation. *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)("Adjutant General"). The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under PEERA, and it is incumbent upon the one alleging the violation to prove the charges by a fair preponderance of all evidence. *See Boeing Airplane Co. v. National Labor Relations Board*, 140 F.2d 423, 433 (CA 10, 1944).

Structure of the Public Employer-Employee Relations Act

Public employees have the right to form, join and participate in activities of employee organizations for meeting and conferring with public employers regarding grievances and

conditions of employment. K.S.A. 75-4324. The legislative parameters of the duty to meet and confer under the PEERA are found 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." (emphasis added)

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

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

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

Kansas law, however, restricts the scope of a memorandum of agreement between employer and employee organization to:

"all matters relating to conditions of employment, except proposals relating to (1) any subject preempted by federal or state law or by a municipal ordinance passed under the provisions of section 5 of article 12 of the Kansas constitution; (2) public employee rights defined in K.S.A. 75-4324 and amendments thereto; (3) public employer rights defined in K.S.A. 75-4326 and amendments thereto; or (4) 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 promotion may be made to positions in the competitive division of the classified service of the public employer served by such civil service commission or personnel board."

K.S.A. 75-4330(a). Thus it appears that the results of bargaining on both mandatory and non-mandatory topics may be memorialized by a memorandum of agreement between employer and employee organizations, as long as they are not precluded by one of the exclusions outlined above.

Conditions of Employment-Mandatory Topics for Meeting and Confering

K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from refusing to meet and confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations, that is, over "*conditions of employment*". The term "*conditions of employment*" is defined at K.S.A. 75-4322(t) as:

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

The Dilemma

The text of PEERA on the question whether a topic is subject to mandatory negotiability seems to speak with two voices. Whereas K.S.A. 75-4327(b) grants public employees the right to meet and confer with respect to conditions of employment, K.S.A. 75-4326 stipulates that the right does not extend to matters of inherent managerial policy. Further, K.S.A. 75-4330(a) and the statutory definition of conditions of employment, at 75-4322(t), make it clear that the mandatory meet and confer process does not reach matters fixed by the Kansas constitution or statute, nor those preempted by federal law.

Virtually any subject of negotiation that is advanced under an assertion that it is a condition of employment in some way alters or infringes upon managerial prerogative. Further, many subjects are to a greater or lesser degree circumscribed by constitutional, state and federal law.

The resolution of this conflict requires a statutory interpretation which harmonizes K.S.A. 75-4327(b) and 75-4322(t), set out above, with K.S.A. 75-4330(a), above, and K.S.A. 75-4326 of the Kansas PEERA. K.S.A. 75-4326 states:

"Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:

- (a) Direct the work of its employees;*
- (b) Hire, promote, demote, transfer, assign or retain employees in positions within the public agency;*
- (c) Suspend or discharge employees for proper cause;*
- (d) Maintain the efficiency of governmental operation;*
- (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 out."*

The problem, then, in cases presenting the issue of the proper scope of meet and confer is to balance the employees' interest in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and direction of the enterprise.

Balancing Test

The Pennsylvania PERB in addressing this same conflict in the Pennsylvania public employee relations act adopted the use of a balancing test:

"A determination of the interrelationship between sections 701 and 702 calls upon us to strike a balance wherein those matters relating directly to "wages, hours and other terms and conditions of employment" are made mandatory subjects of bargaining and reserving to management those areas that the public sector necessarily requires to be managerial functions. In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question."

In adopting the balancing test for use in determining the mandatory nature of subjects under the Pennsylvania act, the Pennsylvania Supreme Court cited the Kansas case of *National Education Ass'n of Shawnee Mission, Inc. v. Bd. of Ed. of Shawnee Mission*, U.S.D. 512, 212 Kan. 741

(1973)("Shawnee Mission"), as the leading case on the balancing test. *Pennsylvania Labor Relations Board v. State College Area Sch. Dist.*, 90 LRRM 2081 (1975).

While the *Shawnee Mission* case was decided under the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, a balancing test for use under PEERA was similarly approved by the Kansas Supreme Court in an earlier dispute between these same parties:

*"PERB, as the arbiter between employer and employee, has fashioned the 'significantly related' test in an effort to steer a middle course between minimal negotiability, with nearly absolute management prerogative, and complete negotiability, with few management prerogatives. In so doing it has devised a commonsense approach to the problem of sorting out matters which cannot be easily defined or neatly categorized, in order to determine their negotiability."*¹

Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 667 P.2d 306 (1983).

In *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)("Adjutant General"), the PERB examined three criteria in applying the balancing test. By these criteria:

- (1) A subject is mandatorily negotiable only if it intimately and directly affects the work and welfare of public employees.
- (2) A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
- (3) A subject that affects the work and welfare of public employees is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.² *Id.* at p. 34.

¹ While the Court referred to the test as the "significantly related test," a review of the test as described and applied by the PERB, and as applied by the Court in *Pittsburg State* reveals that it is a balancing test which the Court approved. *See also, Note: Labor Law—Mandatory Subjects of Bargaining Under the Kansas Public Employer-Employee Relations Act—Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association*, 32 KAN. L. REV. 697, 707 (1984)(stating that in majority's opinion "significantly related test was a balancing test).

² The PERB in its *Adjutant General* order explained the test as follows:

"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

This test was reaffirmed by the PERB in *Service Employees Union Local 513 v. City of Hutchinson, Ks.*, Case No. 75-CAE-21-1993, p. 30 (Jan. 28, 1994).

Based upon the facts set forth above, this determination will proceed on the assumption that the subject of intellectual property rights intimately and directly affects the work and welfare of the public employees at issue here.³ Before the third criterion set out above, the question of significant interference with inherent managerial prerogatives, can be examined, it is necessary to determine first whether any constitutional or statutory provisions relating to the subject sought to be negotiated would remove it from the area of mandatory negotiability. See K.S.A. 75-4322(t). Likewise, if the subject is preempted by federal law, it is not mandatorily negotiable. K.S.A. 75-4330(a).

Federal Preemption

There is an extensive body of federal statutory and case law in the field of intellectual property rights.⁴ Section 201(a) of the Copyright Act of 1976 vests the copyright rights of a work protected by the act in its author or authors. Section 201(b), however, provides that

“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

weighing or balancing must be made. Where the employer's management prerogative is dominant, there is no obligation to negotiate even though the subject may ultimately affect or impact upon public employee terms and conditions of employment.

“The basic inquiry therefore, must be whether the dominant concern involves an employer's prerogative or the work and welfare of the public employee. The dominant concern must prevail. Since the line which divides these competing positions are often indistinct, it must be drawn on a case by case basis.” *Id.* at page. 35.

³ Counsel for Respondent, however, presents a compelling argument that although the intellectual property rights at issue here may well be related to a professors salary and to their job duties, creation of intellectual property by the professors is done as a normal and expected part of their employment arrangement, and as such, they are fully compensated for doing so.

⁴See James B. Wadley and JoLynn M. Brown, *Working Between the Lines of Reid: Teachers, Copyrights, Work-For-Hire and a New Washburn University Policy*, 38 WASHBURN L. J. 385, 388-93 (1999).

Under the work for hire exception, the employer, here the university or the state, is considered to be the author and owns the copyright of works created by its employees, absent an express written agreement to the contrary. As a part of their employment obligation, petitioner member professors are paid a salary, provided with office space, equipment, research facilities, supplies, secretarial help and so forth. In return, they are expected to produce intellectual property in the scope of their employment. Intellectual property thus created falls under the work for hire doctrine, and by operation of federal law, belongs to the employer, Kansas Board of Regents/Pittsburg State University. The subject of intellectual property rights is thus preempted by the operation of federal law. "Preempt" is defined as "to gain possession of by prior right or opportunity." THE AMERICAN HERITAGE DICTIONARY, p. 1032 (1976). The public employer gains possession of intellectual property rights by prior right or opportunity, that is, by operation of the federal work for hire doctrine. That the result of the operation of federal law regarding intellectual property rights may be changed by agreement of the parties, as is expressly provided in Section 201(b) of the Copyright Act of 1976, set out above, does not mean that the subject is not preempted, merely that the preemptive result may be changed.

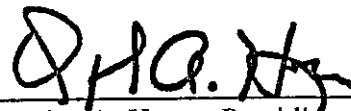
Kansas constitutional or statutory provisions

The constitution of the state of Kansas provides that "[t]he legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education." Art. 6, § 2 (b). As a part of its constitutional duty to "provide for [the state board of regents'] control and supervision of public institutions of higher education", the legislature has considered and adopted laws that mandate that *any* funds received by a state educational institution, or its employee, from the rent or sale of property, *or from any other source*, are dedicated solely to the use of that state educational institution. See K.S.A. 76-718.

Presumably this law means what it plainly says and requires that any funds received by a state educational institution from *intellectual property* are likewise dedicated solely to the use of that state educational institution. It thus appears, and it is the conclusion of the presiding officer, that the disposition of funds from intellectual property of the state's educational institutions is "fixed by statute or the constitution of this state". See K.S.A. 75-4322(t). It is the further conclusion of the presiding officer that the subject of intellectual property rights is preempted by federal law. The topic of intellectual property rights does not constitute a "condition of employment" as that term is defined in the PEERA and is not a mandatory subject of bargaining. The presiding officer concludes that because intellectual property rights are not a mandatory subject of bargaining under the PEERA, Respondent did not commit a prohibited practice in violation of K.S.A. 75-4333(b)(5) as alleged in Petitioner's complaint and that this matter shall be and is hereby dismissed.

IT IS SO ORDERED.

Dated this 21st day of December, 1999.



Douglas A. Hager, Presiding Officer
Div. of Employment Security & Labor Relations
1430 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be **received** no later than **5:00 PM on January 10, 2000** addressed to: Public Employee Relations Board & Labor Relations, 1430 SW Topeka Blvd. - 3rd Flr., Topeka, KS 66612-1853.

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager, Public Employee Relations Board, of the Kansas Department of Human Resources, hereby certify that on the **22nd** day of **December, 1999**, true and correct copies of the above and foregoing Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

C. A. Menghini
MENGHINI & MENGHINI, L.L.C.
316 National Bank Building
Pittsburg, KS 66762
Attorney for Petitioner

Wm. Scott Hesse, Assistant Attorney General
Office of the Attorney General
301 SW 10th Avenue - 2nd Floor
Topeka, KS 66612-1597
Attorney for Respondent

David M. Schauner, General Counsel
KNEA
715 W. 10th Street
Topeka, KS 66612

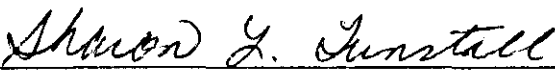
Tony White, Director
UniServ Southeast
615 S. Broadway - Ste. B
Pittsburg, KS 66762

John R. Darling, President
Pittsburg State University
1701 S. Broadway
Pittsburg, KS 66762-5880


Lisa Lewis, Attorney
Department of Administration
900 SW Jackson St. - Rm. 951S
Topeka, KS 66612-1251

Tom Bryant, Interim Executive Director
Kansas Board of Regents
700 SW Harrison - Ste. 1410
Topeka, KS 66603-3760

Joseph T. Barron, Legal Counsel
Kansas Board of Regents
700 SW Harrison, Ste. 1410
Topeka, KS 66603-3760


Sharon L. Tunstall

And to the member of the PERB on 7th, January, 2000.


Sharon L. Tunstall