BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC EMPLOYEES (KAPE), Petitioner, v. KANSAS BOARD OF REGENTS, KANSAS DEPT. OF ADMINISTRATION, and ROBERT HEMENWAY, Chancellor of the University of Kansas, Respondents.	Prohibited Practice Complaints 75-CAE-3, 4, 5, 6, 7 and 8-1996 Pursuant to K.S.A. 75-4321 et seq. and K.S.A. 77-501 et seq

FINAL ORDER
Pursuant to K.S.A. 77-527

This case comes before the Public Employee Relations Board (PERB) to conduct a review of the presiding officer's Initial Order.

History of the Case

Petitioner Kansas Association of Public Employees (KAPE) filed these complaints against the Respondents on August 14, 1995, less than four months after the Petitioner was certified as the exclusive bargaining representative of a unit of Graduate Teaching Assistants (GTAs) employed at the University of Kansas. Petitioner has complained about the behavior of the Respondents during meet and confer discussions between KAPE and University of Kansas officials on June 13, 20, and 29, 1995.

Petitioner has alleged that the Respondents violated K.S.A. 75-4330 (b) by: (1) willfully refusing to negotiate in good faith concerning FY 1996 salaries for University of Kansas GTAs; and (2) willfully retaliating against KU GTAs for their unionizing activities. Petitioner has asked PERB to order the Respondents to cease and desist from

75-CAE-3/4/5/6/7/8-1996 — F

these alleged activities.

After these complaints were served, the Respondents filed Answers to the complaints on August 28, 1995, admitting certain facts, but denying that they had committed any willful prohibited practices. The complaints were then assigned to George Wolf, PERB executive director, to act as the presiding officer. After attempts to settle the case proved fruitless, the presiding officer conducted an evidentiary hearing on March 4, 5, and 6, 1996. After the hearing, the parties filed simultaneous briefs on March 27, 1996, and the presiding officer issued his Initial Order on July 15, 1996.

In his order, the presiding officer did not reach the merits of the complaints. Instead, he ruled that the Petitioner's complaints should be dismissed, on the grounds the June, 1995 meetings had not been valid meet and confer sessions. The presiding officer reasoned that, since the Secretary of Administration was the statutory head of the employer bargaining team, and had not been notified of the discussion sessions, the discussions were void, and could not be used as the basis for any prohibited practice complaints.

Thereafter on August 2, 1996 Petitioner filed a timely petition with the PERB Board, requesting review of the presiding officer's Initial Order. The Board then heard arguments from counsel during the Board's regular meeting of August 21, 1996, and decided to grant Petitioner's request for review.

Mr. Wolf then prepared and issued an Order on August 23, 1996 which scheduled the matter for responsive briefs and oral argument. The Order directed the Petitioner to file its brief by September 23, 1996, and directed the Respondents to file their response briefs by October 23, 1996. The matter would then come before the PERB Board for oral argument on November 20, 1996.

Unfortunately, Petitioner's attorney failed to complete his brief on time, and a procedural dispute arose. Instead of consulting with opposing counsel to obtain their consent to an extension of time, Petitioner's attorney waited until his due date of September 23, 1996, and then filed an *ex parte* request for additional time. Since Petitioner's request was not accompanied by any assurance that he had obtained the consent of opposing counsel, the request was denied by the Board's executive director in an *ex parte* order issued the same day.

Petitioner's attorney then delivered a late brief to the PERB office on October 1, 1996, along with a motion to file the brief out of time. The executive director then issued a ruling denying Petitioner's motion to file a late brief, and Respondents filed a joint motion to dismiss Petitioner's appeal for failure to comply with the briefing schedule. Petitioner then filed a Petition for Review with the PERB Board, appealing the executive director's decision to disallow Petitioner's late-filed brief.

This procedural dispute was eventually resolved, however, after the Respondents

filed timely response briefs on October 23, 1996. When the case came before the Board on November 20, 1996, the Board allowed the Petitioner to file its brief out of time, denied the Respondents' joint motion to dismiss, and heard oral argument from the parties on the merits of the case.

After oral argument was concluded, the Board withdrew into executive session to deliberate its decision, and upon advice of counsel, Board member Jeff Wagaman recused himself from the case. The remaining members of the Board then deliberated the matter in executive session, and returned to the November 20, 1996 public meeting to announce that the matter would be taken under advisement.

After further deliberations in closed session on December 18, 1996, the board now issues the following final order as its ruling in this case.

Questions to be Determined

1. Whether the presiding officer erred when he ruled that no lawful meet and confer negotiations had taken place.

2. Whether the presiding officer's Initial Order is void because it was issued more than 30 days after the parties filed briefs.

3. Whether Respondents had a statutory duty to bargain with the Petitioner over FY 1996 GTA salaries.

4. Whether Respondents retaliated against KU GTAs for their unionizing activities.

5. Whether any of the acts complained of were committed "willfully".

6. Whether the case should be remanded to the presiding officer for further proceedings.

Findings of Fact

The Board adopts as its Findings of Fact the Statements of Fact #1 through #51, set forth by the Respondents Hemenway and Board of Regents on pages 3 through 13 of their October 23, 1996 brief to the Board.

Conclusions of Law

1. Meet and confer negotiations for units of state employees can begin under the Public Employer-Employee Relations Act (PEERA) K.S.A. 75-4321 et seq. only after the parties have notified the Secretary of Administration of their intent to commence negotiations. The Secretary of Administration shall then immediately designate the head of the employer bargaining team and notify the parties in writing of that designation. Bargaining undertaken without notification to or participation by the Secretary of Administration is not sanctioned by PEERA, and agreements reached as a result of such discussions are not binding.

K.S.A. 75-43422(m) defines "meet and confer in good faith" as follows:

"(m) 'Meet and confer in good faith' is the process where 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."

K.S.A. 75-4322(h) defines the employer bargaining team as follows:

> "(h) ... In the case of the state of Kansas and its state agencies, 'Representative of the public employer' means a team of persons, the head of which shall be a person designated by the secretary of administration ..."

These two definitions, taken together, make clear that the obligation to meet and confer in good faith exists only between the representatives of a recognized employee organization and the representative of the public agency. The obligation to meet and confer in good faith cannot arise if either of the parties to discussions is not properly constituted as the lawful "representative". Since it is undisputed that the Secretary of Administration was never notified of the June, 1995 meetings, those meetings did not constitute valid meet and confer negotiations.

2. Respondents had no legal duty to negotiate with Petitioner over GTA salaries for FY 1996. K.S.A. 75-4327(g) states the following rule for timeliness in negotiations under PEERA:

> "(g) It is the intent of this act that employer-employee relations affecting the finances of a public employer shall be conducted at such times as will permit any resultant memorandum of agreement to be duly implemented in the budget preparation and adoption process...."

In this case, the Board of Regents was required to submit its FY 1996 budget to the state budget director by September 15, 1994, almost seven months before the

Petitioner was certified as the exclusive bargaining representative of the University of Kansas GTAs. [Finding of Fact # 4; Tr. Vol 1, p. 1; Vol II, p. 169]. By the time the Petitioner had been certified to represent the KU GTAs, the Regents budget had already been submitted to the legislature and was in the final stages of adoption. By the time the parties met for discussions in June, 1995, the FY 1996 budget for the Board of Regents had already been passed into law.

Clearly the Petitioner's June, 1995 demands for bargaining over FY 1996 GTA salaries affected Respondents' finances, and did not comply with the timeliness requirement of K.S.A. 75-4327(g). As a result, Respondents had no duty to negotiate FY 1996 salaries, and there is no basis for Petitioner's complaint about the Respondents' reluctance to do so. Petitioner simply has no right under PEERA to compel untimely negotiations about FY 1996 salaries.

3. The record fails to show any conduct by the Respondents which can be fairly construed as willful retaliation against University of Kansas GTAs for their unionizing activities. Although the record includes some evidence that one or more individual members of the 1995 Kansas Legislature had a retaliatory motive in deciding not to fund FY 1996 merit increases for Board of Regents GTAs, Respondents cannot be held responsible for actions of members of the legislature.

4. The presiding officer's Initial Order was not void when issued, even though

it was released more than 30 days after the parties filed their briefs. The Petitioner's contention in this regard is completely without merit.

It is settled case law in Kansas that the 30-day requirement of K.S.A. 77-526 for the issuance of an initial order is "directory" rather than jurisdictional. See Expert Environmental Control v. Walker, 13 Kan. App. 2d 56, 58 (1988). This requirement is intended to spur the orderly and prompt administration of cases, but is not intended to deprive the agency of jurisdiction in the event an order is not issued within the required 30 days. The remedy of a party for an administrative delay in the issuance of an Initial Order is found in K.S.A. 77-631(a), and consists only of the right to petition the district court for interlocutory review of the agency's failure to act. Once the agency takes action, the right to interlocutory review expires.

5. "Willfully" as used in K.S.A. 75-4333 (b) means conduct that is purposeful and intentional and not accidental. To establish a willful violation of law, there must be evidence that the perpetrator "knew or showed reckless disregard for the matter of whether its conduct was prohibited". See McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988).

With regard to the question of willfulness in prohibited practice matters, the case of Louisburg Teachers Association v. Louisburg U.S.D. 416, PNA Case No. 72-CAE-1-1991 is most instructive. In that case, presiding officer Monty Bertelli carefully

considered the meaning of the term "willfully" in the Professional Negotiations Act for public school teachers (K.S.A. 72-5413 et seq), and reached the following conclusions:

> "(3) K.S.A. 72-5430(b) sets forth eight categories of conduct which, if undertaken by the board of education or its representative, constitute a prohibited practice and evidence of bad faith in professional negotiations. However, such conduct is to be considered a prohibited practice only if engaged in "*willfully*." The Professional Negotiations Act unfortunately does not contain a definition of "*willful*." One must look to other sources for its meaning.
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> Black's Law Dictionary, 5th ed., provides the following definitions of the word "*willful*":
>
> > "An act or omission is '*willfully*' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.
> >
> > "Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."
>
> The Kansas Supreme Court in the case of Weinzirl v. Wells Group, Inc., 234 Kan. 1016 (1984), defined the term "*willful act*" as it appears in the Kansas Wage Payment Law, K.S.A. 44-313 et seq., as an act "indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another."
>
> K.S.A. 72-5430(b) as presently written with the word "*willfully*" indicates a legislative intent to impose a requirement of some blameworthiness. This interpretation finds support in the fact that K.S.A. 72-5430(b) is patterned after section 158(a) of the federal Labor Management Relations Act which does not contain the word "*willfully*," and which has been interpreted as not requiring specific intent. See N.L.R.B. v. Burnup Sims, Inc., 379 U.S. 21 (1964). Accordingly, it would appear the Kansas legislature added the word "*willfully*" with the intent that proof of a prohibited practice be more difficult under the Kansas Professional Negotiations Act than under the federal Labor Management Relations Act. A reasonable interpretation of K.S.A. 72- 5430(b) therefore is to require proof of anti-union animus or specific intent to violate an employee's or recognized employee organization's statutory rights under the Act as essential to establish a prohibited practice."
>
> -- Initial Order, at pp. 25-27.

The same analysis should be applied to the definition of "willfully" in PEERA at K.S.A. 75-4333(b). To establish a willful prohibited practice under K.S.A. 75-4333(b),

there must be proof of anti-union animus or a specific intent to violate the Petitioner's statutory rights under PEERA.

6. The evidence in this case is insufficient, as a matter of law, to establish that any prohibited practices were committed "willfully" by the Respondents. Although University officials commenced untimely discussions with KAPE about FY 1996 salaries, and commenced those discussions without first notifying the Secretary of Administration, they did so without a full understanding of the required statutory procedures. The actions of University officials in this case were clearly the result of inexperience, rather than anti-union animus or any specific intent to deprive Petitioner of its statutory rights.

7. KAPE contributed to the University's errors, not only when KAPE's representatives insisted upon bargaining concerning FY 1996 salaries, but also when KAPE became aware that the Department of Administration was not present at the discussion table, and took no action to inquire whether the Department had been notified. Contrary to the Petitioner's allegations, a simple inquiry whether the Department of Administration had been notified, would not constitute a prohibited practice in violation of K.S.A. 75-4333(c)(2), as it would lack the necessary willful intent to interfere with Respondent's selection of a representative for meet and confer purposes.

8. The presiding officer was correct in ruling that the June, 1995 discussions were

not lawful meet and confer sessions, because of the failure of the parties to notify the Department of Administration. However, the presiding officer erred in concluding that on that basis alone, the Petitioner's complaints should be dismissed.

Nevertheless, the Board finds in this case that Respondents did not commit any of the prohibited practices set forth in K.S.A. 75-4333(b). Thus, the result in this case remains the same, that the Petitioner's prohibited practice complaints must be dismissed without a remedy pursuant to the provisions of K.S.A. 75-4334(b).

Order

Petitioner's complaints are hereby determined to be without merit, and Petitioner's requests for relief are hereby denied.

Entered in Topeka, Kansas this 3rd day of ~~December, 1996.~~ January, 1997

PUBLIC EMPLOYEE RELATIONS BOARD

Floyd Taylor, Chairman

William Haynes, Vice-Chairman

Errol Williams, Board Member

Greg Windholz, Board Member

Jeff Wagaman, Board Member, not participating.

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Notice of Right to Seek Judicial Review

This is a final order issued by the Public Employee Relations Board pursuant to K.S.A. 77-527. This order is subject to review by the district court in accordance with the Act for Judicial Review and Civil Enforcement of State Agency Actions K.S.A. 77-601 et seq.

Unless a motion for reconsideration is filed pursuant to K.S.A. 77-529, a petition for judicial review must be filed with the appropriate district court within 30 days after the Order is served upon the parties. Since this Order is being served upon the parties by mail, the parties are allowed a total of 33 days from the date on the certificate of mailing below to file their petition for judicial review. See K.S.A. 77-613 (b) and (d).

Pursuant to 1995 Supp. K.S.A. 77-527(j), K.S.A. 77-613(e), and K.S.A. 77-615 (a), any party seeking judicial review must serve a copy of its petition upon the Board's designated agent at the following address:

A.J. Kotich, Chief Counsel
KDHR - Legal
401 Topeka Blvd.
Topeka, Kansas 66603-3182

Questions regarding judicial review should be directed Don Doesken, staff attorney, at the KDHR - Legal office. Tele: (913) 296-5020.

Certificate of Service

I, Shirley J Klein do hereby certify that on this 3rd day of January, 1997, the foregoing Final Order was served upon the parties by depositing copies in the United States mail, first-class, postage pre-paid, addressed to:

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