BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

IN THE MATTER OF		
Kansas Association of Public Employees (KAPE),		
Petitioner,	Case No.	75-CAE-3-1996 75-CAE-4-1996
v.		75-CAE-5-1996 75-CAE-6-1996
Board of Regents, Department of Administration and Chancellor Hemenway,		75-CAE-7-1996 75-CAE-8-1996
Respondent.		

INITIAL ORDER

NOW on this 4th day of March, 1996, the above-captioned prohibited practice matter comes on for hearing, pursuant to K.S.A. 75-4334 (a) and K.S.A. 77-523, before Presiding Officer George M. Wolf.

APPEARANCES

PETITIONER:

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RESPONDENT:

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ISSUES PRESENTED FOR REVIEW

This case, in fact, had its inception on April 8, 1992, when a petition seeking a unit clarification determination was filed by the Kansas Association of Public Employees (hereinafter referred to as "KAPE".) KAPE sought to become the certified representative of the "Graduate Teaching Assistants and Graduate Research Assistants". An election was eventually, but duly held, on the University of Kansas campus in Lawrence, Kansas, on the 17th and 18th of April of 1995. The counting of the ballots reflected that KAPE had been, by the election, selected by the voters to be the employee representative of "all graduate teaching assistants employed by the University of Kansas". The Public Employer/Employee Relations Board (hereinafter "PERB") issued its "Certification of Representative and Order to meet and confer" on April 27, 1995. See, Kansas Association of Public Employees v. Kansas Board of Regents, University of Kansas, PERB Case No. 75-UD-1-1992.

Following this election, according to Marc B. Adin, Director of Human Resources at the

University of Kansas, University representatives met with representatives of KAPE to discuss prior to negotiation of a Memorandum of Agreement the graduate teaching assistants (hereinafter referred to as "GTAs") salaries on June 13, 20 and 29, 1995. These dates were verified in a letter drafted by Marc B. Adin and entered as Exhibit "Q" in this case without objection by the respondents. Agreement was not reached by the parties as to the GTA salaries during the sessions of June 13, 20 and 29. On August 14, 1995, KAPE filed six separate prohibited practice complaints which stemmed from a common-fact situation; that being the conduct and behavior of the respondents during and following the June 13, 20 and 29 meetings. The six cases were consolidated for hearing purposes. Case No. 75-CAE-3-1996 named Chancellor Robert Hemenway as the respondent; Case No. 75-CAE-4-1996 named the respondent as the Kansas Department of Administration; Case No. 75-CAE-5-1996 named the respondent the Kansas Department of Administration; Case No. 75-CAE-6-1996 named Chancellor Robert Hemenway as the respondent; Case No. 75-CAE-7-1996 named the University of Kansas as the respondent, specifically, the Board of Regents; and, Case No. 75-CAE-8-1996 named Chancellor Robert Hemenway as the respondent.

Prior to consideration of the six petitions and the sub-allegations contained therein, the Kansas Department of Administration (hereinafter referred to as "DOA"), timely raised an issue of a threshold nature which itself must be examined prior to consideration of the prohibited practices alleged by the petitioner KAPE. The issue raised by DOA first appears in its "Statement of Proposed Facts and Issues of respondent Department of Administration"; appears second in the opening

statement by DOA Attorney, Linda Fund; and third and finally, in the post-hearing brief of DOA which was the DOA's final submission for the Presiding Officer's consideration. The DOA in its "Statement of Proposed Facts and Issues of Respondent Department of Administration", in essence captures the remarks made by DOA Attorney Linda Fund in her opening statement and in the post-trial briefs submitted by the DOA. The "statement" quite simply states the point thusly:

> Whether a prohibited practice can be found when the representative of a public agency, pursuant to K.S.A 75-43-22(h) has never been noticed at and involved in the meet and confer process as set out in the public employees/employer relations act (PEERA).

FINDINGS OF FACT

1) That proper service was had on the parties hereto and that the contested matter is within the jurisdiction of the Public Employee / Employer Relations Board.

2) That Respondent, The University of Kansas through its agent Marc B. Adin, Director of the Department of Human Resources, on August 11, 1995, wrote a letter to the PERB with copies to Chancellor Robert Hemenway, Richard Mann, David Shulenburger, Karen Dutcher, Scott Stone and Paul Dickoff stating that three meetings had been held between the University of Kansas and KAPE; the meetings having taken place on June 13, 20, and 29th of 1995, a copy to the DOA or it's representative was conspicuously absent. Mr. Adin's letter was marked Exhibit "Q" and entered into evidence at the hearing without objection.

3) That the parties each and all had on February 23, 1996, entered in certain stipulations filed herein that are set out as follows:

> "1. Neither the Secretary of Administration nor any staff member from the Department of Administration was contacted by any official of the University of Kansas or the Board of Regents about KAPE's request to meet prior to the meetings between the University of Kansas and representatives of the Graduate Teaching Assistants.
>
> 2. Neither the Secretary of Administration nor any staff member from the Department of Administration were contacted by the Graduate Teaching Assistants or their representatives from the Kansas Association of Public Employees regarding KAPE's request to meet prior to the meetings between the University of Kansas and representatives of the Graduate Teaching Assistants.
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> 3. Neither the Secretary of Administration nor anyone from the Department of Administration was present at the three meetings held with representatives of the University of Kansas and the Graduate Teaching Assistants and their representatives from the Kansas Association of Public Employees."
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> It was therefor stipulated by all parties to this matter that the DOA was never officially notified or made aware of the purported meet and confer proceedings between The University of Kansas and purported "Representative of a public agency".

4) Paul Dickhoff, Chief Negotiator for KAPE, testified at the hearing of the matter on March 4, 1996 (transcript pp. 60-64) as follows :

> "Q. Who do you typically go about contacting when the employees desire to begin a meet-and-confer process?
>
> A. I'll say that varies.
>
> Q. Can you elaborate some?
>
> A. If I were going to go into negotiations at Kansas State University, I would probably contact either Gary Leitneker or Carmin Ross-Murray. If you were going to negotiate at Pittsburg State University I might contact Michelle Sexton. Very recently I've had some discussions with the Department of Administration about contacts, who's authorized to do what, when and where. And currently, if I were going into negotiations with an agency of the State, I would contact Linda Fund

and I have in the past contacted people like Les Hughes, Al Nauman. So it varies. It just depends on the unit I'm going into and the relationship that I have with the parties at the table.

Q. And isn't it true that, in your experience, that Board of Regents Institutions typically have a little more latitude at the bargaining table than maybe the Department of Corrections or SRS?

A. I would say that, yes, I think the Regents have given-- at least given me the impression that they speak for themselves more than permitting the Department of Administration to speak in their behalf.

Q. Would you state, then, in your experience that Board of Regents negotiations teams have expressed or had some kind of autonomy or greater autonomy than the Department of Administration?

A. Greater autonomy than the Department of Administration or than other state agencies?

Q. Than other State agencies.

A. Yes. I would say that, I mean, it's kind of a difficult question to answer. My experience has been that I have not negotiated across the table with anyone from the Department of Administration at any time that I have been involved with negotiations with the Regents Institution. The chief spokes-person at the table is consistently someone from that Regents Institution in the State of-- in the case of the State and it agencies, the chief spokes-person could either be an agency individual or it could be a representative of the Department of Administration.

Q. And doesn't it say in the statute that your chief spokes person for the State will be the chief spokes person-- will be a representative of the Department of Administration?

MS. FUND: Objection. I think we're right back to where we were. If he wants to qualify Mr. Dickhoff as an expert, I think he has to do it. These questions are directly regarding the law. I think that's the presiding officer's purvey.

MR. STONE: I have to disagree. Asking someone if they're aware if something is in the law is a little different than asking someone to render an opinion on the law.

(THEREUPON, the court reporter read back the following question:

Q. And doesn't it say in the statute that the chief spokes-person for the State will be the chief spokes-person will be the representative of the Department of Administration?

HEARING OFFICER WOLF: Where is that going?

MR. STONE: Well, it's going to show that someone was sitting at the table claiming to be chief spokes-person for the State and by law it says that person then is Representative of the Secretary of Administration.

MR. DUTCHER: Objection. I don't think there's been anything in evidence that anyone claimed to be chief spokes-person for the State.

MR. STONE: There will be.

HEARING OFFICER WOLF: Well, again, keeping with the decision you made not to qualify Mr. Dickhoff as an expert witness, I'll allow the question, but let's keep in mind that if he isn't an expert witness that we're talking to at this time has not been cast in that roll as yet. Excuse me, I would.

Q. (BY MR. STONE) Is it your understanding that the chief spokes-person for the State Bargaining Team is a Representative of the Secretary of Administration?

A. Yes. And I'd like to qualify that just a bit. The statute talks about the representative of the employer being a team of persons, the head of which shall be representative of the Department of Administration. I think it says the Secretary of Administration or designee or something of that effect. But my interpretation of that is, that the person in power, when we go to the table, is either the Secretary of Administration or the Secretary designee. The team of persons includes both a representative of the Secretary and the Representative of the agency involved. Agency or agencies involved."

Mr. Dickhoff further testified at the hearing of the matter on March 4, 1996 (transcript pp. 95-99 as follows:

Q. (BY HEARING OFFICER WOLF) Excuse me. My question is one of series of questions that doesn't have anything to do with narrowing the scope. And I don't think you should feel sticky. Can we agree that it was not you then that initiated the correspondence with the University? If I understand what you've just said and what my notes said is, the first time that you-- that you really came to grips with the issue or talked to anybody from the University or the Regents or whomever, was it the first meeting where you talked about the shape of the table and ground rules and so forth; is that right?

A. As memory serves me, yes.

Q. Was there a member of the Department of Administration present at that meeting?

A. At the ground rules meeting?

Q. Uh-huh.

A. No, there was not.

Q. They weren't represented? Did you think that was unusual?

A. Yes.

Q. And did you follow that up?

A. Uh-huh.

Q. Well, my experience, again, with the meet-and-confer process is, that it's really none of my business who they bring to the table with them, nor is it any of their business who I bring to the table with me any more that it is the business of one counsel or one claimant who the other claimant hires as their representative. The statute places-- I mean, it certainly contains some language which talks about who the representative of the employer is supposed to be, it's a team of persons. And-- or their designees. And if they chose not to come to the table, there isn't much I can do about it.

Q. In your capacity of chief negotiator, do you feel you had any obligation to inquire about the Department of Administration to make any inquiries as to why they weren't there?

A. No.

Q. Whose responsibility would that have been?

A. I believe that would have been Mr. Adin's responsibility.

Q. We've asked a lot of questions. I'll ask one myself. Why do you think it was Mr. Adin's responsibility and not KAPE's responsibility?

A. Because, again, to reiterate who-- perhaps if I put the shoe on the other foot it might be worth while. If I were to notify Mr. Adin that I would not be present at the table but in my place there would be-- or our representative for this particular set of negotiations is going to be anyone else, Mr. Adin might think that was somewhat unusual that I wouldn't be there or that some employee of KAPE would not be there. But it's really none of his business who we chose to send to the bargaining table as long as they're authorized to be there in our behalf. If I send my son to the bargaining table and I authorize him to act in my behalf, I probably get what I deserve, but I nonetheless have the right to send him there and they have no right to challenge that. I explained earlier, that, in my experience no one from the Department of Administration has ever spoken in behalf of the Regents Institutions. It has always been an employee of the Regents Institutions who's the chief spokes-person at the table. Whether the individual is present at the table or not is their decision not mine. For all I know, the Department of Administration could have told Marc Adin for the limited purposes that you're going to the bargaining table you can be our designee. I don't know that. I don't know it to be true or I don't know it to be false.

Q. Would you believe that you under the circumstances that exist at the time, that the Department of Administration might have, for lack of a better term, have been considered an adversary of KAPE?

A. No more than any other day of the week.

Q. I guess my next question is somewhat redundant. But if we were to assume that they were-- they had some interest, was going to be affected by a proceeding that you initiated, do you think that in general there is any sort of obligation to notify an opposing party?

A. I think that matter has been discussed subsequent to the problems that arose in the meet-and-confer process at K.U. And, in fact, we're still in the process of trying to iron out the bumps in who's contacted under what situations. I think my earlier testimony indicated that if I were making a similar contact today, there's absolutely no question in my mind who the State would like to have contacted in that regard. And that would be Linda Fund of the Department of Administration."

5) A threshold issue raised by DOA at page 10 of its post-hearing brief is stated as follows:

> "Meet and confer in good faith" is the process whereby the representative of a public agency and the representative of the recognized employee organization have the mutual obligation personally to meet and confer regarding conditions of employment in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment. K.S.A. 75-4322(m). The authorized representative for the GTAs is KAPE. "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 and the heads of the state agency or state agencies involved or one person designated by each such state agency head." K.S.A. 75-4322(h), emphasis added. The statutory language is clear and unambiguous; as such the trier of fact must give the effect intended by the legislature. See, Commerce Bank of St. Joseph v. State, 251 Kan. 207,215 (1992). Hear it is clear that the Secretary of Administration or her designee is a necessary participant for the PEERA meet and confer process.
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> Petitioner alleges that the belief that one is at a meet and confer session places one under the obligations of PEERA. Petitioner elicited testimony from participants to the meetings which indicated that all participants believed they were participating in a meet and confer session under PEERA. Petitioner noted that there were "ground rules for meet and confer". Petitioner also elicited much

testimony regarding the role of the chief spokesperson. (See hearing transcript pp. 67-70; 105-106; 121) Petitioner attempts to imply away the statutory mandates of K.S.A. 75-4322(h) by suggesting that through believing that they were in the meet and confer process the parties could eliminate the necessity of having the Secretary of Administration appoint the head of the team. Petitioners suggestion flies in the face of the statutory mandate, however.

PEERA is a creature of statute. As such, its powers and procedures are determined by the legislature and limited to those defined by the legislature. *Board of Meade County Comm'rs v. State Director of Property Valuation*, 18 Kan.App.2d 719(1993) The act can allow no more or no less procedural requirements than those which the legislature placed into the act. PEERA does not dictate who will be the chief spokesperson to present the team's position. It does dictate who chooses the head of team, however. K.S.A. 75-4322(h). The chief spokesperson and the head of the meet and confer team are not synonymous terms. The head of the meet and confer team is statutorily defined while the chief spokesperson is chosen by the team to meet the needs of the team.

The mandate to designate the head of a meet and confer team denotes that the Secretary of Administration will have knowledge of the process an agency is to undertake. The act does not allow for agencies to choose the head of the meet and confer team. The act does not allow for parties to, in all good faith, "believe away" the participation of the Secretary of Administration. The plain language of the statute mandates that the Secretary of Administration either participate or send a designee to the meet and confer table. K.S.A. 75-4322(h).

The Department of Administration would also note the Secretary of Administration or his or her designee is a necessary party to any memorandum of agreement or understanding. *See* K.S.A. 75-4322(n) and 75-4331. Both a memorandum of agreement and a memorandum of understanding require the participation of the representative of the public agency which, by definition, includes the participation of the Secretary of Administration. Memorandum of agreements are kept within the Department of Administration. The final signature on memorandums is that of the Secretary of Administration. This

procedure falls in line with the statutory mandate that the Secretary of Administration be involved personally or through his or her chosen designee. K.S.A. 75-4322(h)

The law clearly mandates the participation of the Secretary of Administration. It is undisputed that not only was the Secretary of Administration nor her designee not a participant, there was no knowledge of the meetings provided to the Secretary of Administration or her designee. See, STIPULATION.

The Department is not casting blame at either the agency or the employee organization. The Department submits that the lack of notice is just one more false start in a unique and troubled attempt to find resolution in this claim. The statutory requirements stand alone, however. The legislature included the Secretary of Administration within its definition of public agency and, as such, the position is a necessary party to the meet and confer process contemplated under PEERA.

The finding of a prohibited practice, by necessity, demands that a party have knowledge of the alleged wrong doing. There can be no finding of a prohibited practice when the statutorily defined representative of the public agency required to participate is not provided notice of the meetings between a state agency and the employee organization and has no knowledge of the proposals, counter-proposals or lack thereof.

ORDER

The issues presented in this case, both in terms of number, novelty and complexity, invite review, analysis and comment; however, the authority of the representative of a public agency, to transact business with an employee representative in a "meet and confer" proceeding is dependent on specific statutory authority permitting them to do so. In Woods v. Midwest Conveyor Co., 231 Kan. 763, 770, 648 P. 2d 234 (1982), the Kansas Supreme Court held as follows:

The Kan. Const. art. 3 Sec. 1 provides: 'The judicial power of this state shall be vested exclusively in one court of justice.' The KCCR is an administrative

> agency. Administrative agencies are creatures of statute and their power is dependent upon the authorizing statutes, so that we must find within the statute warrant for the exercise of any authority which they claim. They have only such powers as have been conferred upon them by law, expressly or by clear implication. 1 Am. Jur. 866, Administrative Law Sec. 70 Bennett v. Corporation Commission, 157 Kan. 589, 596, 142 P. 2d 810 (1943), 150 A.L.R. 1140 (1950).

In the instant matter, the DOA has raised a threshold issue as to whether the agencies, creatures of statute, acted in a way that was, in fact, authorized by law, or in a way that they were functioning consistently with powers that may have been conferred upon them as agencies by law, expressly or by clear implication. The basic and controlling sections of K.S.A. 75-4322 are set out as follows:

> (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 the State of Kansas and its state agencies. Such chief executive shall be for counties, the chairman of the board of county commissioners; for cities, the mayor, city manager or city superintendent; for school districts, the president of the board of education; and for other local units, such similar elected or appointed officer. 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 and the heads of the state agency or state agencies involved or one person designated by each such state agency head.

A second section of the statute adds language to help further clarify section'(h)' set out above:

> (m) 'Meet and confer in good faith' is the process whereby the representative of a public agency and representatives of recognized 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.

The presiding officer concludes from the findings of fact, which are set out above and a part hereof, is that there is no dispute that KAPE is the legal employee representative and the DOA and the University of Kansas are agencies of the State of Kansas as contemplated by K.S.A. 75-4322, sub sections (h) and (m). Neither is

there a dispute that the University of Kansas and KAPE had three meetings between June 13 and 29, 1995.

Further, Chief Negotiator for KAPE, Paul Dickhoff gave testimony based on more than twenty years experience with PEERA, that the DOA must by law be an inextricable part of a "team of persons" that is described by subsections (h) and (m) of K.S.A. 75-4322 as "representative of a public agency" and that the resultant representative of a public agency must be part of the meet and confer process.

Finally, on February 23, 1995, KAPE, the University of Kansas and the DOA stipulated that neither the University of Kansas nor KAPE ever gave notice to the DOA or any agent thereof, of the meetings that were held between the University of Kansas and KAPE on June 13, 20, and 29, 1995.

IT IS THEREFOR ORDERED AND ADJUDGED, that while the applicable statute is disappointingly silent as to specific procedural steps in constituting an official "representative of a public agency", the statute by clear implication places the burden on the agency, in this case the University of Kansas, to contact the DOA when necessary, as in the instant case and participate in the formation of the "representative of a public agency" prior to entering into activities such as meet and confer discussions. Had the University of Kansas followed this procedure, much delay, confusion and misinformation could have been avoided. The failure of the University to act appropriately placed KAPE in the position of choosing whether to assume it was dealing with an "official representative of a public agency" or to take it upon itself to notice up the DOA which the statute clearly implies may be done if not must be done, to make certain all real parties in interest are given proper notice of a pending action, procedure or process as may be covered by K.S.A. 75-4322. Although, Mr. Dickhoff testified that Regent's institutions, in his experience, have enjoyed more autonomy than other state agencies, there is nothing this Presiding Officer can find in the pertinent statute to distinguish Regent's institutions from other state agencies, regarding autonomy.

IT IS THEREFOR FURTHER ORDERED AND ADJUDGED that the failure to notice up and include the DOA in the formation of the "representative of a public agency", to take part in the anticipated meet and confer process between the University of Kansas and KAPE constitutes a fatal flaw in presenting a duly constituted employee representative at the bargaining table on June 13, 20, and 29, 1995. The failure to comply with K.S.A. 75-4322(h) and (m) renders void any attempt to meet and confer as contemplated by the statute.

IT IS FURTHER ORDERED AND ADJUDGED that the prohibited practices set forth in the six cases filed by KAPE herein are hereby dismissed.

George M. Wolf
Presiding Officer
PERB

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 Employer-Employee Relations Board, either on its own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on August 2, 1996 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66612.

CERTIFICATE OF MAILING

I, Kay Fordham, hereby certify that on the **15th** day of **July, 1996**, a true and correct copy of the foregoing Reconsideration of Agency Order was deposited in the United States Mail, first class, postage prepaid, addressed to:

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