BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

FRATERNAL ORDER OF POLICE, LODGE NO. 4, Petitioner,	)	
vs.	)	Case No. 75-CAE-4-1991
CITY OF KANSAS CITY, KANSAS, Respondent.	)	

ORDER

NOW, on the 18th day of December, 1991, the City of Kansas City, Kansas having filed a Request for Review with the Public Employee Relations Board of the Initial Order in the above-referenced prohibited practice complaint wherein the Respondent was found to have committed a prohibited practice the request comes on for consideration by the Board.

FINDINGS OF FACT

1. The Initial Order of the Presiding Officer was filed Friday, November 15, 1991 and bears a Certificate of Service verifying the Initial Order was "deposited in the U.S. mail, first class, postage prepaid, addressed to" Respondent's attorney, on that same day.

2. The name and address of Respondent's attorney on the certificate of service on the Initial Order is the same as appears upon the attorney's entry of appearance and all other correspondence to or from Respondent's attorney.

3. The Initial Order was received in the office of Respondent's attorney on Tuesday, November 19, 1991.

4. Respondent's attorney mailed a Request for Review of the Initial Order bearing a certificate of service showing mailing by First Class Mail of Monday, December 2, 1991. The Request was received by the Secretary and file stamped on Thursday, December 5, 1991. The envelope containing Respondent's

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Request for Review bears a postage meter date of December 2, 1991, but no postmark.

5. Petitioner, Fraternal Order of Police, Lodge No. 4, filed, on December 6, 1991, a motion to dismiss Respondent's Petition for Review as being untimely filed thereby denying the Board of jurisdiction to review the Initial Order.

6. On December 10, 1991 the Respondent filed a Motion to Docket its untimely Request for Review based upon "excusable neglect of legal counsel."

DISCUSSION AND OPINION

Before determining whether Respondent's Request for Review presents issues which warrant granting a review of the Initial Order, the threshold issue of the Public Employee Relations Board's lack of jurisdiction to entertain the complaint, as raised by Petitioner's Motion to Dismiss, must be examined. K.S.A. 77-527(b), in pertinent part, states:

> *"A petition for review of an initial order must be filed with the agency head , . . . , within 15 days after service of the initial order." (emphasis added).*

The Initial Order was filed on November 15, 1991 and the certificate of service shows it was mailed to the parties on that same date. The Request for Review shows a certificate of service dated Monday, December 2, 1991 with an agency file stamp of Thursday, Decemer 5, 1991.

Petitioner admits in its Motion to Docket Respondent's Petition for Review that when the Request for Review was mailed on December 2, 1991:

> *"Respondent assumed that the Petition would be received by PERB on December 3 or 4, 1991.*
>
> * * * * *
>
> *"Any tardiness in the filing of the Petition for Review was due to excusable neglect of legal counsel and his office and none of the parties has been or would be prejudiced by this Board's allowing the Petition to be docketed."*

K.S.A. 77-531 provides, in pertinent part:

> *"Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person at the person's last known address. . . . Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail is completed upon* ***mailing****."* *(emphasis added.)*

Respondent, in its Motion to Docket, apparently believes and would argue the 15 day period for filing a Request for Review set forth in K.S.A. 77-527 begins from the date the Initial Order is received by the party. Using this interpretation of K.S.A. 77-527, the 15 day period began November 19, 1991 thereby making December 4, 1991 the last day to file the request for review. (Respondent's Motion to Docket, p.2).

K.S.A. 77-532 makes it clear that an order is served when it is *"mailed,"* not when it is received by the party. An order is *"mailed"* within the meaning of the law when it is dropped in a street letter box as well as when it is deposited in the post office. Casco National Bank v. Shaw, 10 A. 67 (1887); Schneider v. Oakman Cons. Min. Co., 176 P. 177 (Cal. 19); Rawleigh Medical Co.

v. Burney, 102 S.E. 358, 359 (1920); Texas Cas. Ins. Co. v. McDonald, 269 S.W. 456, 457 (Tex. 19). As stated by the court in Shaw,:

> *"Street letter-boxes are authorized by an act of congress and are as completely and as exclusively under the care and control of the post-office department as boxes provided for the reception of letters within the post-office building themselves; and we think a letter deposited in a street letter-box, which has been put up by the post-office department, is as truly mailed, within the meaning of the law, as if it were deposited in a letter-box within the post-office building itself. It has been held that delivery to a letter carrier is sufficient."*

A letter is "*mailed*" when it is properly addressed, stamped with the proper postage, and deposited in a proper place for receipt of mail. Texas Cas. Ins., supra. Pursuant to K.S.A. 77-531 service is "*presumed*" where the person makes a written certificate of service. Here there is a written certificate of service showing the date of mailing as September 30, 1991 which must be presumed correct until evidence to the contrary is produced by the one challenging that date. No such evidence has been presented by Respondent. In fact, there is nothing in Respondent's Petition to Review that would indicate any disagreement with the truthfulness of the certificate of service. Service being completed upon "*mailing*" Respondent was served with the Initial Order on November 15, 1990 when, according to the certificate of service, it was mailed.

Since the initial order was served by mail, K.S.A. 77-531 provides:

> *"Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period."*

This provision is similar to K.S.A. 60-206(e). In interpreting that three day provision the Kansas Supreme Court in Wheat State Telephone, 195 Kan. 268, 271 (1965) concluded:

> *"The rule simply means that the three additional days allowed where service has been made by mail should be added to the original period and the total taken for the period for the purpose of computation."*

Pursuant to K.S.A. 77-531 the three days for mailing is added to the 15 days allowed to request a review of an initial order giving a total of 18 days within which U.S.D. 314 had to file its Request for Review. In computing the period of time allowed a party to request review, the day of service of the initial order is not included. Wheat State Telephone Co. v. State Corporation Commission, supra at 271. In this case the certificate of service indicates November 15, 1991, so that day would not be counted. The 15 day period would begin November 16, 1991. Counting forward 18 days from November 16, 1991 makes December 3, 1991 the final day for a party to file a Request for review in this case. Accordingly, the Respondent's Request for Review being filed with the Board on December 5, 1991 was clearly beyond the December 3,

1991 deadline. This is true even if Respondent's incorrectly computed deadline of December 4 is used.

Petitoner next argues the *"Act [Kansas Administrative Procedure Act] does not define the term 'filed.'"* This is correct. The Board must therefore look elsewhere for guideance to determine what the legislature meant when it used the term *"filed."* Black's Law Dictionary defines *"file"* to mean:

> *"A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file as a matter of record and reference."*
>
> *"To deposit in the custody or among the records of a court. To deliver an instrument or other paper to the proper officer or official for the purpose of being kept on file by him as a matter of record and reference in the proper place."*

The Kansas Supreme Court in City of Overland Park v. Nikias, 209 Kan. 643, 647 (1972) appears to have adopted a similar definition:

> *"The word 'file' contemplates the deposit of the writing with the proper official." See also State v. Heth, 60 Kan. 560 (1899); Rathburn v. Hamilton, 53 Kan. 470 (1894).*

This definition is consistent with the opinions from other jurisdictions: Shultz v. United Steelworkers of America, 319 F. Supp. 1172, 1175 (D.D. Pa. 1970), (Complaint by union member concerning election was *"filed"* when received by Secretary of Labor); Garcia v. Sanco Finance Co., 392 P.2d 51, 52 (Okl. 1964), (Word *"file"* means to deposit in court or public office a paper of

document, filing consists of delivery of same to proper office); Dudukovich v. Lorain Metropolitan Housing Authority, 389 N.E.2d 1113, 1115 (Ohio 1979), (Act of depositing notice in mail, in itself, does not constitute a *"filing,"* at least where the notice was not received until after expiration of the prescribed time limit - the term *"filed"* requires actual delivery); Blake v. R.M.S. Holding Corp., 341 So.2d 795, 799 (Fla. App. 1977), (To be *"filed"* under statute requiring that application for agricultural assessment of property be filed with tax assessor by certain date, document or paper must be delivered to and received in office of assessor); and Horn v. Abernathy, 343 S.E.2d 318, 321 (Va. 1986), (Hospital's request for medical malpractice panel to review claim which was mailed was not *"filed"* until it was delivered, and was not timely when delivered after expiration of prescribed time limit for filing request).

The court in Stern v. Electrol, Inc., 238 N.Y.S.2d 1005 (1963) correctly summarizes the reason for this position:

> *"The term 'filed' as used in the section cited cannot properly be equated with 'mailed' or 'served by mail': the distinction is substantial and material in legal meaning and effect and in common parlance as well."*

The Kansas legislature, in adopting the Administrative Procedures Act, K.S.A. 77-501 et seq., uses both the term *"file"* and *"serve"* throughout, and so must be presumed to have been aware of the difference between the words. In K.S.A. 77-527(b) it specifically

used the term *"filed"* and must have intended the specific requirements associated with that term. It is also important to note that no provision was provided for extension of the filing period for good cause shown.

Respondent's Request for Review was not delivered to or received by the Public Employee Relations Board, the agency head, until Thursday, December 5, 1991 when it arrived in the mail. While it may be true the Request while in the possession of the postal service was in the process of being delivered, K.S.A. 77-527(b) requires more than the request being in the process of delivery, it requires that it be delivered to and received by the Board within the prescribed 15 day period.

The means of delivery and filing of the Request for Review was solely withing the control of the Respondent. It elected to use First Class Mail. The Respondent cannot delegate the responsibility for delivery to a third party and then assert the untimely performance of that third party as a defense to failure to timely file its Request for Review. While the act of physical delivery may be delegated to another, the responsibility to see that delivery and filing are timely made always remains with the appealing party.

Here Respondent elected to deliver its Request for Review by First Class Mail by mailing the request only one day before the December 3, 1991 deadline for filing. Other means such as personal

delivery, Federal Express or Priority Mail, which would have insured next day delivery were not use. The unreliability of next day delivery of First Class Mail is a matter of common knowledge, and one which could, or should, have been anticipated by Respondent in making its election of appropriate means of delivery.[1] Respondent's counsel is, or should be, aware of the importance of timely filing of petitions for review and the ramifications of failing to meat those deadlines. When one elects to send pleadings by First Class Mail one assumes the risk of possible delay and that delivery will not be completed as *"presumed."*[2]

Respondent argues that *"denial of an appeal on technical procedural grounds is not favored, and should not serve as the basis for dismissing an appeal . . ."* With this there is no argument. Here however the issue is not one of a *"technical procedure"* but rather one of significant importance, i.e. a jurisdictional requirement.

The Kansas Supreme Court has consistently held:

> *"The rule is well established that the time for taking an administrative appeal, as prescribed by statute, is*

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[1]The very fact that the postal service has seen the necessity to establish a system of "priority mail" to insure next day service for which "absolutely, positively has to be there the next day" indicates a recognition by the postal service that First Class Mail can no longer be relied upon to porvide the next day delivery as it once was.

[2]K.A.R. 84-2-1 provides, in pertentent part "(b) Service by a party. The moving party and respondent to any action shall be required to file the original and five copies of any pleadings with the board or its designee **either in person or by certified mail**." Here the filing of the Request for Review by the Respondent was not done "in person" or by "certified mail" but rather sent simply by First Class mail in contravention of K.A.R. 84-2-1. No explaination is provided by Respondent for its failure to comply with the regulation. Had the Request been sent by certified mail in accordance with the regulation, it is more likely that timely delivery and filing would have occurred. The failure to follow the dictates of the regulation further weighs against the granting of Respondent's Motion to Docket.

> *jurisdictional and delay beyond the statutory time is fatal. Lakeview Village, Inc. v. Board of Johnson County Comm'rs, 232 Kan. 711, Syl. 5, 659 P.2d 187 (1983); Vaughn v. Martell, 226 Kan. 658, 603 P.2d 191 (1979)." W.S. Dickey Clay Mfg. Co. v. Kansas Corp. Comm'n, 241 Kan. 744, 749, 740 P.2d 585 (1987).*

As the court noted in Vaughn, supra at 660-61:

> *"In order for an appellant to maintain his right of appeal, he must bring himself clearly within the provisions of the statute which provided for such appeal."*
>
> * * * *
>
> *"Since the taxpayers-appellants in this case did not file a timely appeal with the State Board of Tax Appeals within the forty-five (45) days allowed by K.S.A. 79-1609, the state board had no jurisdiction to make any order in the appeal except to dismiss the appeal for want of jurisdiction." (Emphasis added).*

Neither *"excusable legal neglect"* nor *"good cause"* is sufficient to overcome a failure to file a request for review within the time period provided by K.S.A. 77-527, and no statutory authority is provided for extending the statutory limits. This interpretation of K.S.A. 77-527 is consistent with that reached by the Secretary of Human Resources in deciding the timeliness of filing requests for review of an initial order under the Professional Negotiations Act, K.S.A. 72- 5413 et seq., Brewster-NEA v. Unified School District 314, Brewster, Kansas, 72-CAE-2-1991.

Finally, Respondent agrues that there is no prejudice to Petitioner to allow the Petition for Review to proceed even thought untimely filed. The question of prjudice or lack thereof is

irrelevant to the issue of timely filing pursuant to K.S.A. 77-527. The issue is one of jurisdiaction, and prejudice is not a factor in that determination.

CONCLUSION

Based upon the above, the filing of the Request for Review by the City of Kansas City, Kansas does not meet the 15 day requirement of K.S.A. 77-527(b), and must be dismissed by the Public Employee Relations Board for want of jurisdiction to entertain the request. The fact that the request is only two days late is not a factor. In Williams v. Board of County Commissioners, 192 Kan. 548 (1964) the taxpayer was precluded from maintaining an appeal where it was filed on the 31st day and the statutory limit was 30 days.

ORDER

IT IS THEREFORE ORDERED that the Request for Review by the City of Kansas City, Kansas not meeting the 15 day requirement of K.S.A. 77-527(b) is dismissed by the Public Employee Relations Board for want of jurisdiction to entertain the request.

Dated this 18th day of December, 1991

Merrill Werts, Chairman

Dorothy N. Nichols

Art J. Veach

Lee Ruggles

Wallace L. Downs

NOTICE OF APPEAL

This is a final Order pursuant to K.S.A. 77-530(b)(2). A petition for judicial review must be filed within 30 days after service of this order with the Clerk of the appropriate district court pursuant to K.S.A. 77-614 et seq.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Supervisor for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 13 th day of December, 1991, a true and correct copy of the above and foregoing Final Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Steve A.J. Bukaty
Blake and Uhlig, P.A.
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, Kansas 66101

Daniel B. Denk
McAnany, Van Cleave & Phillips, P.A.
707 Minnesota Avenue, Suite 400
P.O. Box 1300
Kansas City, Kansas 66117

Sharon Tunstall

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
OF THE STATE OF KANSAS

FRATERNAL ORDER OF POLICE, LODGE NO. 4, Petitioner, vs. CITY OF KANSAS CITY, KANSAS, Respondent.	)	Case No. 75-CAE-4-1991

INITIAL ORDER

ON the 18th day of October, 1990 the above-captioned prohibited practice complaint came on for formal hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appeared by Steve A.J. Bukaty, Blake and UHLIG, P.A., 475 New Brotherhood Bldg., 753 State Avenue, Kansas City, Kansas 66101.

Respondent: Appeared by Daniel B. Denk, McANANY, VAN CLEAVE & PHILLIPS, P.A., 707 Minnesota Avenue, Suite 400, P.O. Box 1300, Kansas City, Kansas 66117.

ISSUE PRESENTED FOR DETERMINATION

WHETHER THE ACTION TAKEN BY RESPONDENT IN REASSIGNING THE SUPPORT UNIT OFFICERS WAS IN RETALIATION FOR THE FILING OF A GRIEVANCE BY SERGEANT SIPES ON APRIL 27, 1990 THEREBY VIOLATING K.S.A. 75-4333(b)(1), (3) AND (4).

SYLLABUS

1. **PROHIBITED PRACTICES** - Burden of Proof - Presumptions. The party alleging a violation of the Public Employer-Employee Relations Act has the burden of proving the complaint by a

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preponderance of the evidence. The filing of the complaint creates no presumption of a prohibited practice.

2. **PROHIBITED PRACTICES** - Burden of Proof - Allocation of burden. Under K.S.A. 75-4333(b)(1), (3) and (4) if the public employer takes adverse action against an employee that is based in whole or in part on antiunion animus, or that the employee's statutorily protected activity was a substantial or motivating factor in the adverse action, a prohibited practice has been committed.

3. **PROHIBITED PRACTICES** - Burden of Proof - Rule. An employee or employee organization to prevail must make a prima facie showing sufficient to support the inference that the employer's opposition to protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

4. **PROHIBITED PRACTICES** - Employer Interferes With, Coerces, or Restrains Employees - Evidence - Inferences. Motivation is a question of fact which may be inferred from either direct or circumstantial evidence. A fact-finding body must have some power to decide which inferences to draw and which to reject.

5. **PROHIBITED PRACTICES** - Employer Interferes With, Coerces, or Restrains Employers (K.S.A. 75-4333(b)(1)) - Inquires to be made.

    a. Are the public employees engaged in protected activities as set forth in the Public Employer-Employee Relations Act?

    b. Is there a reasonable probability that the employer's conduct will have an interfering, restraining or coercive effect on the public employees?

    c. To what extent must the public employer's legitimate business motives be taken into account?

6. **MANAGEMENT RIGHTS** - Discretion of employer - Substitution of judgement. The determination of the methods, means and personnel by which operations are to be carried on, and to direct the work of and transfer employees is clearly a part of

Support Officers were supposed to report to different Divisions at the beginning of their shift on May 1, 1990. However, their cars, battery packs, and other equipment were all still at Support Unit Headquarters in the South Patrol Division at that time. (Tr. p. 1067-68, 1171-72, 1175-76, 1178). Some of the supervisors to whom the Support Officers were assigned did not know about the reassignment before the Support Officers showed up. (Tr. p. 1169-70) One supervisor described the scene as "utter chaos." (Tr. p. 1167-68).

28. As a result of the reassignment, the Support Unit sergeant's position was abolished. Officers were required to report directly to the afternoon and evening/midnight sergeants at CPD, WPD and SPD. (Tr. p. 183-84). Sergeant Sipes, the Support Unit Sergeant, was ordered to report to the South Division on the midnight shift without regard to senority or his bumping rights. (Tr. p. 185). Sargent Sipes requested reassignment to a vacant traffic sergeant's position; his request was granted. (Tr. p. 242, 556).

29. On May 4, 1990, Major Monchil received the Petitioner's grievance packet challenging the reassignment of the Support Unit, and denied same. Chief Dailey likewise denied the grievance on May 10, 1990. In support of his decision Chief Dailey maintained the Department's conduct was a valid exercise of management authority as provided for in the Memorandum of Agreement. (Tr. p. 563-643, Ex. D).

30. Shortly after the reassignment of the Support Unit, the Department set up other special units including the Neighborhood Crime Task Force which continues to perform certain operations. The Neighborhood Crime Task Force Officers were removed from District cars. (Tr. p. 596-97).

31. Respondent was aware that a class of sixteen (16) new officers would be joining the Police Department in the spring of 1990 at the time the decision to reassign the Support Unit was made. (Tr. p. 659).

32. Officer Dennis K. Roberts, and Jerry R. Campbell periodically served as acting Sergeant for the Support Unit. Since the reassignment of the Support Unit officer, Officer Roberts has had a greater opportunity to

told by Acting Captain Newsom that Major Monchil was upset over the grievance and Monchil was going to disband the Support Unit because of the grievance. Lieutenant Johnson denied making such statement. (Tr. p. 173-176, 1159-60, 1174-82, 1192-93).

24. On April 27, 1990, Sergeant Michael H. Callahan overheard Lieutenant Louis Johnson and Acting Captain Wendall Newsom discussing with Sergeant Sipes that the Support Unit was reassigned in retaliation for the grievance filed by Sergeant Sipes. (Tr. P. 291). Lieutenant Johnson and Acting Captain Lieutenant Newsom denied such conversation took place. (Tr. P. 802-03, 886-87, 1223, 1225).

25. Acting Captain Newsom, on two separate occasions after the grievance was filed, told Chief Lodge Steward Peter J. Fogarty, in confidence, that the Support Unit was reassigned in retaliation for the filing of the Sipes' grievance. Acting Captain Newsom denied ever making such statements to Chief Lodge Steward Fogarty. (Tr. P. 1180-81, 1189, 1225-28).

26. On Saturday, April 28, 1990, Captain Washington told Sergeant Sipes that Major Monchil was going to disband the Support Unit because Monchil was upset over the April 27, 1990 grievance. (Tr. P. 176). Captain Washington was not called to testify at the hearing.

27. On May 1, 1990, the Department implemented the decision allegedly finalized in mid-April and issued a memorandum to all Support Unit officers which reflected the reassignment of the Support Unit to the divisions, and which informed Support Unit officers that they would no loner report physically to CPD and would not report to the Support Unit sergeant. Support officers were directed to report instead to the sergeants on duty within the various geographic regions to which they had been assigned as they had done for several years previously. (Tr. p. 1065-66, Ex. 3, B).

Many of the Support Officers never received or saw copies of the transfer memorandum, and learned of their transfer from other sources. (Tr. p. 363-65, 417-18, 466-67, 1178). Petitioner was not notified in advanced of the reassignment nor consulted regarding the resulting changes in the contractually bid positions. (Tr. p. 56).

scheduled shift was from approximately 7:00 PM until 3:00 AM. (Tr. p. 49-57, 64, 171-72)

Officer Brandon was the junior officer at that time and was thus reassigned to the West Patrol Division by Sergeant Sipes. (Tr. p. 167-229) Officer Brandon was sent to ride in District Car #221 with the District car's radio frequency rather than his own and was required to work until 6:00 AM rather than 3:00 AM. (Tr. 49-51, 64). Consequently, Officer Brandon worked three hours of overtime. During his shift, Officer Brandon was assigned under the supervision of WPD Sergeants.

20. Sergeant Sipes and others in the Support Unit made the F.O.P. Lodge #4 aware of the April 20, 1990 assignment of Officer Brandon to another bid position. (Tr. p. 54). Chief Union Steward Pete Fogarty filed a grievance on behalf of Officer Brandon and the Support Unit on Friday, April 27, 1990, by presenting it in person to Captain Hooks. Officer Fogarty explained to Captain Hooks that Sergeant Sipes was the originator of the complaint. (Tr. p. 54, 452-53, 1063, Ex. 2).

21. The grievance alleged that respondent had changed the terms and conditions of employment by assigning Officer Brandon to a supervisor outside of the Support Unit. Petitioner further contended that the events of April 19-20, 1990, violated Article 23 of the Memorandum Of Understanding, which provides that "overtime within the Bureau of Operations will be offered on the basis of seniority to officers on the preceding shift and within the division where the overtime became available." The grievance also requested that the Department compensate the officer who was "denied the opportunity to work the overtime." with three hours of overtime. Finally, the support officers wanted to clarify the policy regarding transfer of Support Unit officers from their bid positions. (Tr. p. 175-79, Ex. A).

22. The Respondent conceded the impropriety regarding the payment of overtime and settled the matter without the benefit of the grievance procedure. Both officer Brandon and the senior officer entitled to the overtime, were paid overtime wages for the three hours worked by Officer Brandon. (Tr. p. 69-70, 85-86, 562-63).

23. On April 27, 1990, the day the grievance was filed Lieutenant Johnson told Sergeant Sipes that he had been

17. The increased black-out periods, longer response times, and repeated complaints about the Support Unit prompted Major Dan Monchil, the Operations Bureau Director to recommend to Police Chief Thomas Dailey that the Department initiate steps to reassign the Support Unit back to specific divisions. (Tr. p. 962-65, 981, 983, 988-89, 1079-86, 1155). The Police Department deemed it more economical to put the Support Unit officers directly in areas with demonstrated needs. (Tr. p. 1039, 1041-42, 1080, 1167-68). According to Major Monchil in mid-April 1990, the Police Department finalized plans to reassign the Support Unit back to the divisions.(Tr. p. 553-556, 585-86, 600, 972-73, 1039, 1041, 1042, 1059, 1063-67, 1085-86, 1088-90, 1133-36). The Respondent, however, produced no written documents setting forth the recommendations of Major Monchil, memorializing the decision-making process, or outlining the finalized plans and procedures. Neither Sergeant Sipes nor any office in the Support Unit were aware of, consulated about or privy to the reassignment discussions or decision.

18. Major Monchil testified he had the transfer decision approved by the Chief of Police three (3) to five (5) days before the Support Unit officers were reassigned on May 1, 1990. (Tr. p. 1088-1097, 1127-28). The Respondent did not produce any written document evidencing such approval.

19. On April 19, 1990, Sergeant Sipes received a directive from Lieutenant Yeagle, a lieutenant from the Western Patrol Division, to send one of his men to ride District 221.[4] Lieutenant Yeagle directed Sergeant Sipes to check his seniority roster because the assignment would involve overtime. Yeagle indicated that the Support Unit officer would be riding 221 for the whole shift and using 221's radio number since the dispatcher on duty had a tendency, if they heard the Support Unit number, to send the unit back downtown rather than to the desired area. (Tr. p. 49-51, 64, 166-68, 229-231).

On April 20, 1990, Support Officers Brandon and Whitworth were assigned together to ride a two (2) man car in the Central section of the I-635 corridor. Their

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[4] In April of 1990, the Department received reports of increased vandalism in the WPD. Consequently, officers out of WPD were assigned the specific duty of patrolling these neighborhoods thus creating a manpower shortage in the WPD.

Sergeant Sipes, and additional complaints alleged that Sergeant Sipes was uncooperative with the divisions and conducted roll calls riddled with joking and horseplay. (Tr. p. 921-31, 997, 1075, 1109-1111). Complaints about the Support Unit originated at all levels of the chain-of-command and were forwarded to superiors throughout the Police Department. (Tr. p. 688, 690, 692, 696, 702, 710, 712-713, 718, 751-56, 768, 793-98, 826, 850-55, 903, 923-30, 962-966, 1026-37, 1035-36, 1075-76, 1094-1104, 1105). Support Unit conduct also generated complaints from citizens in the community. (Tr. p. 794-96).

At some point in time, Lieutenant Johnson, impressed upon Sergeant Sipes the importance of correcting the operational deficiencies of Support Unit officers. The unit's performance would improve for a short period of time then return to its former levels. (Tr. p. 791-95)

15. Under Captain Washington, the Support Unit was often used for special operations, including drug "buy and bust" operations, street sweeps, and other operations requiring concentrated manpower. The Support Unit Officers were also assigned special duties such as crowd control, VIP protection, and other special patrols. (Tr. p. 165-66965, 1108, 1111, 1155, 1166). The vast majority of Support Unit special operations were ordered by the upper echelon of the Command Staff including Major Monchil and Captain Hooks. In all of 1989 and 1990 there were only two (2) isolated incidents where special operations were not authorized by Monchil or Hooks. Sergeant Sipes did not initiate any special assignments on his own; the two (2) allegedly unauthorized special assignments were initiated by Captain Washington. (Tr. p. 967-68, 999-1000, 1005-08, 1013, 1021-22, 1039, 1111, 1119-20).

16. Over fifty percent (50%) of all crime reports in Kansas City, Kansas originate downtown in the Central Patrol Division; a majority of the City's violent crimes, drug-related crimes, and other high priority calls also originate in the Central Patrol Division. (Tr. p. 1113). The Support Unit Officers riding in the I-635 corridor would receive calls from Central Patrol and would proceed downtown to support the District cars and answer priority calls. Due to manpower shortages and call backlogs however the Support Officers often were not able to return to the I-635 corridor but would be given other calls in Central Patrol Division while trying to return to the I-635 corridor. (Tr. p. 134-35, 1028, 1033-34).

Sergeant Sipes as well as sergeants from the other divisions. (Tr. p. 47, 49, 61, 62, 130, 152, 630).

In approximately June, 1989, the Support Unit headquarters were moved to the South Patrol Division. Under this arrangement the Support Unit shared offices with the SCORE Unit, a swat team operation, and the Unit was put under the control of Captain Washington who was in charge of the Special Forces Division of the Police Department. The Support Unit continued its I-635 patrol and was also engaged in special assignments. (Tr. p. 964, 988).

12. Between the fall of 1988 and the spring of 1990, the Department experienced continued manpower shortages. The shortages resulted in extended black-out periods. (Tr. P. 254, 258, 274, 280, 284, 285). These periods reflected the times when there was an insufficient number of available cars to respond to calls from the public. During this same period, response times in each division increased. (Tr. p. 254, 258).

13. The combination of black-out periods and extended response times forced the Police Department's adoption of new staffing requirments. In accordance with the terms of the Memorandum Of Understanding, the Department canceled all personal leave days and implemented mandatory overtime. (Tr. p. 247, 550, 623, Ex. R). The Support Unit did not work mandatory overtime. (Tr. p. 667-68)

14. Complaints from the divisions regarding the performance of the Support Unit began in September of 1989 and continued into 1990. (Tr. p. 962-65, 981, 983, 988-89, 1075, 1079-80, 1155). Officers within the Police Department maintained that the Support Unit was not available for calls as required, especially for answering calls in the South Patrol Division. Testimony revealed that the Support Unit was perceived as being involved in too many special assignments making them unavailable for patrol assignments and had drifted away from its primary function of support, (Tr. p. 537, 557-58, 570-87, 645); that Support Unit officers were often observed outside their assigned I-635 corridor areas; and the Support Unit officers were congregating on calls in the Central Patrol Division for no apparent reason. (Tr. p. 1023-24). Lieutenant Louis Johnson, Sergeant Sipes' immediate supervisor, received complaints about the leadership of

In the annual bid, officers bid for duty assignments on the basis of seniority and bid to fill a given position for one (1) year effective the second Sunday in January. Officers officially bid for shift and station assignments, days off; in practice, most officers bid for Districts and supervisors as well. (Tr. p. 624, Ex 1) This process permits officers to select their duty assignments for the upcoming bid year. The officers are free to select or bid both geographic assignments and shifts. The order of selection is based upon seniority. Probationary and new officers are placed in what vacancies are left at the end of the seniority officer's bid.

10. Manpower and resource shortages have been experienced by the Police Department since at least 1983. (Tr. p. 135-36). In 1988 the decrease in manpower and resources resulted in increased response times and occasional "black out" periods when no patrol officers were available to respond to calls within Kansas City, Kansas. In 1989, prior to the 1989 bid process, then Chief of Police Meyers established a task force to evaluate the Police Department's overall efficiency and manpower distribution, and make recommendations as to the best way to meet the public's needs with the limited resources and manpower available. (Tr. p. 532-34, 724-26, 955-56).

11. The task-force discovered unacceptable levels in response times. (Ex. Q). To address this phenomenon, the task-force recommended modifications to operational aspects of the Support Unit. Task-force recommendations lead to the creation of the I-635 Corridor concept for the Support Unit. (Tr. p. 534-37, 642, 726-36, 956-60). I-635 is a north/south interstate that divides the City of Kansas City, Kansas, in half. The task-force believed that by reassigning the Support Unit to the I-635 Corridor, response times would be reduced. (Tr. p. 1073-75). The task force determined that it was more expedient to dispatch Support Unit Officers from a central location to answer calls throughout the City. Theoretically, Support Unit Officers in the corridor would be in a central location and thus able to quickly respond to calls in any Division within the Department's jurisdiction. The "I-635 Corridor" concept was implemented to coincide with the 1989 annual bid. (Tr. p. 737). The Support Unit was housed in the Central Patrol Division, maintained its flexible hours and was placed under the supervision of

3:00 PM. Officers assigned to the support unit were given flexible hours and flexibility in their days off. (Tr. p. 729-31) The principal purpose of the umbrella shift was to provide extra coverage during shift changes and during high crime hours, and to act as tactical support or backup to Division patrol cars on priority calls. (Tr. p. 11-12, 47-49, 154-56, Ex. Q) Umbrella Shift officers were advised that they were subject to call by any division at any point during their shift.[3]

8. Since its inception, the Support Unit's size, physical location, duties and supervision has varied. (Tr. p. 60, 266-74, 451, 523-32, Ex. G-H) Support Unit officers have fallen under the direct supervision of sergeants from the various divisions assigned to the afternoon and/or evening/midnight shift as well as under the supervision of the Support Unit Sergeant. In 1983, Sergeant Ronald Miller was assigned as the Sergeant for the Support Unit. (Ex. G) There was no Support Unit in 1984. (Tr. p. 526) In 1985 Support Unit officers reported to sergeants to the various divisions assigned to the afternoon and evening/midnight shifts. In 1986 and 1987 Support Unit supervision was identical to that which existed in 1985. (Tr. p. 529, 531) In 1988 Support Unit officers responded to both Sergeant Gerald Sipes, a participant in this action, and other sergeants within the various divisions. (Tr. p. 531-32) In 1989 the Support Unit was assigned a Support Sergeant, Sargeant Sipes. (Ex. L).

9. Pursuant to the negotiated Memorandum of Agreement, officers within the Police Department select their positions through a bid process. (Tr. p. 39) Bidding for positions in the Bureau of Operations is scheduled each December. (Tr. p. 14-16, Ex. 1) Notwithstanding the bid process, the Department is free to redesign the geographic parameters of each district. (Tr. p. 58-59). The Department may abolish a bid position at any time during the year, provided that such decision is based upon the needs of the Department. (Tr. p. 59, 243, 555, 575, 633, 666).

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[3] The parties do not dispute that each Support Unit Officer was subject to the rank structure of the Department. That is to say, that if given an order by a superior officer, regardless of the officers particular geographic assignment, Support Unit officers were obliged to obey the order.

3. The Police Department is divided into four separate bureaus; Bureau of Inspections, Bureau of Services, Bureau of Investigations and the Bureau of Operations (hereinafter Operations).

4. Operations has the largest contingent of sworn members of the Police Department. Their duties consist primarily of tasks relating to traffic and patrol. The city is divided geographically into three (3) patrol divisions; Division One - Central Patrol District (CPD), Division Two - West Patrol District (WPD) and Division Three - South Patrol District (SPD). (Tr. p. 42-43) Each of the divisions maintains a headquarters building which houses the administrative and manpower compliments for the division. The Patrol Divisions are further subdivided into districts, and marked police vehicles are assigned to patrol a specific district.

5. Officers within each division work one of three shifts; the morning/day shift, afternoon shift, and the evening/midnight shift. (Tr. p. 44-46) Each shift is preceded by a fifteen minute roll call. During this period, officers from the prior shift begin the process of turning in equipment and finishing up paperwork. Officers coming on duty report to roll call. During this transition period, the number of officers actually on patrol is reduced.

6. A fourth shift eventually evolved. (Tr. p. 44-45) The Police Department observed two phenomena related to patrol activity: the first, an increase in response times throughout the department, (response time is the period of time it takes a police unit to respond and react to a call from the public); the second, criminal activity in Kansas City, Kansas peaks, and is most concentrated during, the evening and midnight shifts (Tr. p. 154-56).

7. In response to the aforementioned observations, the Department established a shift variously known as the "umbrella shift" or "support unit."[2] (Tr. p. 155-165, 217, 231-32). The Support unit shift was from 7:00 PM to

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[2] 1989 marks the first year in which the title support unit was officially adopted by the Department. Previously the support unit was identified as both the (Modified) Umbrella Unit and the Support Unit. According to Chief Dailey the singular designation was implemented to reflect the singular mission of the Unit which was to support the operation functions of the Department.

management's prerogative. The Public Employee Relations Board cannot substitute its judgment for that of the public employer as to what constitutes reasonable grounds to reassign its employees.

7. **MANAGEMENT RIGHTS** - Duty to Bargain - Effects. While an employer is not obligated to bargain over purely managerial prerogatives, it is under an independent duty to bargain over the "effects" of that decision.

8. **DUTY TO BARGAIN** - Notice of Action Required - Adequacy of notice. A public employer must give sufficiently clear and timely notice of its intended action. Notice, to be effective, must be given sufficiently in advance to actual implementation of a decision to allow bargaining.

FINDINGS OF FACT[1]

1. Petitioner, the Fraternal Order of Police, Lodge #4, is an "employee organization" as defined by K.S.A 75-4322(i) and is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for all patrolmen, detectives and sergeants employed by the Police Department for the purpose of negotiating collectively with the Respondent and the Police Department pursuant to the Public Employer-Employee Relations Act of the State of Kansas, with respect to conditions of employment as defined by the K.S.A. 75-4322(t).

2. Respondent, City of Kansas City, Kansas, is a "*public agency or employer*", as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c), and a municipality organized pursuant to the laws of the State of Kansas and is classified under those laws as a city of the first class. The Police Department is an entity falling under the jurisdiction and control of the City and is charged with maintaining the safety and security for citizens residing in the City.

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

serve as acting sergeant and his pay has increased accordingly. Officer Campbell did not testify as to lost wages, if any. (Tr. p. 413-415, 197-198).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE I

WHETHER THE ACTION TAKEN BY RESPONDENT IN REASSIGNING THE SUPPORT UNIT OFFICERS WAS IN RETALIATION FOR THE FILING OF A GRIEVANCE BY SERGEANT SIPES ON APRIL 27, 1990 THEREBY VIOLATING K.S.A. 75-4333(b)(1), (3) AND (4).

Burden of Proof

[1] The Public Employer-Employee Relations Act (PEERA) does not set forth the standard of proof necessary to establish a prohibited practice. The Kansas Supreme Court has indicated that an examination of the federal Labor-Management Relations Act, 29 U.S.C. §§141-197, can "*provide guidance*" in interpreting PEERA. U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531-32 (1990). 29 U.S.C. §160(c) provides in pertinent part:

> *"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."*

"[T]he mere filing of charges by an aggrieved party . . . creates no presumption of unfair labor practices under the Act, but it is

incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence." Boeing Airplane Co. v. National Labor Relations Board, 140 F.2d 4323 (10th Cir. 1944). Findings of unfair labor practices must be supported by substantial evidence. Coppus Engineering Corp. v. National Labor Relations Board, 240 F.2d 564, 570 (1st Cir. 1957).

Pertinent Statutes

Employees of a public employer covered by the Professional Employer-Employee Relations Act have the "*right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment.*" K.S.A. 75-4324. It is a prohibited practice pursuant to K.S.A. 75-4333(a) for a public employer to:

> *"(1) Interfere, restrain, or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;*
>
> * * *
>
> *" (3) Encourage or discourage membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting;*
>
> *(4) Discharge or discriminate against an employee because he or she has filed any affidavit, petition, or complaint or given any information or testimony under this act, or because he or she has formed, joined or chosen to be represented by an employee organization;*
>
> *. . .".*

There is little Kansas case law interpreting K.S.A. 75-4324, or 75-4333(b)(1), (3) or (4). However those statutes are similar to Section 7 and Sections 8(b)(1),(3) and (4) of the National Labor Relations Act ("NLRA"). It is appropriate, in light of the close parallel between these sections of PEERA and the NLRA, to examine federal interpretations of the NLRA, where those decisions are consistent with the purposes of the Kansas PEERA. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that the legislature intended a different result, and, with respect to those areas where PEERA differs from the NLRA federal authority may be of limited value.

As the Kansas Supreme Court stated in National Education Association v. Board of Education, 212 Kan. 741, 749 (1973):

> *"In reaching this conclusion we recognize the differences, noted by the court below, between collective negotiations by public employees and 'collective bargaining' as it is established in the private sector, in particular by the National Labor Relations Act. Because of such differences federal decisions cannot be regarded as controlling precedent, although some may have value in areas where the language and philosophy of the acts are analogous. See K.S.A. 1972 Supp. 75-4333(c), expressing this policy with respect the Public Employer-Employee Relations Act." See also U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531-32 (1990).*

A reasonable interpretation of K.S.A. 75-4333(b) requires proof of anti-union animus or specific intent to violate an employee's or recognized employee organization's rights as essential to establish a prohibited practice.

Allocation of Burden of Proof

[2] Clearly, under K.S.A. 75-4333(b)(1), (3) and (4) if the public employer takes adverse action against an employee that is based in whole or in part on antiunion animus, or put another way, that the employee's statutorily protected activity was a substantial or motivating factor in the adverse action, a prohibited practice has been committed. It is the "*true purpose*" or "*real motive*" in the adverse employer action that constitutes the test.

[3] Both Petitioner and Respondent point to N.L.R.B. v. Wright Line, 662 F.2d 899 (1st Cir. 1981), (Wright Line), as setting forth the appropriate test to be applied in determining whether a prohibited practice has been committed in the instant case. In Wright Line, the National Labor Relations Board, (NLRB), relying on Mt. Healthy City School District School Board of Education v. Doyle, 429 U.S. 247 (1977), (Mt. Healthy) announced the following rule: the general counsel (employee or employee organization) must first "*make a prima facie showing sufficient to support the*

inference that [the employer's opposition to] protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

The result is the "*dominant motive*" or "*but-for*" test. As the court explained in N.L.R.B. v. Fibers Int'l. Corp., 439 F.2d 1311, 1312, n.1 (1st Cir. 1971):

> *"So that there may be no misunderstanding about what we mean by dominant motive, we state it again. Regardless of the fact that enforcing the penalty may have given the employer satisfaction because of the employee's union activities, the burden is on the Board [employee or employee organization] to establish that the penalty would not have been imposed, or would have been milder, if the employee's union activity, or a union animus, had not existed."*

Or as put another way in N.L.R.B. v. Eastern Smelting and Refining Co., 598 F.2d 666, 670 (1st Cir. 1979):

> *"[The employer] is not to be charged unless its actions would not have been taken 'but for' the improper motivation..."*

In other words, there must be a demonstrated causal connection between the employer's conduct and employee's union membership or activities, or the employer's anti-union animus. As stated in Wright Line, supra at 903:

> *"We came to recognize that the existence or not of a causal link between union activity and the employee's injury -- or, as section 8(a)(3) puts it, the existence*

> *of anti-union 'discrimination in regard to hire or tenure of employment' -- was most accurately determined by asking whether the discharge would have occurred 'but for' the protected activity. If the discharge would have occurred absent the protected activity, it is clear no unfair labor practice existed since a bad motive without effect is no more an unfair labor practice than an unexecuted evil intent is a crime."*

[4] The question of whether a public employee is the target of a public employer's adverse action because of his employee organization affiliation and/or participation in K.S.A. 75-4324 protected activities is essentially a question of fact. Since motivation is a question of fact, the Public Employee Relations Board may infer discriminatory motivation from either direct or circumstantial evidence. N.L.R.B. v. Nueva Engineering, Inc., *761 F.2d 961, 967 (4th Cir. 1985). An administrative agency empowered to determine whether statutory rights have been violated may infer within the limits of the inquiry from the proven facts such conclusion as reasonably may be based upon the facts proven.* Republic Aviation Corp. v. N.L.R.B., *324 US 793, 800 (1944). In* Radio Officers', *347 U.S. 17 (1953), (Radio Officer's), the court stated:*

> *"An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute*

> *made by experience officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries." Id. at 48-49.*

Encouragement and discouragement are "*subtle things*" requiring "*a high degree of introspective perception*", Radio Officers', supra at 51, such that actual encouragement or discouragement need not be proved but that a tendency is sufficient, and such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination. PEERA does not require that the employees discriminated against be the ones discouraged for purposes of violations of K.S.A. 75-4333(b)(3), nor does it require that the change in employees' desire to join an employee organization or participate in organization activities have immediate manifestations, Radio Officers', supra at 51. A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers', supra at 50.

Respondent cites Wright Line for the proposition that the burden of persuasion should not be shifted to the employer as stated by the NLRB. In Wright Line, at 905, the Court of Appeals for the First Circuit refused to enforce of the National Labor Relations Board's decision because in its view it was error to place the burden on the employer to prove that the discharge would

have occurred had the union animus motive not been present. The Court of Appeals determined the Board (employee or employee organization) had the burden of showing not only that a forbidden motive contributed to the adverse action of the employer but also that the action would not have taken place independently of the protected conduct of the employee. This was the law until 1983.

In National Labor Relations Board v. Transportation Management Corp., 462 U.S. 393 (1983), the United State Supreme Court found that requiring the Board (employee or employee organization) to prove by a preponderance of the evidence that the employee would not have been subject to the adverse action had it not been for his union activities was improper. Following its reasoning in Mt. Healthy, the court then held that placing the burden upon the employer to demonstrate by a preponderance of the evidence that the adverse action would have been taken even if the employee had not been involved with the union to avoid being found to have committed an unfair labor practice was consistent with the NLRA. Placing the burden upon the public employer to establish that he was motivated by legitimate objectives is not unreasonable given that the proof of his motivation is most assessable to him. N.L.R.B. v. Great Dane Trailers, 386 U.S. 26, 34 (1967). Accordingly, it is this assignment of the burden of proof which will be applied under the Public Employer-Employee Relations Act. This standard strikes the

Here the right the Public Employer-Employee Relations Act seeks to protect is the right of public employees to participate in the activity of the employee organization with respect to filing grievances without public employer interference. There is no question that Sergeant Sipes was engaged in such protected activity. This right must be considered in the context of the policy of the Act, which fosters cooperation between public employers, public employees, and employee organizations.

b. Reasonable Probability Test

A showing that the public employer's conduct actually restrains, coerces, or interferes with the exercise of public employee rights, or whether the public employee intends such a result is not usually required to prove a violation of K.S.A. 75-433(b)(1). The test applied in the private sector is the test of reasonable probability, i.e., whether the public employer's conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights to some extent. As the NLRB concluded in American Freightways Co., 44 L.R.R.M. 1302 (1959):

> *"It is well settled that the test of interference, restrain and coercion...does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably said, tends to interfere with the free exercise of employee rights under the Act."*

appropriate balance between the employee's right to protection from an employer's statutorily prohibited activity and the employer's right to exercise managerial prerogatives for legitimate business reasons.

Prima Facie Showing

[5] To determine whether the public employer's conduct interferes with, coerces or restrains public employees, several inquires must be made:

a. Are the public employees engaged in protected activities as set forth in the Act?

b. Is there a reasonable probability that the employer's conduct will have an interfering, restraining or coercive effect on the public employees?

c. To what extent must the pubic employer's legitimate business motives be taken into account?

a. Protected Activity

Under K.S.A. 75-4324 public employees have the right "to form, join, and participate in the activities of employee organizations for the purpose of meeting and conferring with public employers with respect to grievances and conditions of employment." Only when the public employer's conduct infringes on these protected activities can it be said that there is interference with, coercion or restraint of employees in the exercise of their rights. American Ship Building Co. v. N.L.R.B., 380 U.S. 300 308 (1965).

c. Legitimate Business Motives

Petitioner's Burden

Petitioner must initially make a prima facie showing sufficient to support the inference that Respondent retaliated against Sergeant Sipes and the support unit for filing the grievance. Black's Law Dictionary, 5th ed., p. 1071, defines "Prima facie case" as:

> *"A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. . . ."*
>
> *"Courts use concept of 'prima facie' case in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation he asserts; . . . and (2) courts used 'prima facie' to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it."*

To meet the burden of a prima facie showing Petitioner provided testimony that Major Monchil was upset over the filing of the Sipes' grievance and had expressed an intent to disband the Support Unit; and that on the day the reassignment was to be implemented members of the support unit had not received written notice of their reassignment and neither had some of the division supervisors to which support officers were assigned, the cars, radios and equipment of the support officers had not been transferred and were not available when the support officers reported to duty resulting in a situation characterized as "*utter*

As noted in NLRB v. Grower-Shipper Vegetable Ass'n., 122 F.2d 368, 377 (9th Cir. 1941):

> *"The act prohibits interference with, restraint and coercion of the employees in the exercise of the rights, guaranteed (by statute)... Interference, restraint and coercion are not acts themselves but are descriptive and are the result of acts. Whatever acts may have the effect of interference, restraint and coercion are included in those terms, and are therefore prohibited. Thus they include a great number of acts which, normally, could be validly done, but when they interfere with, restrain or coerce employees in the exercise of their rights, they are prohibited by the act."*

This test is equally applicable to public sector employers and K.S.A. 75-4333(b)(1). The employer's conduct complained of here is the *"abolition of Sergeant Sipes' job and the abolition of the Support Unit on May 1, 1990 were made in retaliation for members of that Unit having filed a grievance two (2) working days earlier."* (Pet. Brief p. 55). It is hard to argue that such action, if proven, does not reasonably tend to have a chilling effect upon employee organization membership or participation in employee organization activities, i.e. conferring with respect to grievances. *See e.g.* Loomis Courier Service, Inc. v. N.L.R.B., 595 F.2d 491, 494 (9th Cir. 1979).

filing of the grievance. Accordingly, Petitioner has established a prima facie case.

Shifting Burden

Once a prima facie showing is established, the burden shifts to the public employer to demonstrate by a preponderance of the evidence that it would have reached the same decision even in the absence of the employee's protected conduct. Transportation Management Corp., 462 U.S. at 400-02. In this case it must be decided whether the Respondent reassigned the Support Unit and abolished Sergeant Sipes' position because Sergeant Sipes filed a grievance, a statutorily protected employee right, or whether Respondent acted because of some legitimate business reason unrelated to employee affiliation or protected activity. Stated another way, did the Respondent satisfy its burden of showing a "*good motive*" sufficient in itself to justify the reassignment.

[6] The determination of the methods, means and personnel by which operations are to be carried on, and to direct the work of and transfer employees is clearly a part of management's prerogative, and is recognized by K.S.A. 75-4326. The Public Employee Relations Board cannot substitute its judgement for that of the public employer as to what constitutes reasonable grounds to reassign its employees. Service Employees Union Local 513 v. City of Hays, Kansas, Case No. 75-CAE-8-1990 (1991); N.L.R.B. v. Wagner

chaos." Petitioner further points to the lack of written documents memorializing the discussions, plans or approval for reassignment of the Support Unit, and lack of notice to the Petitioner of the proposed change as supporting the inference of an improper motive.

Petitioner additionally emphasizes the close proximity between the filing of the grievance and the reassignment of the Support Unit; two working days and four calendar days. The imposition of an unfavorable change in working conditions that follows closely in time the exercise of protected employee rights raises a strong inference that the two are causally related. *See e.g.* N.L.R.B. v. Jack August Enterprises, Inc., 583 F.2d 575 (1st Cir. 1978); Richardson Paint Co. v. N.L.R.B., 574 F.2d 1195 (5th Cir. 1978) (Employee unlawfully discharged one day after circulating petition protesting layoffs.); and Panchito's v. N.L.R.B., 581 F.2d 204 (9th Cir. 1978) (Union adherent fired one day after supervisor informed employer that the worker was discussing union meetings with another employee.). Timing remains one of the singularly most important elements of circumstantial proof. *See e.g.* Jim Causley Pontiac v. N.L.R.B., 620 F.2d 122 (6th Cir. 1980); and N.L.R.B. v. Warren L. Rose Castings, Inc., 587 F.2d 1005 (9th Cir. 1978).

This evidence, standing alone and uncontradicted, supports and compels a conclusion that the reassignment of the Support Unit and abolition of Sergeant Sipes position were in retaliation for the

found to have relied upon them in part, then the case is characterized as one of "dual motive" and the employer must demonstrate by a preponderance of the evidence that the decision would have been implemented in the same manner that it was implemented notwithstanding the protected employee activitiy. Transportation Management Corp., supra at 400-02.

Petitioner asserts, however, that the manpower shortage reasons proffered by Respondent were not the "*dominate motive*" for the decision but rather pretextual. It points to the statement attributed to Major Monchil that he was upset with Sergeant Sipes for filing the complaint and was going to disband the Support Unit; the short time period between the filing of the grievance and the reassignment of the Support Unit, the statements attributed to Major Monchil, and the reassignment of the Support Unit; and the lack of preparation to effectuate the reassignment as evidence that the grievance and not manpower shortage was the motivating factor for the decision. Additional support may be found in the assignment of officers out of the divisions and into specialty units soon after the Support Unit reassignment, and the anticipated addition of sixteen new officers upon graduation in the spring of 1990.

To rebut the inference of improper motive, the Petitioner presented the testimony of Chief Dailey, Major Monchil and Captain Hooks to establish that discussions concerning the reassignment of

Iron Works, 220 F.2d 126 (C.A. 7th Cir. 19). The determination of the methods, means and personnel by which operations are to be carried on is a matter left to the discretion of the employer, N.L.R.B. v. Mylan-Sparta Co.:

> *"[M]anagement is for management. Neither Board nor court can second-guess it or give it gentle guidance by over the shoulder supervision.... It has, as the master of its own business affairs, complete freedom with but one specific definite qualification; it may not [act] when the real motivating purpose is to do that which section 8(a)(3) forbids."*

Given the evidence of manpower shortages resulting in increased black-out periods and longer response times, and the complaints received concerning the operational deficiencies of the Support Unit and the unit drifting away from its primary function of support, the decision to reassign the Support Unit, standing alone, was within the managerial rights of K.S.A. 75-4326.

While it is acknowledged that an employer can reorganize its departments for a legitimate reason, it cannot do so when its purpose is to evade the requirements of PEERA. Merely proffering a legitimate business reason for the adverse employment action is not sufficient, the reason must be *bona fide* not pretextual. If the proffered reasons are a mere litigation figment or were not relied upon, then the reasons are pretextual. Marathon LeTourneau Co. v. N.L.R.B., 699 F.2d 248, 252 (5th Cir. 1983). However, where the employer advances legitimate reasons for its actions and is

Western Line Consolid. Sch. Dist., 439 U.S. 410, 416 (1974), appears applicable in this case: the employer "*seems to argue that the preponderance shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made*" absent the protected activity .

The evidence indicates that the Police Department was experiencing a manpower shortage that caused increased black-out periods and longer response times. More probable that not Chief Dailey and Major Monchil did look at various alternatives to address these problems, including reassignment of the Support Unit. Major Monchil and Captain Hooks may very well in Mid-April have finalized plans to reassign the Support Unit at some point in time. The pivotal question, however, is whether the decision to implement the reassignment plan at that particular time was motivated by Sergeant Sipes grievance or the manpower shortage. The burden is upon Respondent to prove by a preponderance of the evidence the "*good motive*" and it has failed to make a successful "*same decision anyway*" defense.

The determinative factor is the timing of the decision. As stated above, fact-finding tribunals may draw upon experience in factual inquiries. Anyone associated with governing bodies for very long becomes distinctly aware that government runs on paper and, except in emergency situations, all phases of a major change in operation are planned, detailed, approved and communicated to

the Support Unit were initiated in late 1989, were renewed in early 1990, and the plans finalized in mid-April, 1990. Petitioner also offered the testimony of Lieutenant Johnson, Acting Captain Newsom and Major Monchil, among others, denying Major Monchil ever expressed anger at Sergeant Sipes for filing the grievance and stated an intent to disband the Support Unit for that reason.

Credibility therefore becomes the determinative factor. The credibility of witnesses is generally a matter for the determination of the hearing examiner. N.L.R.B. v. Ogle Protection Service, Inc., 375 F.2d 497, 500 (6th Cir. 1968). "*It may be that the Board improperly gave what other persons would think undue credit to various circumstances. But it is not for us [the court] to determine the credibility of witnesses; that is the function of the triers of the facts.* N.L.R.B. v. Aluminum Products Co., 120 F.2d 567 (7th Cir. 1941). This position was adopted by the Kansas Supreme Court in Swezey v. State Department of Social & Rehabilitation Services, 1 Kan.App.2d 94, 98 (1977).

From the demeanor of the witnesses, the directness and content of the responses to questions, experiences of the finder of fact, as well as from the record as a whole, the witnesses for Petitioner appeared more credible. This does not mean that given the conditions as they existed the decision to reassign the Support Unit would not have been justified at another time or under different circumstances. The court's observation in Givan v.

Sipes was transferred to the South Division without providing for or allowing his bumping rights. Additionally, Respondent failed to produce any evidence indicating an emergency situation or such change in circumstances in April of 1990 as to necessitate the implementation of the reassignment of the Support Unit in the manner that occurred after May 1, 1990.

These facts plus the timing of the transfer, just two working days and four calendar days after the filing of the Sipes' grievance, supports the inference that the reassignment was in retaliation for the grievance; refutes Respondent's defense that the decision to reassign the support unit had been made at least two weeks before the grievance was filed; adds credence to the testimony of Sergeant Sipes, Sergeant Callahan and Officer Fogarty that they were told Major Monchil was upset over the Sipes grievance and intended to disband the Support Unit; and discredits the testimony of Chief Dailey, Major Monchil, Captain Hooks, Acting Captain Newsom and Lieutenant Johnson.

The Petitioner has presented evidence sufficient to make a prima facie showing to support the inference that the timing and implementation of the decision to reassign the Support Unit was motivated by the Sipes' grievance rather than the alleged lack of manpower. Respondent failed to carry its burden of persuasion, by a preponderance of the evidence, that the reassignment was the result of the manpower shortage and would have taken place, at that

all in sufficient time prior to the change to allow for an orderly transition. Additionally, a "*paper trail*" is developed to document and memorialize the process. This observation finds even greater application in a para-military organization such as a police department.

Here Respondent failed to produce any written documentation memorializing discussions, over approximately six months, between Chief Dailey and Major Monchil concerning alternatives to address the manpower shortage; recommendations from Major Monchil to Chief Dailey; planning by Major Monchil and Captain Hooks for the reassignment of the Support Unit; a finalized plan for the reassignment of the Support Unit detailing when the reassignment of the Support Unit detailing when the reassignment would occur, who was assigned where, the supervisory scheme, and the logistics of the transfer; or a final request to implement the reassignment plan by Major Monchil, and approval of the request by Chief Dailey. Add to this the "*utter chaos*" that resulted on the day of implementation of the transfer plan wherein some of the support officers did not received notification of the transfer, division supervisory personnel had not been informed of the transfer of support officers to their command nor were prepared for their arrival, necessary equipment had not been transferred to the divisions to make the support officers operational, and Sergeant

employees, is best served by subjecting problems to the mediating influence of collective bargaining.

[7] It is well settled that while an employer is not obligated to bargain over purely managerial prerogatives, it is under an independent duty to bargain over the "*effects*" of that decision on mandatorily negotiable subjects. *See e.g.* N.L.R.B. v. Transmarine Navigation Corp., 380 F.2d, 933, 939 (9th Cir. 1967); N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2nd Cir. 1961). Once the public employer makes a non-negotiable decision it is still under an obligation to notify the recognized employee representative of its decision so the representative may be given the opportunity to bargain over the rights of the public employees whose employment status will be altered by the managerial decision. *See e.g.* Rapid Bindery, supra; N.L.R.B. v. Royal Plating and Polishing Co., 350 F.2d 191 (3rd Cir. 1965).

[8] When a recognized employee representative has sufficiently clear and timely notice of an employer's decision and thereafter makes no protest or effort to bargain about the decision, it waives its right to complain that the public employer acted in violation of K.S.A. 75-4333(b) (1) and (5). *See e.g.* N.L.R.B. vs. Spun-Jee Corp., 385 F.2d, 379, 383-84 (2nd Cir. 1967). Notice, to be effective, must be given sufficiently in advance to actual implementation of a decision to allow bargaining. *See e.g.* N.L.R.B. v. Brown-Dunkin Co., 287 F.2d 17, 20 (10th Cir. 1961). As

particular time, had Sergeant Sipes not engaged in a activity protected by PEERA, i.e. filing the grievance. Respondent's actions therefore constitute a violation of K.S.A. 75-4333 (b) (1), (3) and (4).

Appropriate Remedy

The decision to reassign the Support Unit and abolish Sergeant Sipes' position is clearly within the realm of managerial discretion as contemplated by K.S.A. 75-4326, and not a subject of collective bargaining. This is not to hold that the public employer is absolved of all duty to bargain with the recognized employee representative when it makes such a managerial decision. K.S.A. 75-4327(b) provides, "*Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, . . . the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment to the public employees as provided in this act, . . .*" The Kansas Legislature made the policy determination, in enacting PEERA, that, despite management's interest in absolute freedom to operate its agency as it sees fit, the interests of public employees are of sufficient importance that their recognized employee representative ought to be consulted in matters affecting them, and that the public interest, which includes the interests of both public employers and

concluded by the court in Town & Country Manufacturing Co., 136 N.L.R.B. 1022, 1030 (1962), enforced 316 F.2d 846 (5th Cir. 1963), *"No genuine bargaining... can be conducted where [the] decision has already been made and implemented."* In the present case the Respondent does not and cannot contended that it gave Petitioner timely notice of its decision to reassign the Support Union and abolish Sergeant Sipes' position.

Upon determination that the public employer has committed a prohibited practice the Public Employee Relations Board could justifiably direct the public employer to restore the situation existing prior to the reassignment of the support unit. But this appears impractical as the Support Unit has been reassigned for a considerable period of time, at least one bid period has past, and to reinstate the Support Unit would require pure speculation as to what, if any Acting Sergeant's pay would have been earned by Officer's Campbell and Roberts and overtime pay earned by the support officers during the period of reassignment -- matters peculiarly suitable for resolution within the collective bargaining framework. Further as set forth above, adequate justification existed to have reassigned the Support Unit if it had not been for the improper motive. The appropriate remedy, therefore, it is to attempt to recreate in some practical manner the situation that would have existed had the Respondent afforded the Petitioner an

adequate opportunity to bargain over the effects of the decision to reassign the Support Unit.

ORDER

IT IS THEREFORE ADJUDGED that Respondent, City of Kansas City, Kansas, has committed a prohibited practice as set forth in K.S.A. 75-4333(b) (1), (3) and (4).

IT IS ORDERED that Respondent cease and desist activities against support unit officers and Sergeant Sipes which are prohibited by K.S.A. 75-4333(b) (1), (3) and (4).

IT IS FURTHER ORDERED that Respondent shall meet and confer in good faith with Petitioner concerning the effects of the reassignment of the Support Unit as it relates to mandatorily negotiable subjects.

IT IS FURTHER ORDERED that Respondent shall conspicuously post a copy of this order for thirty (30) days at all locations where members of the bargaining unit represented by Petitioner are employed.

IT IS SO ORDERED this 15th day of **November, 1991.**

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

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Public Employee Relations Board, Department of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Supervisor for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 15th day of November, 1991, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Steve A.J. Bukaty
Blake and UHLIG, P.A.
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Members of PERB

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