BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

City of Junction City, Kansas, ----------Petitioner, vs. Junction City Police Officers Association, ----------Respondent. and Junction City Police Officers Association, ----------Petitioner, vs. City of Junction City, Kansas, ----------Respondent.	)	Case no. 75-CAEO-2-1992 Case no. 75-CAE-4-1992

INITIAL ORDER

ON March 23 and 24, 1992 the above-captioned prohibited practice complaints 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 Michael G. Barricklow,
5400 S. 159th,
Rose Hill, Kansas 66133.

Respondent: Appeared by Charles A. Zimmerman
City Attorney,
P.O. Box 287
Junction City, Kansas 66441

75-CAEO-2-1992
&
75-CAE-4-1992

ISSUE PRESENTED FOR DETERMINATION

Case No. 75-CAE-4-1992

I. WHETHER THE ACTION TAKEN BY THE JUNCTION CITY COMMISSION ON TUESDAY, SEPTEMBER 3, 1991, OF REVISING THE CITY-WIDE GRIEVANCE POLICY FOR ALL CITY EMPLOYEES CONSTITUTED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 75-4333(b)(1) AND (b)(5) AS A UNILATERAL CHANGE IN A MANDATORILY NEGOTIABLE SUBJECT.

   a. WHETHER THE DECISION TO CHANGE THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT, OR A SUBJECT OF MANAGEMENT RIGHTS.

   b. WHETHER THE IMPLEMENTATION OF CHANGES TO THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT OR A SUBJECT OF MANAGEMENT RIGHTS.

II. SHOULD THE CITY OF JUNCTION CITY BE FOUND TO HAVE COMMITTED A PROHIBITED PRACTICE FOR UNILATERALLY REVISING THE CITY-WIDE GRIEVANCE POLICY, WHETHER THE APPROPRIATE REMEDY IS TO ORDER THE CITY TO RESCIND THE CHANGES, AND PROCEED TO MEET AND CONFER WITH THE JUNCTION CITY POLICE OFFICERS ASSOCIATION OVER THE PROPOSED CHANGES.

III. WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(5) BY REFUSING TO ALLOW THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO "MECHANICALLY RECORD IT OWN MINUTES" OF THE MEET AND CONFER SESSIONS.

   a. WHETHER MEET AND CONFER SESSIONS ARE CONTROLLED BY THE KANSAS OPEN MEETINGS ACT, K.S.A. 75-4317 ET SEQ.

IV. WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(1) BY ATTEMPTING TO ESTABLISH A LACK OF TRUST IN THE JUNCTION CITY POLICE OFFICERS ASSOCIATION CHIEF NEGOTIATOR, MICHAEL BARRICKLOW, THROUGH STATEMENTS ATTRIBUTED TO THE CHIEF OF POLICE.

Case No. 75-CAEO-2-1992

V. WHETHER THE TELEPHONE CALLS MADE BY MICHAEL G. BARRICKLOW, CHIEF NEGOTIATOR FOR THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO THE CERTAIN MEMBERS OF THE CITY COMMISSION OF THE CITY OF JUNCTION CITY, KANSAS, ON FRIDAY, SEPTEMBER 27, 1991, CONSTITUTES A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(c)(2) AND 75-4333(c)(3) BY INTERFERING WITH THE MEET AND CONFER PROCESS BY CIRCUMVENTING THE DULY AUTHORIZED BARGAINING REPRESENTATIVES OF THE PUBLIC EMPLOYER.

VI. WHETHER A MEMBER OF AN EMPLOYEE BARGAINING UNIT IS BARRED FROM DISCUSSING A SUBJECT OF MANDATORY NEGOTIABILITY WITH AN ELECTED PUBLIC OFFICIAL WHO IS A MEMBER OF A GOVERNING BODY PURSUANT TO K.S.A. 75-4322(G) DURING THE TIME THAT SUBJECT IS AN ISSUE OF MEET AND CONFER NEGOTIATIONS BETWEEN THE EMPLOYEE'S RECOGNIZED REPRESENTATIVE AND THE REPRESENTATIVE OF THE GOVERNING BODY.

SYLLABUS

1. **DUTY TO BARGAIN** - Good Faith - Unilateral changes. It is a well established labor law principle that a unilateral change, by a public employer, in terms and conditions of employment is a prima facie violation of its public employees' collective negotiation rights, but not *per se* a prohibited practice.

2. **DUTY TO BARGAIN** - Unilateral Changes - Responsibility of employer prior to change. Where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

3. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. A finding of wilful conduct requires a showing that the party continued a course of conduct in conscious disregard of the foreseeable injurious consequences.

4. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. A person is presumed to intend the natural and logical consequences of his acts. Thus if conduct is sufficiently lacking in consideration for the rights of others, and indifferent to the consequences it may impose, then, regardless of the actual state of the mind of the party and his actual concern for the rights of others, it is wilful conduct.

5. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. Wilful conduct does not require a deliberate intention to injure. Rather the "intent" in wilful conduct is not an intent to cause injury, but it is an intent to do an act, or an intent to not do an act, in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to the rights of another.

6. **PROHIBITED PRACTICES** - Insistence on negotiating non-mandatory topic - Tape recording negotiation sessions. The demand for verbatim recording devices during negotiations as a means to record those negotiations is not a mandatory subject of bargaining under PEERA, and either party's insistence to impasse on this issue is, accordingly, a prohibited practice, without regard to whether such insistence was in good or bad faith.

7. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Purpose of PEERA - Legislative Intent. In enacting PEERA the Legislature established that it is the public policy of this state to promote harmonious and cooperative relationships between government and its public employees by permitting such employees to organize and bargain collectively. The purpose of PEERA is to encourage the use of the collective bargaining process in the public sector.

8. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Interpretation of Statutes - Harmonizing conflicting statutes. Where two statutes deal with the same subject matter, i.e. collective bargaining sessions, and are not inconsistent with each other, they must be harmonized to the extent possible - notwithstanding the fact that the statutes may have been

enacted at different times with no reference to each other. This principle of statutory construction operates because the law does not favor repeal by implication.

9. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Interpretation of Statutes - Requirements under Kansas Open Meetings Law. While the Open Meetings Law contained in K.S.A. 75-4317 et seq. manifests a general policy that all meetings of a governmental body should be open to the public, meet and confer sessions under PEERA are not subject to the Act.

10. **PROHIBITED PRACTICES** - Interference, Restraint or Coercion - Elements of coercive speech. Employers have a constitutional right to express opinions that are noncoercive in nature. In considering coercive effect of speech, any assessment must be made in the context of its setting, the totality of the circumstances, and its impact upon the employees. Statements found to be isolated, trivial, ambiguous and susceptible to innocent interpretation, given no background of union animus, do not violate K.S.A. 75-4333(b)(1).

11. **DUTY TO BARGAIN** - Selected Representatives for meet and confer - Duties and rights. Each party to a meet and confer relationship has both the right to select its representatives for bargaining and the duty to deal with the chosen representative of the other party.

12. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Exclusive Representative - purpose. Kansas has adopted, through the Public Employer-Employee Relations Act ("PEERA"), a statutory policy that authorizes public bodies to accord exclusive recognition to representatives chosen by the majority of an appropriate unit of employees for the purpose of meeting and conferring on conditions of employment and adjusting grievances. The consequences of exclusive representation is the limiting of the rights of individual employees.

13. **DUTY TO BARGAIN** - Open Meetings for negotiations - Pubic forum. When a governing body has either by its own decision or under statutory command, determined to open its decision making processes to public view and participation, the governing body has created a *"public forum"* dedicated to the expression of views by the general public. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

14. **PROHIBITED PRACTICES** - Bypassing Chosen Representative. The bypassing of the public employer's chosen meet and confer representative by employee organization officials directly contacting members of the governing body to discuss subjects under negotiation constitute a violation of K.S.A. 75-4333(c)(2) as interfering with respect to selecting a representative for the purpose of meeting and conferring or the adjustment of grievances

FINDINGS OF FACT[1]

1. Petitioner, the Junction City Police Officers Association, ("JCPOA") 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 non-exempt police officers who are employed by Respondent, City of Junction City, Kansas ("City"), for the purpose of negotiating collectively with the respondent 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 Junction City, Kansas ("City"), 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.

3. Dr. Hazel Swartz is the Director of Chapter I for U.S.D. 475 and also its grants writer. She is a Junction City City Commissioner, having served approximately one year

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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."

on the Commission at the time of the formal hearing. (Tr.p. 55-56).

4. Kenneth Merle, Jr. is the marketing officer of the Central National Bank. He also serves as a Junction City City Commissioner, having served approximately three years at the time of the formal hearing. (Tr.p. 84).

5. Theodore Sanders serves as a Junction City City Commissioner. (Tr.p. 161).

6. Jerry E. Smith is the Police Chief of Junction City, having served for thirteen years. He has served as a member of the City's bargaining team for all previous negotiations with the JCPOA. (Tr.p. 100-01).

7. Tom Wesoloski is employed by the Junction City Police Department, and served as President of the JCPOA during the times involved in this complaint. (Tr.p. 110-11).

8. Robert Story serves as a Sergeant of the Junction City Police Department where he has been employed for approximately seven and one-half years. (Tr.p. 154-55).

9. Dan Breci serves as a patrolman with the Junction City Police Department where he has been employed for approximately two and three-fourths years. (Tr.p. 182-83).

10. David W. Tritt is the Personnel Director for the City of Junction City, having served in that position for two and one-half years. He has served in a similar capacity for the Adams Products Company for ten (10) years, with CR Industries for three (3) years, and with Pittsburg Plate Glass. He has experience in contract negotiations and two and one-half years of experience working under the Public Employer-Employee Relations Act. (Tr.p. 205, 232).

11. Blaine R. Hinds is the City Manager of the City of Junction City, having served in that position for four (4) years. He has seventeen (17) years of experience dealing with labor relations and collective bargaining familiar with PEERA. (Tr.p. 290, 298, 300).

12. The JCPOA noticed the City in mid-April, 1991 of its desire to meet and confer for purposes of negotiating a 1992 contract. (Tr.p. 257).

13. The first meet and confer session between the JCPOA and the City on a 1992 contract took place on May 23, 1991 with Michael Barricklow serving as the chief negotiator for the JCPOA. (Tr.p. 46). A chief negotiator had been appointed by the City to represent it in negotiations. The negotiator appointed by the City was Dave Tritt. (Tr.p. 26). The purpose of that first meeting was to exchange proposals and establish ground rules for negotiations. (Tr.p. 19, 34, 259-60).

14. The JCPOA, at the commencement of meet and confer sessions on the 1992 contract, noticed twelve (12) items for negotiations, including a separate grievance procedure for police officers. The grievance procedure was one of the items ultimately taken to impasse. (Tr.p. 45, 47, 51, 106-07, 131-32, 167, 207, 208; Ex. E, F, 8). Additionally, the JCPOA submitted a two page document entitled Negotiation Ground Rules and listing ten (10) ground rules for the negotiations. Item Number Seven (#7) related to tape recording the negotiation sessions. Item number seven provided:

> "7. A summary of each session will be kept by each team. Each party reserves the right to make tape recordings of each negotiation session. These tapes are for the sole use of the negotiating teams in closed sessions." (Tr.p. 262; Ex. C).

15. With reference to Item Number Seven, Michael Barricklow inquired if the City negotiating team had any objections to the JCPOA mechanically recording the meet and confer sessions. (Tr.p. 34).

16. The JCPOA maintained it was an association right to take their own minutes of the negotiation sessions in what ever manner it chose. (Tr.p. 20). In addition, the JCPOA urged the following reasons for requiring mechanically recording the meet and confer sessions:
    1. A tape recording provides a good reference to which to refer to confirm what was or was not said or agreed to during the negotiation sessions. (Tr.p. 37, 163).
    2. Being on the record keeps negative remarks out of the negotiations. (Tr.p. 37).
    3. By having statements on the record there would be less potential for reprisals by management on members of the JCPOA negotiating team because of what was said or done during the negotiations. (Tr.p. 37).

4. The parties would be less reluctant to share information. (Tr.p. 53).

16. The City negotiating team, composed of Mr. Hinds, Mr. Tritt and Chief Smith, objected to having any of the negotiating sessions mechanically recorded. (Tr.p. 19, 25, 215-16). The reasons given for not wanting the sessions recorded included:
    1. There never had been a problem in the past that required recording, and there was nothing to indicate anything had changed for these meetings. (Tr.p. 20).
    2. The recording could have a chilling effect on the negotiation process. (Tr.p. 20).
    3. It would impede negotiations by inhibiting the open and free exchange of ideas and information as the team members speak for the record. (Tr.p. 20, 111-12, 216).
    4. The tapes could be used by other bargaining units for personal or negotiation purposes. (Tr.p. 20-21, 217).
    5. Tape recorders had never been used in past negotiations. (Tr.p. 25-26).
    6. Tape recording of meet and confer sessions is not a mandatory subject of negotiation. (Tr.p. 216).

16. In an attempt to reach a compromise on the use of tape recorders, the JCPOA offered not to publicly disclose the tapes of the sessions. This offer was rejected. (Tr.p. 21).

19. The ground rules were ultimately agreed upon at the June 5th meeting; including changes to the tape recording proposal. The new wording of Item Number Seven provided:
    "7. A summary of each session will be the responsibility of each team. The JCPOA will peruse (sic) the right of taping the sessions through appropriate means." (Tr.p. 263; Ex. D).

20. While being able to explain the benefits that could result from tape recording the meet and confer sessions, none of the JCPOA witnesses could delineate any terms and conditions of employment affected by the tape recording or the denial of tape recording, of meet and confer sessions. (Tr.p. 35).

21. On August 21, 1991 the JCPOA filed with the Public Employer-Employees Relations Board ("PERB") a

notification of impasse and request for appointment of a mediator indicating the parties were in agreement. By letter dated August 23, 1991, Roger Naylor, Federal Mediation and Conciliation Service, was appointed to mediate the dispute. The letter used was a computer generated form letter. Unfortunately, the letter in one paragraph erroneously listed the parties at impasse as the City of Hays, Kansas and Service Employees Union Local rather than the JCPOA and the City of Junction City. When the error was brought to the attention of the PERB a correction was sent out on October 18, 1991 to Roger Naylor and the parties. (Case No. 75-I-11-1992).

22. Officer Breci testified Chief Smith made a comment at one September staff meeting that "You guys need to get with your negotiator and tell him basically what department he is working for." (Tr.p. 185). Officer Breci stated the comment was done light heartedly, but appeared to embarrass the JCPOA members present at the meeting. (Tr.p. 193).

23. Sergeant Story testified he was approached by Chief Smith who mentioned the August 23, 1991 letter. Sergeant Story believed the Chief was making fun of the JCPOA, but was not of the opinion the Chief's comments were made to influence him to change his negotiator. (Tr.p. 177-78, 181). He felt the comment was made in jest, and that the Chief thought the incident was humorous. (Tr.p. 181).

24. Sergeant Story could not recall Chief Smith ever making any other comment about the ability of the JCPOA negotiator or that the JCPOA should seek someone else to represent it. (Tr.p. 181, 195). He believed the comment was an isolated incident and not an ongoing practice. (Tr.p. 181-82, 194, 235).

25. Chief Smith does not recall making the comment "You guys need to go out and find someone that knows what he's doing due to the fact he doesn't even know where he's negotiating," at any staff meeting in September, 1991, or to any individual JCPOA member. (Tr.p. 110).

26. Chief Smith admits, after receiving the August 23, 1991 letter, he contacted JCPOA President Tom Wesoloski and asked if he had received the letter. Mr. Wesoloski stated he had not received a copy. Chief took the August 23, 1991 letter to Mr. Wesoloski because he thought it could have a bearing on the negotiations, and if it was

a mistake, Mr. Wesoloski should be aware of it so as to attempt to rectify the problem. He did not take the October 23, 1991 letter to Mr. Wesoloski because it was self explanatory and required not remedial action. (Tr.p. 142-43). Smith commented at that time, "If the association is going to pay someone to negotiate, they should at least know the difference between Hays and Junction City." (Tr.p. 110-11; Ex. 6).

27. It was Chief Smith's opinion the JCPOA should not have retained the services of an outside negotiator for the 1992 negotiations because the community would rather see police officers negotiate for themselves; the JCPOA would receive more citizen support in their requests had they stayed within the organization for its negotiator. He maintained this was his personal opinion and not that of his position as Chief of Police so it did not affect his negotiation duties. (Tr.p. 123-24, 127, 139-40).

28. The first session with federal mediator Roger Naylor was held on September 27, 1991 at the Harvest Inn in Junction City, Kansas. The parties met jointly with the mediator to list items at impasse, then moved to separate caucus rooms. (Tr.p. 274-75).

29. Prior to the first mediation session the members of the JCPOA negotiating team advised Michael Barricklow that the City Commission's had at its September 3, 1991 Commission meeting changed the City-wide Grievance Procedure. During the joint mediation session with Mr. Naylor from the Federal Mediation Service, Michael Barricklow inquired of Mr. Tritt whether the City Commissioners were aware that "grievance procedure" was a subject presently under negotiations. Mr. Tritt answered they were so aware, however members of the JCPOA negotiating team doubted the veracity of Mr. Tritt's answer. Despite this doubt, the JCPOA negotiating team did not request of Mr. Tritt that he return to the Commission to inquire if they were aware of the mandatory negotiability of the subject "grievance procedure." (Tr.p. 28-29).

30. After the parties separated to caucus in different rooms at the Harvest Inn, Mr. Barricklow telephoned City Commissioners Ken Talley, Hazel Swartz and Theodore Sanders. (Tr.p. 9, 28, 161, 172). Each contact commenced with Mr. Barricklow introducing himself as the

superintendent for another school district and the chief negotiator for the JCPOA. (Tr.p. 10, 28, 56).

31. Commissioner Swartz was contacted by telephone at approximately 10:30 a.m. on September 27, 1991 at her place of employment. (Tr.p. 56, 160). The telephone call lasted between 8 and 15 minutes. (Tr.p. 67).

32. Commissioner Swartz and Michael Barricklow talked about three subjects; salary for police officers, a grievance procedure for police officers, and police officers performing certain types of off-duty employment. (Tr.p. 57, 160). The conversations were initiated by Mr. Barricklow. (Tr.p. 57, 59). Commissioner Swartz did not ask any questions of, nor elicited any information from, Michael Barricklow during the contact. (Tr.p. 68).

33. The conversation concerning the grievance procedure centered around whether she was aware a grievance procedure was a mandatory subject of bargaining; that it was currently being negotiated; and if that information had been given to them by Chief Negotiator Tritt. She answered in the affirmative to each questions. (Tr.p. 61-62).

34. Commissioner Swartz was aware the City had appointed Dave Tritt as Chief Negotiator for the City, and had received briefings from Mr. Tritt concerning the status of the JCPOA negotiations. (Tr.p. 58). She told Michael Barricklow she felt uncomfortable with the conversation, and thought it was inappropriate. (Tr.p. 57-58, 59, 60, 68).

35. Commissioner Swartz did not feel coerced, restrained or interfered with in performance of her duties as a City Commissioner because of the Barricklow conversations. (Tr.p. 69), nor did she loose confidence in Mr. Tritt as the City's Chief Negotiator. (Tr.p. 80).

36. Commissioner Talley received a telephone call from Michael Barricklow at his place of employment on September 27, 1991. (Tr.p. 85). The telephone call lasted between 3 to 5 minutes. (Tr.p. 94, 160).

37. During the contact Mr. Barricklow inquired if Commissioner Talley was aware the City's Chief Negotiator, Mr. Tritt, was doing something illegal. (Tr.p. 85-86). Commissioner Talley was surprised by the

call and inquired why Mr. Barricklow was talking to him instead of Mr. Tritt concerning matters under negotiation. (Tr.p. 86-87). Commissioner Talley terminated the conversation, refusing to discuss any particular subject, because he believed the conversation was inappropriate. (Tr.p. 86, 88).

38. While not feeling personally threatened by the contact, Commissioner Talley did feel the negotiations could be threaten. (Tr.p. 90, 94). He perceived Michael Barricklow's intent in making the telephone call was to "defer my faith in my negotiator." (Tr.p. 94).

39. The conversation with Commissioner Sanders was the same as the conversation with Commissioner Swartz. (Tr.p. 161).

40. Both Commissions Swartz and Talley were aware that negotiations were going on between the City and the JCPOA on the same day the contacts were made. (Tr.p. 57, 85, 293-94).

41. Both Commissioner Swartz and Commissioner Talley acknowledged, as public officials, they received calls from city employees at their homes. (Tr.p. 62, 89).

42. This was the first time the JCPOA had ever directed inquiries directly to commission members rather than through the appointed negotiator. (Tr.p. 27).

43. Since Mr. Tritt is responsible to take any subsequent tentative agreement with the JCPOA back to the City Commission for ratification, his veracity, credibility and persuasiveness with the City Commissioners is important. (Tr.p. 278-79).

44. All terms and conditions of employment affecting the police officers are not memorialized in the written 1991 JCPOA contract. (Tr.p. 129). While no Grievance Procedure was specifically provided for in the 1991 JCPOA contract, police officers were covered by the City-wide Grievance Procedure, as set forth in the Employee Handbook, in existence at the time of negotiations on the 1991 contract. (Tr.p. 25, 30-33, 138, 223, 242, 328; Ex. A).

45. Witnesses Swartz, Talley, Smith, Story, Tritt and Hind acknowledged awareness that a "grievance procedure" is a

mandatory subject of negotiations. (Tr.p. 70-71, 79, 97, 103-04, 159, 209, 212, 321).

46. During negotiations on the 1991 JCPOA contract, the City did not indicate to the JCPOA negotiating team it contemplated changing the City-wide Grievance Procedure during the term of the contract. (Tr.p. 33, 223).

47. During the 1991 contract negotiations, the JCPOA never indicated or agreed to allow the City to change the existing City-wide Grievance Procedure during the term of the 1991 contract nor did the City request a waiver of negotiations on any contemplated changes. (Tr.p. 33-34, 223-24).

48. The 1991 JCPOA contract contains no provision waiving the JCPOA right to negotiate changes in the City-wide Grievance Procedure. (Tr.p. 34).

49. Mr. Tritt first discussed with Mr. Hinds the need to make changes in the existing City-wide Grievance Procedure in June, 1991. Mr. Hind assigned the task of rewriting the grievance procedure to address these problems to Mr. Tritt with the assistance of the city attorney. (Tr.p. 225-26).

50. The need for changes in the existing City-wide Grievance Procedure was precipitated by events relating to a non-Police Department grievance that arose in late 1990. In the spring of 1991 the City determined the existing grievance procedures were unwieldy, and the multiple step appeal process unnecessarily protracted the grievance proceedings. (Tr.p. 225). According to Mr. Hinds, the City had to make some changes regarding employees other than the police officers, and could not wait until all the negotiations had taken place with the JCPOA, The City implemented the changes and continued to negotiate with the JCPOA regarding any changes in the grievance procedure the JCPOA viewed as necessary. (Tr.p. 320).

51. Input on proposed changes to the City-wide Grievance Procedure was not sought from department heads. (Tr.p. 229). The City administration did not even contact the Chief of the police department, Jerry Smith for his input on the proposed changes prior to its adoption by the City Commission. (Tr.p. 105).

52. The JCPOA was not provided a copy of the proposed changes to the City-wide Grievance Procedure prior to consideration and adoption by the City Commission at its September 3, 1991 meeting. Additionally, the city employees did not receive advance copies of the proposed changes, nor were their opinions or recommendations solicited. (Tr.p. 42, 44, 230, 318).

53. The new City-wide Grievance Procedure was finalized as Policy Resolution No. 91-7. (Tr.p. 243; Ex. I).

54. According to Police Chief Smith, the fact that the City intended to consider changes in the City-wide Grievance Procedure at the September 3, 1991 Commission meeting appeared in the newspaper, and on television and radio. (Tr.p. 105, 169, 229).

55. The JCPOA, upon receiving information that the City intended to consider changing the City-wide Grievance Procedure, made no request to negotiate the proposed changes. (Tr.p. 41).

56. Policy Resolution No. 91-7, was adopted by the City Commission on September 3, 1991, and it superseded the city-wide grievance procedure that appeared in the Employee Handbook. (Tr.p. 244). All city employees, including the police officers, were then covered by the new, city-wide, grievance procedure. (Tr.p. 18-19, 44, 72, 82, 93, 95, 106, 129).

57. The adoption of the new City-wide Grievance Procedure made changes in the then existing City-wide Grievance Procedure that appeared in the Employee Handbook. (Tr.p. 78, 82, 96-97, 130, 214). The major changes included a reduction of time required to complete the grievance process, elimination of the three-person grievance panel provided at the final appeal step and replacing it with a single hearing officer position filed by a local attorney, and reducing the categories of grievances that are eligible to proceed to the final step in the grievance process. (Tr.p. 225-26).

58. The JCPOA was first officially advised that the Grievance Procedure had been changed and the police officers would be working under a new City-wide Grievance Procedure through a memorandum to Hestor dated September 10, 1991, after the changes had been adopted by the City Commission. (Tr.p. 12, 44, 102; Ex. 1).

59. The Commission changes to the City-wide Grievance Procedure came at a time when a separate police department grievance procedure was a subject of negotiations on a 1992 JCPOA contract. (Tr.p. 13, 103). The membership to the JCPOA were upset that the City had unilaterally changed the City-wide Grievance Procedure affecting the police officers without first submitting the proposed changes to the meet and confer process. (Tr.p. 158).

60. At the time of the formal hearing on this prohibited practice complaint, negotiations on the 1992 JCPOA including a separate grievance procedure for the police department, had not been completed. (Tr.p. 81).

61. Amending the existing City-wide Grievance Procedure and negotiating a separate Police Department grievance procedure as part of the 1992 JCPOA contract were mutually exclusive processes. (Tr.p. 230-31, 323). Both Chief Smith and Mr. Tritt considered the negotiations on grievance procedures that occurred between the JCPOA and the City were on a separate grievance procedure for the police officers to be included in the 1992 contract, and not on the proposed changes to the City-wide Grievance Procedure. (Tr.p. 137, 227-28). As Mr. Tritt testified, "We had negotiations on their (JCPOA) own [Police Department grievance procedure], but not for the City-wide." (Tr.p. 232).

62. Mr. Tritt, Mr. Hind and Chief Smith admitted that no negotiations occurred between the JCPOA and the City on the proposed changes to the City-wide Grievance Procedure. (Tr.p. 131, 231-32, 319, 325).

63. Mr. Tritt acknowledges that public employers cannot unilaterally change a mandatory subject of meet and confer without first negotiating with the recognized representative of the affected employees. (Tr.p. 263).

64. The City admits that it could have negotiated a grievance procedure for the police department different than the City-wide Grievance Procedure. (Tr.p. 247). The Junction City firefighters negotiated a 1992 contract which included a separate grievance procedure for the fire department. (Tr.p. 83, 93, 245; Ex. G). Mr. Hind testified that it would have been reasonable to change the City-wide Grievance Procedure for all other non-represented city employees by the September 3, 1991

resolution, but continue the old City-wide Grievance Procedure for the Police Department pending negotiations with the JCPOA. (Tr.p. 329).

65. At the time of the formal hearing on this prohibited practice complaint, a fact-finder had not been appointed and the fact-finding process to resolve the impasse in negotiations on the 1992 JCPOA contract had not been completed. (Tr.p. 224, 303, 307-324). Likewise, the fact-finding process was not employed prior to the adoption of Policy Resolution No. 91-7 on September 3, 1991. (Tr.p. 52).

66. No grievances were filed by a police officer under the new City-wide Grievance Procedure since its adoption September 3, 1991. (Tr.p. 233).

67. The parties, since the formal hearing on the prohibited practice complaint, have completed the meet and confer process and ratified a 1992 JCPOA contract including a separate grievance procedure for the Police Department.

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE I

WHETHER THE ACTION TAKEN BY THE JUNCTION CITY COMMISSION ON TUESDAY, SEPTEMBER 3, 1991, OF REVISING THE CITY-WIDE GRIEVANCE POLICY FOR ALL CITY EMPLOYEES CONSTITUTED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 75-4333(b)(1) AND (b)(5) AS A UNILATERAL CHANGE IN A MANDATORILY NEGOTIABLE SUBJECT.

a. WHETHER THE <u>DECISION</u> TO CHANGE THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT, OR A SUBJECT OF MANAGEMENT RIGHTS.

b. WHETHER THE <u>IMPLEMENTATION</u> OF CHANGES TO THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT OR A SUBJECT OF MANAGEMENT RIGHTS.

A. Unilateral Action

The legislative parameters of the duty to bargain under Public Employer-Employee Relations Act ("PEERA") are found in K.S.A. 75-4327(b):

> *"Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization."*

K.S.A. 75-4322(m) defines *"Meet and confer in good faith"* as:

> *"the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment."*

The Kansas Supreme Court has interpreted these statutes to mean:

> *"the Act [PEERA] imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations."* Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983).

After the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, p.29 (Feb. 10, 1992)("Savings Clause");

See National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952). If the parties are not able to agree on the terms of a mandatory subject of bargaining they are said to have reached "*impasse*." Savings Clause, at p.29; West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526, 541-423 (Conn. 1972). Under PEERA when good faith bargaining has reached impasse and the impasse procedures set forth in K.S.A. 75-4332 have been completed, the employer may take unilateral action on the subjects upon which agreement could not be reached. Id.

A party's refusal to negotiate a mandatory subject of bargaining is a prohibited practice pursuant to K.S.A. 75-4333(b)(5) and (c)(3), although the party has every desire to reach agreement upon an overall memorandum of agreement, and earnestly and in all good faith bargains to that end. Savings Clause, at p.29; *See* 48 Am.Jur.2d, Labor and Labor Relations, § 998 at p. 812. A prohibited practice can be found despite the absence of bad faith, and even where there is a possibility of substantive good faith. *See* Morris, The Developing Labor Law, Ch. 13, at p. 564. Additionally, as the United States Supreme Court explained in NLRB v. Katz, 369 U.S. 736, 743 (1962),("Katz"), even in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively with the chosen representatives of his employees in much the same manner as a flat refusal to bargain.

[1] It is a well established labor law principle that a unilateral change, by a public employer, in terms and conditions of employment is a prima facie violation of its public employees' collective negotiation rights. Brewster-NEA v. USD 314, Brewster, Kansas Case No. 72-CAE-2-1991 (Sept. 30, 1991) p. 23 ("Brewster"); Katz, supra. It is also well settled, however, that a unilateral change is not *per se* a prohibited practice. Brewster, at p.23. As the court concluded in NLRB v. Cone Mills, Corp., 373 F.2d 595 (4th Cir. 1967):

> *"Thus, we think it is incorrect to say that unilateral action is an unfair labor practice per se. See Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1423 (1958). We think it more accurate to say that unilateral action may be sufficient, standing alone, to support a finding of refusal to bargain, but that it does not compel such a finding in disregard of the record as a whole. Usually, unilateral action is an unfair labor practice -- but not always."*

After a negotiated agreement has been reached between the public employer and the exclusive representative of public employees pursuant to K.S.A. 75-4321 et seq., then during the time that agreement is in force, the public employer, acting unilaterally, may not make changes in items included in that agreement or changes in items which are mandatorily negotiable, but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included in the resulting agreement. *See* NEA-Wichita v. U.S.D. 259, 234 Kan. 512 (1983).

The underlying rationale for this principle appears to be two-fold. First, because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a *"mandatory"* bargaining item. Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Secondly, since only unilateral changes are prohibited, an unfair labor practice will not lie if the *"change"* is consistent with the past practices of the parties. R. Gorman, Basic Text on Labor Law, 450-54 (1976).

Black's Law Dictionary, 5th ed. 1979) defines *"procedure"* as:

> *"The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which regulates the formal steps in an action or other judicial proceeding; a form, manner and order of conducting suits or prosecutions. The judicial process for enforcing rights and duties recognized by substantive law and for justly administering redress for infraction of them."*

There is no question that the resolution adopted by the City on September 3, 1991 established a procedure for addressing the grievances of all City employees, including the police officers. The *"Grievance Policy"* contained in the Employee Handbook, (Ex. A), clearly sets forth the *"machinery," "mode of proceeding,"* and *"formal steps"* for handling a complaint filed by any City employee, including a police officer. K.S.A. 75-4324 gives public employees the right to organize for the purpose of meeting and conferring

with public employers with respect to conditions of employment. K.S.A. 75-4322(t) defines *"conditions of employment"* in pertinent part as meaning *"grievance procedures."* If a topic is by statute made a part of the terms and conditions of employment, then the topic is by statute made mandatorily negotiable. *See* NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, Syl. 5, 1983).

Certain subjects *"which lie at the core of entrepreneurial control"* cannot be made mandatory subjects of bargaining. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 223 (1963) (Justice Stewart concurring). As quoted by the Kansas Supreme Court in U.S.D. No. 352 v. NEA-Goodland, 246 Kan. 137, 143 (1990):

> *"Perhaps the single greatest, and almost universally recognized, limitation on the scope of bargaining or negotiation by state public employees is the concept of managerial prerogative as it has developed in the public sector. In essence, the concept creates a dichotomy between 'bargainable' issues, that is those issues which affect conditions of employment, and issues of 'policy' which are exclusively reserved to government discretion and cannot be made mandatory subjects of bargaining. Anno., 84 A.L.R.3d 242, §3[a]."*

Here, the decision to establish or modify a grievance policy for City employees is within the managerial prerogatives set forth in K.S.A. 75-4326 and not mandatorily negotiable. However, the grievance procedures should be viewed as the mechanics for applying the policy, and must be negotiated prior to implementation of the policy. Fraternal Order of Police, Lodge No. 4 v. City of Kansas City, Kansas, Case No. 75-CAE-4-1991 (November 15, 1991); Brewster-

NEA v. Unified School District 314, Brewster, Kansas, Case No. 72-CAE-2-1991 (September 30, 1991).

The City argues *"that because Policy Resolution PR-7 superseded the entire grievance procedure [then existing and set forth in the Employee Handbook], the JCPOA would have been in the position of having no grievance procedure for its members if PR 7 was not applicable City-wide."* It further contends that even if the revision of the City-wide grievance policy constituted a prohibited practice, *"no harm was done to the JCPOA."* (Res. Brief p. 8).

Whether the change is viewed as beneficial or detrimental is irrelevant to the determination of whether there was a unilateral change in terms and conditions of employment. Brewster, at p. 25. In School Bd. of Indian River County v. Indian River County Education Ass'n, Local 3617, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

> *"A unilateral increase in benefits could foreseeable do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."*

The reason that unilateral action is prima facie unlawful is in the high degree of probability that it may frustrate a bargaining opportunity. Even if there has actually been a unilateral change

in a term and condition of employment, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain. As the court noted in Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984):

> *"The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith."*

[2] In summary, where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

The City asserts the grievance procedure adopted by the City on September 3, 1991, with minor differences, was *"substantially the same grievance procedure as the City proposed to the JCPOA on July 26, 1991."* The issue was the subject of negotiations on the 1992 contract during the meet and confer sessions up to August 23,

1991, and during the subsequent meetings with the mediator as the first step in the impasse procedures. This, the City argues, provided the JCPOA ample opportunity to negotiate the grievance procedure prior to its adoption and implementation in September, 1991.

At the onset it is necessary to remember during the same period of time the City was negotiating with the JCPOA a 1992 contract containing a separate grievance procedure, it was also preparing to adopt a new City-wide grievance procedure to replace the existing grievance procedure covering all City employees including the police officers. What the City apparently fails to recognize in its arguments is these are two distinct and mutually exclusive activities. The duty to bargain applies equally to both. David Tritt, Director of Personnel and the City's chief negotiator, was cognizant of this duality. According to Mr. Tritt, he did not consider the negotiations with the JCPOA on the 1992 contract to be negotiations on the new City-wide grievance procedure. Further, Tritt testified there were, in fact, no negotiations with the JCPOA on the City-wide grievance procedure prior to its adoption in September. This was corroborated by the testimony of Chief Smith. Nothing in the 1991 contract or negotiations leading to that contract indicate a waiver by the JCPOA of any right to negotiate changes in the grievance procedure. Clearly, the JCPOA had neither

the opportunity to, nor waived its right to, bargain any change in the grievance procedure.

Even assuming, *arguendo*, that the negotiations on the 1992 JCPOA contract could be considered in determining whether the City satisfied its obligation to meet and confer in good faith on grievance procedures as the City argues, the evidence clearly indicates that the parties never reached agreement on the terms of any new grievance procedure, and, having reached impasse, never completed the impasse procedures required by K.S.A. 75-4332. Both Personnel Director Tritt and City Manager Blain, while testifying the parties did meet with the mediator appointed by the Public Employee Relations Board in accordance with K.S.A. 75-4332(c) when the parties reached impasse on the 1992 contract, admitted that the fact-finding provisions of K.S.A. 75-4332(d) were not complied with prior to the September 3, 1991 adoption of the City-wide grievance procedure.

Whether viewed as a failure to negotiate or a failure to complete the K.S.A. 75-4332 impasse procedure, essentially when the City took the unilateral action complained of herein, it in effect sought to, and did modify, during the life of the existing 1991 JCPOA contract, the terms and conditions of employment of the police officers. Such unilateral action constitutes a failure to meet and confer as required by K.S.A. 75-4327(b), and a prohibited practice as set forth in K.S.A. 75-4333(b)(1) and (5).

B. Willfulness

In its defense, the City argues the absence of *"wilfulness."* City Manager, Blain Hinds, testified the City had to make changes in the City-wide grievance procedure and could not wait until all the negotiations had taken place with the JCPOA.[2] So the City made the changes but continued to negotiate on the 1992 contract including any changes to the grievance procedure sought by the JCPOA.

K.S.A. 75-4333(b) sets forth eight categories of conduct which, if undertaken by the public employer, constitute a prohibited practice and evidence of bad faith in meet and confer proceedings. Such conduct is to considered a prohibited practice only if engaged in *"willfully."* PEERA, however, does not contain a definition of *"willful."*

"Wilful" conduct can be difficult to define with precision, and requires a case-by-case examination. Dictionaries provide two alternative definitions of *"willful:"* (1) *"deliberate"* or *"intentional,"* and (2) *"headstrong," "heedless"* or *"obstinate."* The American College Dictionary, at p. 1396 (6th ed. 1953) defines *"willful"* in these two ways. First:

"[W]illed, voluntary, or intentional; wilful murder."

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[2] See Finding of Fact #50 above.

Second:

> *"[S]elf-willed or headstrong, perversely obstinate or intractable."*

The same dictionary includes *"headstrong," "perverse"* and *"wayward"* as synonyms for *"willful"* indicating that they refer to one who stubbornly insists upon doing as he pleases despite authority. Thus, *"willful"* suggests a stubborn persistence in doing what one pleases especially in opposition to those whose wishes or commands ought to be respected or obeyed -- *"a willful child who disregarded his parent's advise."* In the context here, a public employer who disregards the legislative commands of the Public Employer-Employee Relations Act, and the rights of the public employees.

The American Heritage Dictionary of the English Language, at p. 1466 (4th ed. 1973) defines *"willful"* as follows:

> *"1. Said or done in accordance with one's will; deliberate [; or]*
>
> *"2. Inclined to impose one's will; unreasoningly obstinate."*

Websters Ninth New Collegiate Dictionary, at p. 1350 (9th ed. 1986) also defines *"willful"* as:

> *"1. [O]bstinately and often perversely self-willed [; or]*
>
> *"2. [D]one deliberately; intentional.*

Finally, Black's Law Dictionary, at p. 1434 (5th ed. 1979), provides the following definitions for the word *"willful;"*

> *"Preceding from a conscious motion of the will; voluntary. Intending the result which actually comes to*

> *pass; designed; intentional; not accidental or involuntary. An act . . . is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.*
>
> * * * * *
>
> *"A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other is negative."*
>
> * * * * *
>
> *"Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."* (emphasis added).

Clearly, use of the first definition places a much more difficult burden upon the complaining party to prove a prohibited practice for not only must it be shown that an act was committed, but also that it was **committed with the intent** to violate the act or injure the other party. The second definition, by contrast, removes the requirement of evil intend. Of course, where it can be shown that a party has undertaken a course of conduct with evil intent, a prohibited practice will be found. However, the absence of an evil intent will not necessarily insulate a party from being found to have committed a prohibited practice. Examination of various definitions of *"wilful conduct,"* as an alternative to evil intent, require that it appear the party (1) had knowledge of existing conditions, and was conscious from such knowledge that injury will likely or probably result from his conduct, and (2)

with indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. 57A Am.Jur.2d, §263, p.298. In choosing between the two alternative definitions, it must be kept in mind that PEERA should be construed liberally to accomplish the purposes set forth in the act.[3] Accordingly, the knowledge of the consequences together with the choice to proceed evincing the constructive intent or state of mine that characterizes *"willful conduct"* is the appropriate definition for applying the *"wilfully"* requirement of K.S.A. 75-4330.

a. Knowledge

[3] For conduct to be wilful it must be shown that the party knew or reasonably should have known in light of the surrounding circumstances that his conduct would naturally or probably result in injury. Mandel v. U.S., 545 F. Supp 907 (1982). The requisite knowledge can be actual or constructive, Lynch v. Board of Education, 412 N.E.2d. 447 (Ill. 1980), and is judged by an

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[3] PEERA was designed to accomplish the salutary purpose of promoting harmony between public employers and their employees. The basic theme of this type of legislation "was that through collective bargaining the passions, arguments and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." H.K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99, 103 (19); West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526 (Conn. 19). The duty to meet and confer in good faith takes on more important dimensions in the public sector because employees of government are denied the right to strike. City of New Haven v. Conn. St. Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979). "Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives . . ." Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 19).

objective rather than subjective standard.[4] In certain cases it can be presumed from the exhibited conduct that the party's intentions were wilful. Teachers Association of District 366 v. USD 366, Yates Center, Kansas, Case No. 72-CAE-7-1881 (Nov. 10, 1988), p.5.[5] Stated another way, a finding of wilful conduct requires a showing that the party continued a course of conduct in conscious disregard of the foreseeable injurious consequences. Mandel v. U.S., supra.

b. Constructive Intent.

[4] To be considered *"wilful"* the conduct must be conscious and intentional and of such a nature that under the known existing conditions injury will probably result therefrom. It is said a person may so disregard the rights of others and be so headstrong in proceeding in the face of known potential injury to those rights, that the law is justified in assuming that his conduct is *"intentional and unreasonable"*. Dussell v. Kaufman Constr. Co., 157 A.2d 740 (Pa. 1960). This doctrine is based upon the principle that a person is presumed to intend the natural and logical consequences of his acts. Payne v. Vance, 133 N.E. 85 (Ohio 1921). Thus if conduct is sufficiently lacking in consideration for the

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[4] That is, it is not necessary that the party himself recognizes conduct as being extremely dangerous; it is enough that he know, or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable person the highly dangerous character of his conduct. Foldi v. Jeffries, 461 A.2d 1145 (NJ 19).

[5] In this case the hearing officer stated, "It should be noted that while the Professional Negotiations Act requires that any violation thereof must be found to be 'wilful,' the existence of intent may be determined by inference.

rights of others, and indifferent to the consequences it may impose, then, regardless of the actual state of the mind of the party and his actual concern for the rights of others, it is wilful conduct. Pelletti v. Membrila, 44 Cal.Rptr. 588 (1965); Ewing v. Cloverleaf Bowl, 143 Cal. Rptr. 13 (1978); Tresemer v. Barke, 150 Cal.Rptr. 384 (1978).

c. Intent To Injure

[5] Wilful conduct does not require a deliberate intention to injure. Lynch v. Board of Education, supra. **Rather the "intent" in wilful conduct is not an intent to cause injury, but it is an intent to do an act, or an intent to not do an act, in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to the rights of another.** Roberts v. Brown, 384 So.2d 1047 (Ala. 1980); Grimshaw v. Ford Motor Co., 174 Cal.Rptr. 348 (1981); Thompson v. Bohiken, 312 N.W.2d 501 (Iowa 1981); Brisboise v. Kansas City Public Service Co., 303 S.W.2d 619 (Mo. 1957); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979). Furthermore, *"ill will"* is not a necessary element of "wilful" conduct, and the conduct charged need not be based in ill will or malicious intent. Bolin v. Chicago S.P., M.& O. R. Co., 84 N.W. 446 (Wisc. 1900). Willfulness means something more than good intentions coupled with bad judgment, but not necessarily an intent

to do harm; it requires a conscious indifference to the consequences. Stephens v. U.S., 472 F.Supp. 998 (1979).

In the instant case, both City Manager Hinds and Personnel Director Tritt had extensive experience in public employee negotiations and testified they were familiar with the Public Employer-Employee Relations Act. The evidence clearly demonstrates the City was aware grievance procedures are mandatory subjects for negotiations; aware the City had an obligation to negotiate any proposed changes to terms and conditions of employment through impasse before unilateral action could be taken; and was aware no negotiations with the JCPOA were undertaken nor impasse procedures completed at the time the September 3, 1990 City-wide grievance procedure was adopted. While the City may not have intended to cause injury to the JCPOA or the police officers, *"it did intend to do an act [adopt a new City-wide grievance procedure] , or intent to not do an act [negotiate with the JCPOA prior to adopting the City-wide grievance procedure]"* so as to evince the constructive intent or state of mine that characterizes *"willful"* conduct. Certainly a reasonable man, especially one with the labor relations experience of Hinds and Tritt, knew, or had reason to know, that such conduct would, to a high degree of probability, result in injury to the JCPOA by denying it the rights guaranteed by K.S.A.

75-4327(b).[6] It is obvious the conduct of the City was sufficiently lacking of consideration for the rights of the JCPOA to "*meet and confer in good faith . . . in the determination of conditions of employment*" of the police officers as guaranteed in K.S.A. 75-4327(b), and rights of the police officers as public employees guaranteed in K.S.A. 75-4324, and indifferent to the consequences of its September 3, 1991 action so as to constitute wilful conduct as required by K.S.A. 75-4333(b).

ISSUE II

SHOULD THE CITY OF JUNCTION CITY BE FOUND TO HAVE COMMITTED A PROHIBITED PRACTICE FOR UNILATERALLY REVISING THE CITY-WIDE GRIEVANCE POLICY, WHETHER THE APPROPRIATE REMEDY IS TO ORDER THE CITY TO RESCIND THE CHANGES, AND PROCEED TO MEET AND CONFER WITH THE JUNCTION CITY POLICE OFFICERS ASSOCIATION OVER THE PROPOSED CHANGES.

Having determined that the actions of the City in unilaterally adopting the new City-wide grievance procedure on September 3, 1991 constituted a prohibited practice as a violation of K.S.A. 75-4330(b)(1) and (5), it is necessary to next determine the appropriate remedy. The JCPOA requested the City be ordered to rescind the new City-wide grievance procedure, at least as to its

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[6] As cited above, in School Bd. of Indian River County v. Indian River County Education Ass'n. Local 3617, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

> "A unilateral increase in benefits could foreseeable do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."

applicability to the police officers; to reinstate the previous grievance procedure for use by the police officers during negotiation proceedings; and to meet and confer with the JCPOA concerning the proposed changes to the grievance procedure. The City argues that since the parties have reached agreement on a new grievance procedure as part of the 1992 contract the issue is moot.

A case is moot when no further controversy exists between the parties and where any judgment of the court would be without effect. NEA-Topeka, Inc. v. U.S.D. 501, 227 Kan. 529, syl. #1 (1980). Here a controversy continues to exist as to whether the City committed a prohibited practice by its actions of September 3, 1991, so the matter cannot be considered moot. However, with the ratification of the 1992 contract between the JCPOA and the City containing a grievance procedure, to order the new City-wide grievance procedure rescinded as applied to police officers, or the parties to negotiate the proposed changes in the City-wide grievance procedure, will serve no purpose. Since such remedy as requested by the JCPOA would be without effect, it must be denied. The JCPOA request for fees and costs is also denied.[7] The appropriate remedy is an order directing the City to cease and

[7] Had the JCPOA taken some affirmative action to protect their rights upon receiving notice of the City's intention to change the City-wide Grievance Procedure prior to the September 3, 1990 Commission meeting, and the City then proceeded with its unilateral action without submitting the proposed changes to meet and confer proceedings, the award of fees and costs may have been justified. See U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 v. 519, 530-32 (1990).

desist taking future unilateral action on matters effecting the terms and conditions of employment of the police officers.

ISSUE III

WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(5) BY REFUSING TO ALLOW THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO "MECHANICALLY RECORD IT OWN MINUTES" OF THE MEET AND CONFER SESSIONS.

a. WHETHER MEET AND CONFER SESSIONS ARE CONTROLLED BY THE KANSAS OPEN MEETINGS ACT, K.S.A. 75-4317 ET SEQ.

A. Tape Recording Sessions

Read together, sections K.S.A. 75-4322(m), 75-4324, 75-4327(b), 75-4333(b)(5) and 75-4333(c)(3), establish the obligation of the employer and the representative of its employees to meet and confer with each other in good faith with respect to *"conditions of employment."* These sections are similar or identical to Sections 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158.[8] In N.L.R.B. v. Wooster Div. of Borg-Warner Corp. 356 U.S. 342 (1958) ("Borg-Warner") the Supreme Court held that the duty to bargain in good faith is limited to the subjects of wages,

[8] Although PEERA is modeled on the NLRA, it is not identical in all aspects. Because there are differences between the two acts, the rationale of decisions under the federal law is applicable to cases arising under PEERA insofar as the provisions of the two acts are similar or the objects to be attained ar the same. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 (February 10, 1992); See Law Enf. Labor Serv. v. County of Mower, 469 N.W.2d 496, 501 (Minn. 1991). As the Kansas Supreme Court concluded in U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531 (1990), "[a]n examination of the federal Labor-Management Relations Act, 29 U.S.C. §§ 141-197 (1988), provides us with guidance" in interpreting Kansas labor relations statutes, citing National Education Association v. Board of Education, 212 Kan. 741, 749 (1973).

hours and terms and conditions of employment. On matters concerning those subjects *"neither party is legally obligated to yield."* Borg-Warner, 356 U.S. at 349; Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office, Case No. 75-CAE-9-1990 (March 11, 1991), p.19)("Adjutant General"). However, as to other matters, designated non-mandatory, "each party is free to bargain or not to bargain, and to agree or not to agree." Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978); *See* Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 210 (1964). Accordingly, lawful subjects of bargaining are divided into two categories; mandatory and non-mandatory.

A party is not permitted to insist on a non-mandatory subject as a condition or a prerequisite to an agreement on the mandatory subjects. Savings Clause, at p.30; Borg-Warner, 356 U.S. at 349; N.L.R.B. v. Operating Engineers Local 542, 532 F.2d 902, 907 (3rd Cir. 1976). Such insistence is, in effect, a refusal to bargain about mandatory subjects of bargaining. Savings Clause, at p. 30; Borg-Warner, 356 U.S. at 349. Even in the absence of bad faith, a party violates the duty to meet and confer in good faith by insisting on a nonmandatory subject as a precondition to bargaining. Borg-Warner, 356 U.S. at 348-50.

The JCPOA, during discussions of the ground rules for negotiations, sought to tape record the meet and confer sessions to obtain a verbatim transcript. The City objected. Negotiations

were undertaken without the requested recording but the JCPOA subsequently filed a prohibited practice charge with the PERB claiming the City's refusal to allow the tape recording of the negotiating sessions constituted a violation of the duty to meet and confer in good faith as proscribed by K.S.A. 75-4333(b)(5).

The employer in N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981) insisted on verbatim recording of collective bargaining sessions. The federal court upheld the Board determination that verbatim recording of collective bargaining sessions was a nonmandatory subject of bargaining:

> *"It is our view that the issue of the presence of a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations does not fall within 'wages, hours, and other terms and conditions of employment.' Rather these subjects are properly grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages , hours, and other terms and conditions of employment.' As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue. Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978).*

Thus, the employer's insistence to impasse on the verbatim recording was a violation of the duty to bargain in good faith. Id, at p.655-58. The court also reasoned that verbatim recording could chill negotiations since the presence of a court reporter

"may cause the parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiation." Id. at p. 656. A party's insistence on tape recording collective bargaining negotiations constituted an unfair labor practice the court concluded. Id.

In Latrobe Steel Co. v. N.L.R.B., 630 F.2d 171 (3rd Cir. 1980) the court upheld the Board's finding that verbatim recording of collective bargaining negotiations is a nonmandatory subject of bargaining. It was nonmandatory, the state reasoned, because there is *"no significant relation between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees."* Id. at p. 176. Moreover, the Court explained, verbatim recording had the potential to chill negotiations and thereby impede reaching an agreement which it was the policy of the NLRA to encourage. Thus, by insisting on a nonmandatory subject of bargaining as a precondition to negotiation of mandatory subjects of bargaining, the company had violated its duty to bargain in good faith. Id. at p.179.

Finally, as the NLRB reasoned in Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978):

> *"The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours and other terms and conditions of employment.' As it s our statutory responsibility to foster and encourage*

> *meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue.* Id. *at 773.*

There appears no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees. *Cf* Chemical Workers Local No.1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179, 78 LRRM 2974 (mandatory subjects limited to issues that settle an aspect of the relationship between the employer and employees); N.L.R.B. v. Massachusetts Nurses Ass'n, 557 F.2d 894, 897-98, 95 LRRM 2852 (1st Cir. 1977) (an interest arbitration clause is a non-mandatory subject of bargaining as it bears only a remote or incidental relationship to terms or conditions of employment); Leeds & Northrup Co. v. N.L.R.B., 391 F.2d 874, 877, 67 LRRM 2793 (3rd Cir. 1968) (principle at heart of statutory provision is requiring negotiation on basic terms which are vital to the employees' economic interest).

[6] It would be contrary to the policy of PEERA which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to breakdown over this preliminary procedural issue. *See* Latrobe Steel Co. v. N.L.R.B., 105 LRRM 2393, 2396 (1980). The use of a recorder could inhibit free and open discussions in collective bargaining sessions. Thus the adverse effects on the bargaining process outweigh the need for a verbatim transcript. Insistence on a

recording device over the other party's objection further suggests a lack of confidence in the good faith of the other side. Such manifestations of suspicion and distrust are antithetical to the negotiations process. Bartlett-Collins, 639 F.2d at 656. The demand for verbatim recording devices during negotiations as a means to record those negotiations is not a mandatory subject of bargaining under PEERA, and either party's insistence to impasse on this issue is, accordingly, a prohibited practice, without regard to whether such insistence was in good or bad faith. *See* Bartlett-Collins Co., 99 LRRM at 1035-36.

The recording of meet and confer sessions not being a mandatory subject of negotiations under PEERA, the City did not refuse to meet and confer in good faith as required by K.S.A. 75-4333(b)(5) when it refused to allow the sessions to be tape recorded.

B. Open Meetings

The JCPOA argues that even if the issue of recording meet and confer sessions is not a mandatory subject of negotiations, the City still cannot refuse to allow the use of a tape recorder because the sessions are subject to the Open Meetings Law, K.S.A. 75-4317 et seq.

This analysis must begin with a review of the pertinent sections of the Open Meetings Law. K.S.A. 75-4317 provides:

> *"(a) In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.*
>
> *"(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a)."*

K.S.A. 75-4317a defines *"Meeting"* as:

> *"As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."*

K.S.A. 75-4318 provides:

> *"(a) Except as otherwise provided by state or federal law . . . , all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees, and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public . . ."*
>
> * * * * *
>
> *"(e) The use of cameras, photographic lights and recording devices shall not be prohibited at any meeting mentioned by subsection (a) of this section, but such use shall be subject to reasonable rules designed to insure the orderly conduct of the proceedings at such meeting."*

Certain exceptions to the open meetings requirement are set forth in K.S.A. 75-4319:

> *"(a) Upon formal motion made, seconded and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. . . ."*

> *"(b) No subjects shall be discussed at any closed or executive meeting, except the following: (1) Personnel matters of non-elected personnel;*
>
> * * * * *
>
> *"(3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency;*
> *. . ."*

Clearly, if meet and confer sessions are subject to the dictates of the Kansas Open Meetings Law, pursuant to K.S.A. 75-4318(e), neither party could prohibit "recording devices" from the sessions. To refuse to meet and confer based upon the presence of such devices would constitute a prohibited practice as proscribed by K.S.A. 75-4333(b)(5).

[7] The Kansas Open Meeting Law as set forth above manifests a general policy that all meetings of a governmental body should be open to the public. In enacting PEERA the Legislature established that it is the public policy of this state to promote harmonious and cooperative relationships between government and its public employees by permitting such employees to organize and bargain collectively. The purpose of PEERA is to encourage the use of the collective bargaining process in the public sector. Collective bargaining involves a process of exploratory problem solving in which governmental bodies and labor organizations explore and consider a variety of problems to be resolved through compromise. The process of compromise is therefore the essential ingredient of effective and successful collective bargaining. Carroll County

Educ. Ass'n v. Board of Ed., 448 A.2d 345, 351-52 (Md. 1982)(Davidson, J. dissenting).

Meeting and conferring in public tends to inhibit if not destroy the collective negotiation process. It suppresses free and open discussion, causes proceedings to become formalized rather than spontaneous, induces rigidity and posturing, fosters anxiety that compromise might look like retreat and, therefore, freezes negotiators into fixed positions from which they cannot recede. Most courts, labor boards, and commentators agree that collective bargaining in public tends to damage the process of compromise necessary for successful collective bargaining. (See authorities cited below).

[8] The issue for determination in this complaint is whether the statute opening the conduct of public business to the general public was meant to accommodate the statutorily protected rights of public employees granted in the Public Employer-Employee Relations Act. The Open Meetings Law declares public policy; it is a statute of general application. Nevertheless the act admits of exceptions, and the rights it confers are conferred upon the general public and not upon any particular segment or representative of the general public. All open-meeting legislation involves the accommodation of differing interests. The Public Employer-Employee Relations Act also appears to be a statute of general application. It grants limited but protected rights to certain public employees. Public

employees are guaranteed the right to express their grievances and make proposals on conditions of employment to their employer's representative. Where two statutes deal with the same subject matter, i.e. collective bargaining sessions, and are not inconsistent with each other, they must be harmonized to the extent possible - notwithstanding the fact that the statutes may have been enacted at different times with no reference to each other. This principle of statutory construction operates because the law does not favor repeal by implication. Of course, to the extent the provisions of the two statutes are irreconcilable, the later statute governs. Criminal Inj. Comp. Bd. v. Gould, 381 A.2d 55 (Md. 1975); Bd. of Fire Comm'rs v. Potter, 300 A.2d 680 (Md. 1973); Department v. Greyhound, 234 A.2d 255 (Md. 1967).[9] Applying these principles in the present case, it is clear that the two statutes are not inconsistent, facially or otherwise. Plainly, they may be harmonized and each given effect.

First, it is argued that the public interest is best served by conducting public sector labor negotiations in sessions closed to the public. *E.g.*, Burlington Community Sch. Dist. v. Public Employment Relations Bd., 268 N.W.2d 512, 523-24 (Iowa 1978); Board of Selectmen of Marion v. Labor Relations Comm'n, 388 N.E.2d 302, 303 (Mass.App. 1979); State ex rel. Bd. of Pub. Utilities v. Crow,

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[9] The Kansas Open Meetings Law was adopted L. 1972, ch. 319, effective July 1, 1972, and the Public Employer-Employee Relations Act adopted L. 1971, ch. 264, effective March 1, 1972.

592 S.W.2d 285, 290-91 (Mo.App. 1979); Talbot v. Concord Union School Dist., 323 A.2d 912, 913-14 (N.H. 1974); *accord* N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652, 656 (10th Cir. 1981); Latrobe Steel Co. v. N.L.R.B., 630 F.2d 171, 176-79 (3rd Cir. 1980); *See* Quamphegan Teachers Ass'n v. Board of Directors, School Admin. Dist. No. 35, Case No. 73-05, April 20, 1973 (Maine Public Employees Relations Board); Mayor Samuel E. Zoll & The City of Salem, Mass. & Local 1780, Int'l Ass'n of Firefighters, Case No. MUP-309, December 14, 1972 (Mass. Labor Relations Comm.); Washoe County Teachers Ass'n & the Washoe County School Dist., Nevada Local Gov't Employee-Management Relations bd., Case No. AI-045295, May 21, 1976; Briell Bd. of Educ. & Briell Educ. Ass'n, State of New Jersey PERC, Docket No. CO-77-88-92, June 23, 1977; Pennsylvania Labor Relations Bd. v. Board of School Directors of the Bethlehem Area School Dist., Case No. PERA-C-2861-C, April 11, 1973, GERR 505 (E-1)(Pennsylvania Labor Relations Board 1973); City of Sparta & Local 1947-A Wisconsin Council of County & Municipal Employees, AFSCME, AFL-CIO, Case VIII, No. 19480, DR(M)-68, Decision No. 14520, April 7, 1976 (Wisconsin Employment Labor Relations Commission); *See also* 1 Werne, Law and Practice of Public Employment Labor Relations §15.3 at 266-67 (1974); Committee on State Labor Law, Section of Labor Relations Law, A.B.A., 2 Committee Reports 274 (1975). These cases, in general advance the notion that the presence of the public and press at such

negotiating sessions inhibits the free exchange of views and freezes negotiations into fixed positions from which neither party can recede without loss of face; in other words, that meaningful collective negotiation would be destroyed if full publicity were accorded at each step of the negotiations.

When the New Hampshire Supreme Court considered the question in the context of an open meeting statute that did not provide a collective bargaining exception, it observed that there was considerable support for the proposition that *"the delicate mechanisms of a collective bargaining would be thrown awry if viewed prematurely by the public."* Tolbot v. Concord Union School Dist., 323 A.2d 913, 913 (N.H. 1974) ("Tolbot"). The New Hampshire Supreme Court concluded:

> *"There is nothing in the legislative history of the Right to Know Law to indicate that the legislature specifically considered the impact of its provisions on public sector bargaining. However, it is improbable that the legislature intended the law to apply in such a fashion as to destroy the very process it was attempting to open to the public.*
>
> * * * * *
>
> *"We agree with the Florida Supreme Court 'that meaningful collective bargaining . . . would be destroyed if full publicity were accorded at each step of the negotiations (Bassett v. Braddock, 262 So.2d 425, 426 (Fla. 1972) and hold that the negotiation sessions between the school board and union committees are not within the ambit of the Right to Know Law. However, in so ruling, we would emphasize that these sessions serve only to produce recommendations which are submitted to the board for final approval. The board's approval must be given in an open meeting in accordance with RSA 91-A:3 (Supp. 1973), this protecting the public's right to know what contractual terms have been agreed upon by the negotiators."*

The court in Talbot also noted the position of several State labor boards that bargaining in public would tend to prolong negotiations and damage the procedure of compromise inherent in collective bargaining. Talbot, 323 A.2d at 912. The reason underlying this conclusion was that the presence of press and public induces rigidity and posturing by the negotiating teams and provokes in them anxiety that compromise will look like retreat. 1 Werne, The law and Practice of Public Employment Labor Relations § 15.3, at 266-67 (1974); Wickham, Tennessee's Sunshine Law: A Need For A Limited Shade and Clearer Focus, 42 Tenn.L.Rev. 557, 564 (1974); 1975 Committee Report of the Labor Relations Law Section of the American Bar Association, Part I at 274.

There is, however, nothing in the history of *"open meetings"* or *"sunshine"* or *"Freedom of Information"* legislation which indicates the public interest is best served by public participation in public-sector collective bargaining. State Ex Rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 290 (Mo.App. 1979). One thorough study indicates that the federal government and all fifty states have legislation providing that some segments of the government must open some or all of their meetings to public observation, but concludes that *"[c]ollective bargaining negotiations cannot effectively be carried out if open to the public."* Statutory Comment, Government in the Sunshine Act: A Danger of Overexposure, 14 Harv.J.Legis. 620, 623, 630 (1977).

Professor Douglas Wickham, an advocate of open-meeting laws, nevertheless acknowledges that ". . . *open-meeting legislation involves the reconciliation of serious value conflicts . . .*" and argues that courts should recognize ". . . *the infeasibility of conducting collective bargaining negotiations in public. The give and take of compromise involves too much loss of face to expect the participants to bargain freely before outside observers.*" Wickham, Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus, 42 Tenn.L.Rev. 557, 564-65 (1975).

Secondly, the meet and confer sessions contemplated by PEERA are not within the ambit of the Open Meetings Law. This is so because the relevant *"body or agency"* for purposes of K.S.A. 75-4318 of the Open Meetings Law is the City Commission, not its negotiating representative, Mr. Tritt. Consequently, unless a quorum of the members of the board is present at negotiating sessions, the sessions are not *"meetings"* within the contemplation of K.S.A. 75-4317a of the Open Meetings Law.

In *In re* Arbitration between Johns Constr. Co. & U.S.D. No. 210, 233 Kan. 527, 529-30 (1983), the court held the Kansas Open Meetings Law does not apply to proceedings before an arbitration board which is holding a hearing on a dispute arising out of a contract for the construction of a school building.

> *"We have no hesitation in holding that it does not. The Kansas Open Meetings Act, by the express language of K.S.A. 1982 Supp. 75-4318(a), applies only to agencies of the state and political and taxing subdivisions thereof,*

> *receiving or expending and supported in whole or in part by public funds. The arbitration board in this case was created by a contract entered into between the school district and a private contractor. The arbitration board was not a public agency as contemplated by the statute, and hence, was not subject to the provisions of the Kansas Open Meetings Act."*

It must be remembered, that even after an agreement is reached by the negotiating teams, the ultimate decision as to whether such tentative agreement should be ratified remains with the governing body, and that debate and vote must take place in an open meeting. The purpose of the Kansas Open Meetings Law is thereby satisfied without frustrating the meet and confer process under PEERA. The Missouri appellate court, in examining the Missouri open meetings act, reached a similar conclusion in finding the open records act did not cover public sector negotiations. In State ex rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 291, (1979), the court reasoned:

> *"Further, it must be borne in mind that the relators cannot, in any event, bind the City Council of Springfield by their negotiations. . . . The relators are the employer's representatives; they have the authority to negotiate, but . . . the legislative authority . . . cannot be bound by the results of the relators' negotiations. When discussions by the negotiators are complete, the results are to be reduced to writing and presented to the [legislative body] for adoption, modification or rejection . . . "*

Additionally, the Kansas Open Meetings Law admits of exceptions. Of particular importance here is K.S.A. 75-4319(b)(3) quoted above. When required to determine whether bargaining sessions were exempt from the Missouri Open Meetings Act, the

Missouri court gave a similar exception covering *"meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote"* a broad interpretation to include all aspects of employee negotiations. The court reasoned:

> *"We have the same view as the New Hampshire court [in Tolbot v. Concord Union School Dist., 323 A.2d 913, 913 (N.H. 1974)]: it is improbable that the General Assembly intended the Open Meetings Act to apply in such manner as to destroy the limited bargaining rights of public employees by exposing the public employees' thought-process, and those of the employer, to the public eye and ear. . . . The public interest does not require that the mechanisms of public sector collective bargaining be inhibited and eventually destroyed by requiring that the negotiations, or discussion about those negotiations, be conducted in public."* State Ex Rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 291 (Mo.App. 1979).

Finally, one must look at the actions of public employers and public employee representatives relative to meet and confer sessions since the adoption of PEERA in 1971. In the almost 20 years since the adoption of PEERA and the Kansas Open Meetings Law this appears to be the first case to raise the issue of open meetings for meet and confer sessions. The reasoning of the New York court in County of Saratoga v. Newman, 476 N.Y. Supp.2d 1020,1022 (1984) appears equally appropriate here:

> *"Despite the fact that the Open Meetings law took effect over seven years ago, the instant case is on of first impression in the courts of this state. In fact, on only one occasion, nearly five years ago, did a party raise the instant question before P.E.R.B. Town of Shelton Island, 12 PERB, par 3112. This is clear evidence that neither public employers, nor employee organizations, have considered negotiating sessions to be covered by the*

Open Meetings Law. Such a long standing practical construction by the parties affected by the statute in question should be given considerable interpretive weight."

[9] While the Open Meetings Law contained in K.S.A. 75-4317 et seq. manifests a general policy that all meetings of a governmental body should be open to the public, meet and confer sessions under PEERA are not subject to the Act.[10] Accordingly, the JCPOA did not have a right under the Kansas Open Meetings Law to tape record the meet and confer sessions, and the City did not violate K.S.A. 75-4333(b)(5) by refusing to allow the sessions be recorded.

ISSUE IV

WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(1) BY ATTEMPTING TO ESTABLISH A LACK OF TRUST IN THE JUNCTION CITY POLICE OFFICERS ASSOCIATION CHIEF NEGOTIATOR, MICHAEL BARRICKLOW, THROUGH STATEMENTS ATTRIBUTED TO THE CHIEF OF POLICE.

K.S.A. 75-4333(b)(1) makes it a prohibited practice for a public employer willfully to:

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[10] This interpretation finds further support in the fact that the Professional Negotiations Act specifically requires negotiation sessions be open to the public. K.S.A. 72-5423(b) provides:

> "Except as otherwise expressly provided in this subsection, every meeting, conference, consultation and discussion between a professional employees' organization and its representatives and a board of education or its representatives during the course of professional negotiations . . . is subject to the Kansas open meetings law."

Such a provision would be unnecessary had the legislature intended the Open Meetings Law to cover public sector negotiations. No such provision appears in the Public Employer-Employee Relations Act leading to the inference that such actions are not to be covered by the Open Meetings Law.

> *"Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;"*

K.S.A. 75-4325 provides:

> *"Public employees shall 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. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations."*

The mandate of K.S.A. 75-4333(b)(1) is the broadest of the subdivisions of 75-4333(b), and is identical to Section 8(a)(1) of the National Labor Relations Act.[11] Motive, as expressed in the decisions of the National Labor Relations Board ("NLRB"), is not the critical element of a Section 8(a)(1) violation. The test applied by the NLRB has been that:

> *"interference, restraint, and coercion under section 8(a)(1) of the Act 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 be said, tends to interfere with the free exercise of employee rights under the Act."*

[10] The JCPOA complains that Chief of Police Jerry Smith approached JCPOA President Tom Wesoloski and made the comment, *"If the association is going to pay someone to negotiate, they should at least know the difference between Hays and Junction City."* This statement, the JCPOA alleges, was intended to establish a lack of trust in the JCPOA Chief Negotiator, Mike Barricklow, by inferring

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[11] See footnote # 8, supra.

a lack of ability. In N.L.R.B. v. Virginia Electric & Power Co., 314 U.S. 469 (1941) the United States Supreme Court held that employers had a constitutional right to express opinions that were noncoercive in nature. In considering coercive effect of speech, any assessment must be made in the context of its setting, the totality of the circumstances, and its impact upon the employees. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1968); N.L.R.B. v. Exchange Parts, 375 U.S. 405 (1964). Statements found to be isolated, trivial, ambiguous and susceptible to innocent interpretation, given no background of union animus, do not violate K.S.A. 75-4333(b)(1). *See* Pease Co. v. N.L.R.B., 666 F.2d 1044 (1981). However, comments that are not isolated or not made in a joking or casual manner may be unlawful. *See* Southwire Co. v. N.L.R.B., 820 F.2d 453 (1987). It is within the competence of the finder-of-fact to judge the impact of statements made within the employer-employee relationship. N.L.R.B. v. Wilhow Corp., 666 F.2d 1294 (C.A. 10th 1981).

The evidence reveals the comment was an isolated incident; made in jest or because Chief Smith thought it was humorous, and not made with the intent to influence the JCPOA to change its negotiator or put him in disrepute. There was no evidence presented of animus toward the JCPOA or their representative by Chief Smith. Such speech, while probably inappropriate under the

circumstances, falls short of the coercion or interference contemplated as being violative of K.S.A. 75-5433(b)(1).

Case No. 75-CAEO-2-1992

ISSUE V & VI

WHETHER THE TELEPHONE CALLS MADE BY MICHAEL G. BARRICKLOW, CHIEF NEGOTIATOR FOR THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO THE CERTAIN MEMBERS OF THE CITY COMMISSION OF THE CITY OF JUNCTION CITY, KANSAS, ON FRIDAY, SEPTEMBER 27, 1991, CONSTITUTES A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(c)(2) AND 75-4333(c)(3) BY INTERFERING WITH THE MEET AND CONFER PROCESS BY CIRCUMVENTING THE DULY AUTHORIZED BARGAINING REPRESENTATIVES OF THE PUBLIC EMPLOYER.

WHETHER A MEMBER OF AN EMPLOYEE BARGAINING UNIT IS BARRED FROM DISCUSSING A SUBJECT OF MANDATORY NEGOTIABILITY WITH AN ELECTED PUBLIC OFFICIAL WHO IS A MEMBER OF A GOVERNING BODY PURSUANT TO K.S.A. 75-4322(G) DURING THE TIME THAT SUBJECT IS AN ISSUE OF MEET AND CONFER NEGOTIATIONS BETWEEN THE EMPLOYEE'S RECOGNIZED REPRESENTATIVE AND THE REPRESENTATIVE OF THE GOVERNING BODY.

[11] K.S.A. 75-4333(c)(2), in pertinent part, makes it a prohibited practice for a public employee organization willfully to:

> *"Interfere with, restrain or coerce a public employer . . . with respect to selecting a representative for the purposes of meeting and conferring or the adjustment of grievances."*

This statute basically prohibits an employee organization from interfering with an employer's choice of representatives for the purposes of meeting and conferring. Each party to a meet and confer relationship has both <u>the right</u> to select its representatives for bargaining and <u>the duty</u> to deal with the chosen

representative of the other party. *See* Mine Workers Local 1854, 238 NLRB 1583 (1980); Frito-lay, Inc. v. Teamsters Local 137, 623 F.2d 1354 (9th Cir. 1980).

The complained of interference here is the direct contact by Michael G. Barricklow, JCPOA Chief Negotiator, with City commission members to discuss subjects, then under negotiation, thereby by-passing the commission's chosen negotiating representative, David Tritt. The evidence shows Mr. Barricklow discussed with Commission member Swartz at least three subjects under negotiation. With commission member Talley he indicated Mr. Tritt was *"doing something illegal,"* and was prevented by Mr. Talley's objections from discussing any specific subjects. In both situations the commission members expressed concern to Mr. Barricklow that such conversations were directed to them rather than their chief negotiator. The contacts were initiated by Mr. Barricklow, and there is no history of similar contacts during negotiations or evidence of commission members initiating contacts with JCPOA members or officials to discuss subjects of negotiation. According to Mr. Talley, he viewed the contact as an attempt to undermine his faith in the City's negotiator, Mr. Truitt.

In Mr. Barricklow's defense, the JCPOA argues the right of a citizen to discuss a matter of public concern with an elected official. The U.S. Supreme Court has held that public employees may not be "compelled to relinquish the First Amendment rights they

would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of their work. Pickering v. Board of Education, 391 U.S. 563, 568 (1968); *See also* Keyishian v. Board of Regents, 385 U.S. 589 (1967). Such rights, however, are not without limits. The U.S. Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy. Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271,285 (1984).

[12] Kansas has adopted, through the Public Employer-Employee Relations Act ("PEERA"), a statutory policy that authorizes public bodies to accord exclusive recognition to representatives chosen by the majority of an appropriate unit of employees for the purpose of meeting and conferring on conditions of employment and adjusting grievances. The consequences of exclusive representation is the limiting of the rights of individual employees. Where, before the adoption of PEERA, any employee was free to negotiate with the public employer over his terms and conditions of employment, now the public employer may not *"meet and confer"* with any employees of the bargaining unit except through their exclusive representative.

The extent to which a public employee's right to communicate with his elected officials is restricted by the doctrine of exclusive representation was addressed in Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175 (1976). In Madison Sch., during the course of a regularly scheduled open meeting of

the Board of Education public discussion turned to currently pending labor negotiations between the board and the teacher's union. One speaker was a nonunion teacher who, over union objection, addressed one topic of the pending negotiations; the union's demand for a *"fair share"* clause which would require all teachers to pay union dues. Subsequently, after a collective-bargaining agreement had been ratified which did not include the *"fair share"* clause, the union filed a complaint claiming the board committed a prohibited practice by permitting the nonunion teacher to speak at its public meeting. The union contended that constituted negotiations by the board with a member of the bargaining unit other than the exclusive representative. The Wisconsin PERB found the board committed a prohibited practice, and that decision eventually reached the United States Supreme Court on review.

[13] When a governing body has either by its own decision or under statutory command, determined to open its decision making processes to public view and participation, the governing body has created a *"public forum"* dedicated to the expression of views by the general public. *"Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone."*

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972). If the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding public employees from discussions on matters concerning working conditions, when they are the ones most vitally concerned with the proceedings. Madison Sch., 429 U.S. at p.175. As the Supreme Court concluded in Madison Sch.:

> *"The participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."*

The mere expression of an opinion at a public forum, i.e. City council meeting, about a matter subject to collective bargaining, whether or not the speaker is a member of the bargaining unit, poses no genuine threat to the policy of exclusive representation expressed in PEERA, provided the speaker does not seek to reach an agreement or bargain with the governing body. *See* Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. at 180 (Stewart, J., concurring). The important factors are that the meeting be open to the public, and the public employee address the governing body not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.

Here the comments of Mr. Barricklow complained of were not to a meeting of the governing body as a whole but rather to individual

governing body members at their places of employment. While it may be that these elected officials do, from time to time, receive telephone calls at work and home, from citizens, including City employees, such does not transform these conversations into *"public forums."* It is a fundamental principle of First Amendment doctrine, articulated in Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 27, 45-46 (1983), that to establish a public forum, it must by long tradition or by government designation be open to the public at large for assembly and speech. There is nothing in the record to support a conclusion that such telephone contacts to discuss policy questions have either by long tradition or by government designation been open for general public participation. The telephone contacts between Mr. Barricklow and council members Swartz and Talley are not protected by the *"public forum"* doctrine, and will not suffice to overcome the doctrine of exclusivity or serve as a defense to a K.S.A. 75-4330(c)(2) complaint. Of additional importance is the fact that Mr. Barricklow is neither an employee of the City nor a citizen of Junction City, but rather an outside, paid negotiator.

No prior PERB decisions can be found to provide guidance in this case, however the Secretary of Human Resources in Unified School District 501, Topeka, Kansas v. NEA-Topeka,("U.S.D. 501"), 72-CAEO-1-1982 & 72-CAEO-3-1981 (July 19, 1983), directly addressed the issue of bypassing the public employer representative under the

Professional Negotiations Act. The recognition and exclusivity rights of the certified employee organization provided in PEERA and the PNA are the same, and the pertinent language of K.S.A. 75-4333(c)(3) is identical to the language of K.S.A. 72-5430(c)(2).[12] In fact, the PERB, in Topeka Printing Pressmen & Assistants Union No. 49 v. State of Kansas, et al., CAE-1-1978 (January 25, 1978), determined that both laws *"are substantially the same,"* and concluded that it is inconceivable that two laws enacted at approximately the same time and utilizing substantially the same procedures could be interpreted differently.

[14] In U.S.D. 501 the Secretary determined that the bypassing of the board of education's chosen negotiations representative by association officials directly contacting board members to discuss subjects under negotiation constituted a violation of K.S.A. 72-5433(c)(2) as interfering *"with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances."*

> *"In summary, it is clear that both parties have the right to designate a representative for negotiations purposes. Furthermore, it is a prohibited practice for either party to interfere with the other party's selection of their representative.*
>
> *"It is a well-established principle that the designation of a representative by the parties is accompanied by rights of exclusivity for negotiations*

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[12] Compare K.S.A. 75-4333(c)(2), "interfere with, restrain or coerce a public employer . . . with respect to selecting a representative for the purposes of meeting and conferring or the adjustment of grievances;" with K.S.A. 72-5430(c)(2) "interfere with, restrain or coerce a board of education . . . with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances."

> *purposes. The examiner is of the opinion that the legislature intended to give both parties the right to exclusive representations. . . .*
>
> *"In the instant case, NEA-Topeka claims that the association retains the right to communicate directly with the board, regarding negotiation matters, thereby circumventing the designated representative of the board. . . .*
>
> *". . . The examiner is of the opinion that the legislature fully intended to embody the general principles of labor relations when they enacted the Professional Negotiations Act. The legislation protects the rights of teachers to organize and negotiate, through representatives of their own choosing. The school board also has the right to designate a representative. . . . Most importantly, once a school board has designated a representative, that representative is the exclusive representative of the board for negotiations purposes, unless the board indicates to the contrary.*
>
> * * * * *
>
> *". . . the examiner believes that the association cannot be negotiating in good faith with the representative of the board if it is simultaneously negotiating directly with the Board. This would also deny the Board the right to designate a representative for negotiation purposes; a right expressly granted by the statute."*

Under the circumstances, considered as a whole, and given his expertise and experience in public employer-employee negotiations and PEERA, Mr. Barricklow knew or should have known of his obligation to negotiate only with the City's chosen representative, and that by contacting the City council members he was circumventing that representative in negotiations. From the evidence it can be reasonably inferred that Mr. Barricklow's conduct was wilful. His motives are immaterial for the reasons set forth in Section I(B) above. Mr. Barricklow, therefore, must be determined to have committed a prohibited practice as set forth in

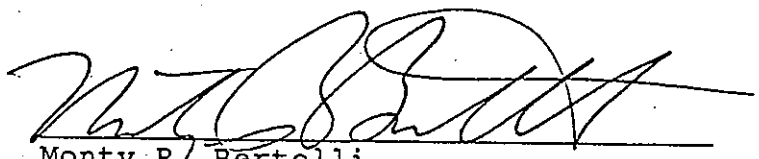
K.S.A. 75-4333(c)(2) when on September 27, 1991 he bypassed the City's chosen representative for negotiations, Mr. Tritt, and directly contacted members of the City Council.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED that the City shall cease and desist implementing unilateral changes to the terms and conditions of employment of the police officers without first alternatively noticing the changes and seeking negotiation with the employees' exclusive representative, or providing such adequate and timely notice of the intended change as to provide the JCPOA an opportunity to request negotiations prior to implementation.

IT IS FURTHER ORDERED that the JCPOA shall cease and desist attempting to negotiate directly with members of the governing body of the City, and shall forthwith negotiate only through the City's chosen representative.

Dated this 31st day of July, 1992



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 Employees 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 Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 31st day of July, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Michael G. Barricklow,
5400 S. 159th,
Rose Hill, Kansas 66133.

Charles A. Zimmerman
City Attorney,
P.O. Box 287
Junction City, Kansas 66441

Sharon Tunstall

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 3rd day of August, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Members of the PERB

Sharon Tunstall