BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 3309, Petitioner, vs. CITY OF JUNCTION CITY, KANSAS (FIRE DEPARTMENT), Respondent.	)	Case No. 75-CAE-4-1994

INITIAL ORDER

ON the 20th day of January, 1994, the above-captioned matter came on for hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by James R. Waers, attorney
Blake & Uhlig, P.A.
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, Kansas 66101

RESPONDENT: Appeared by David W. Tritt, Personnel Director
City of Junction City, Kansas
P.O. Box 287
Junction City, Kansas 66441

ISSUES PRESENTED FOR REVIEW

The parties have stipulated that the following issues be submitted to the presiding officer for determination:

1. WHETHER THE CITY OF JUNCTION CITY, KANSAS COMMITTED A PROHIBITED PRACTICE AS SET FORTH IN K.S.A. 75-4333(b)(1) AND (5) WHEN IT UNILATERALLY CHANGED THE TIME FOR REQUESTING VACATION LEAVE FROM THAT SET FORTH IN PARAGRAPH 7, ARTICLE 10, OF THE MEMORANDUM OF AGREEMENT.

75-CAE-4-1994

a) WHETHER THE CHANGING OF TIME REQUIRED FOR REQUESTING VACATION LEAVE IS A MANAGERIAL PREROGATIVE THAT DOES NOT REQUIRE NEGOTIATION PRIOR TO IMPLEMENTATION.

b) WHETHER THERE HAS BEEN ESTABLISHED A PAST PRACTICE BETWEEN THE PARTIES RELATIVE TO THE TIME REQUIRED FOR REQUESTING VACATION LEAVE WHICH IS ENFORCEABLE EVEN THOUGH CONTRARY TO THE MEMORANDUM OF AGREEMENT.

c) WHETHER THE FIRE FIGHTERS WAIVED THEIR RIGHT TO MEET AND CONFER ON THE PROPOSED CHANGE WHEN IT FAILED TO REQUEST NEGOTIATIONS AFTER BEING INFORMED OF THE PROPOSED CHANGE.

2. WHETHER THE KANSAS PUBLIC EMPLOYEE RELATIONS BOARD IS AUTHORIZED, WHEN PRESENTED WITH ALLEGATIONS OF UNFAIR LABOR PRACTICES, TO DEFER HEARING OF THOSE CHARGES UNTIL AFTER AN ARBITRATION AWARD HAS BEEN MADE PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT, WHERE THE SUBJECT MATTER OF THE ALLEGED UNFAIR LABOR PRACTICE IS ARGUABLY COVERED BY THE COLLECTIVE BARGAINING AGREEMENT IN QUESTION.

a) WHERE THE ALLEGED PROHIBITED PRACTICE IS ONE ARISING OUT OF THE INTERPRETATION OR APPLICATION OF THE TERMS OF A MEMORANDUM OF AGREEMENT WHICH COULD BE RESOLVED THROUGH THE GRIEVANCE OR ARBITRATION PROVISIONS CONTAINED IN THE AGREEMENT, DOES THE PUBLIC EMPLOYEE RELATIONS BOARD HAVE THE AUTHORITY TO DEFER TO THE PARTIES' NEGOTIATED SETTLEMENT PROCEDURES SIMILAR TO THE AUTHORITY OF THE NATIONAL LABOR RELATIONS BOARD ESTABLISHED IN COLLYER INSULATED WIRE, 1992 NLRB 152, 77 LRRM 1931.

SYLLABUS

1. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes.* An employer is also deemed to have violated the Act when it fails to bargain in good faith, or makes unilateral changes in a memorandum of agreement.

2. **MEET AND CONFER IN GOOD FAITH** - *Mandatory Subjects - Balancing Test.* When there is a conflict between an employer's freedom to manage in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck which will take into account the relative importance of the proposed actions to the two parties.

3. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes - Past practices.* A past practice is a consistent prior course of conduct between the parties to a collective bargaining agreement that may assist in determining the parties' further relationship. Four situations are recognized in which evidence of past practices may be used to ascertain the parties' intentions. These four situations are: (1) To clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement.

4. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes - Past practices.* The employee organization-public employer memorandum of agreement includes not just the written provisions stated therein but also the understandings and mutually accepted practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain.

5. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes - Past practices.* To establish a past practice it must be proved both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice. Five indices that assist in determining this mutual acceptance are: (1) clarity and consistency throughout the course of conduct; (2) longevity and repetition creating a consistent pattern of behavior; (3) acceptance of the practice by both parties; (4) mutuality in the inception or application of the practice; and (5) consideration of the underlying circumstances giving rise to the practice.

6. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes - Waiver.* When an employer announces plans for a change in working conditions, an employee organization, having sufficient notice of the contemplated change, will ordinarily be deemed to have waived its right to bargain prior to implementation if it fails to request the opportunity to meet and confer. It is incumbent on the employee organization to act with due diligence in requesting bargaining. Any such waiver must be "clear and unmistakable.

7. **PROHIBITED PRACTICES** - *Deferral To Parties' Memorandum of Agreement Grievance Procedure - Automatic deferral not statutorily required - Within descretion of PERB.* PERB is not required, by statute, to automatically defer to private arbitration a prohibited practice complaint arguably covered by both the parties' memorandum of agreement and K.S.A. 75-4333 prohibited practice provisions. PEERA does not require exhaustion of contractual grievance or arbitration procedures in every case before PERB may entertain a prohibited practice complaint, but instead vests PERB with discretion to determine, once a complaint has been filed, whether to defer to the memorandum of agreement grievance procedure or to adjudicate such dispute in furtherance of its statutory prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334.

8. **PROHIBITED PRACTICES** - *Deferral To Parties' Memorandum of Agreement Grievance Procedure - When appropriate.* In considering whether to defer a prohibited practice complaint to a memorandum of agreement's established grievance and arbitration mechanism, the subject matter of the complaint must arguably be covered by the provisions of the memorandum of agreement and not be primarily statutory in nature. Even though a dispute may be arguably contractual in nature, deferral is inappropriate where interpretation of the contract becomes subordinate to the resolution of the statutory question.

9. **PROHIBITED PRACTICES** - *Deferral To Parties' Memorandum of Agreement Grievance Procedure - When appropriate - Test.* Pre-arbitral deferral by PERB presumes satisfaction of three requirements: 1) a stable bargaining relationship between the parties; 2) intent by the respondent to the prohibited practice complaint to exhaust the memorandum of agreement grievance procedure culminating in final and binding arbitration; and 3) the underlying dispute centers on the interpretation or application of the memorandum of agreement.

FINDINGS OF FACT[1]

1. Petitioner, International Association of Firefighters, Local 3309 ("Union") is an *"employee organization"* as defined by K.S.A 75-4322(i). It is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for certain municipal employees of the City of Junction City, Kansas ("City"). (Petition and Answer). Local 3309 was in their third year of existence at the time of the hearing. (Tr.p. 7).

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 voted to be covered by the Kansas Public Employer-Employee Relations Act in accordance with K.S.A. 75-4321(c). (Petition and Answer).

3. Robert S. Wing is the State President of the International Association of Fire Fighters. (Tr.p. 7).

4. Bob Kim was Fire Chief at the time the 1992-93 Memorandum of Agreement was negotiated. He has since retired. (Tr.p. 9).

5. Lawrence E. Bruzda assumed the position of Fire Chief on December 2, 1991, and is the current Chief. (Tr.p. 57; Ex. 2). He did not take part in negotiations for the 1992-93 Memorandum of Agreement but did participate in the 1993-94 agreement negotiation sessions.

6. David Hernandez is a Firefighter employed by the City, and President of Local 3309 of the International Association of Fire Fighters. (Tr.p. 36).

7. The 1992-93 Memorandum of Agreement was the first negotiated agreement between the Union and the City. It was a two-year agreement covering the period January 1, 1992 to December 31, 1993. (Tr.p. 8). There has since been a successor one-year agreement negotiated for 1994. (Tr.p. 36). Bob Wing served as the Union's chief negotiator for the 1992-93 Memorandum of

---

[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."

Agreement. (Tr.p. 8). Dave Tritt was the chief negotiator for the City. (Tr.p. 9).

8. The 1992-93 Memorandum of Agreement, Article 10 contains the following pertinent provisions relating to application for vacation leave:

> *". . . Vacation leave shall be arranged between Association members and their supervisor, and approved by the Fire Chief. The City's need must be considered in scheduling, however, whenever possible, vacation leave will be scheduled at the Association members convenience.*
>
> * * * * *
>
> *"Vacation leave shall ordinarily be requested at least 1 working shift before beginning of the requested time off. The Chief, or his designee, shall approve or disapprove vacation requests within 72 hours of the date of submission. Once a member's vacation request has been approved, it can only be changed by mutual consent. . . ."*

9. Article 10 was the subject of discussions during negotiations for the 1992-93 Memorandum of Agreement, with both parties submitting proposals. (Tr.p. 9). The proposals concerned mainly the latest date requests for vacation leave could be submitted, but the Local did propose that all vacations be scheduled before the beginining of each calendar year. The City made no proposals on the earliest a request could be submitted. A 45 day limit on the earliest date before commencing vacation a firefighter could submit a request for leave, (hereinafter referred to as the *"45 day limit"*), was never discussed by the parties (Tr.p. 11-13); there was no 45 day limit in effect at the time the 1992-93 Memorandum of Agreement was negotiated (Tr.p. 62); and the Union never agreed to accept a 45 day limit in exchange for concessions from the City on other subjects included in the 1992-93 Memorandum of Agreement. (Tr.p. 14).

10. Article 10, as it appears in the 1992-93 Memorandum of Agreement, contains a provision setting the latest time when a Fire Fighter may request vacation leave, i.e. one working shift before begining the vacation, but sets forth no limit on the earliest date such a request may be submitted. This represented the existing practice of the department, and the agreement was intended to simply codify that policy. There were no side agreements executed covering vacation leave which altered this established practice. (Tr.p. 10, 75, 78-79; Ex.

1). There has since been a successor agreement negotiated, but the language of Article 10 remains unchanged. (Tr.p. 36).

11. By letter from current Fire Chief Lawrence Bruzda to Local President Dave Hernandez, dated June 28, 1993, the Local was informed:

> *"I would like to have the vacation requests submitted to my office no earlier than 45 days preceeding the first day of vacation requested by the [IAFF] member."* (Tr.p. 10; Ex. 2).

12. The 45 day limit on the earliest date before commencing vacation a firefighter could submit a request for leave came as a result of a vacation scheduling problem involving firefighters Fisher and Ross. That problem, however, did not directly involve the subject of early requests for leave but rather submitting requests too close to the date of the proposed vacation. (Tr.p. 73-74).

13. President Hernandez first became aware on or about June 10, 1993 that a 45 day limit had been adopted or was being considered, either through rumors circulating within the department or from his shift Captain, Harold Cyphers. (Tr.p. 37, 41, 50, 58). Upon hearing about the policy change, President Hernandez confronted Chief Bruzda who confirmed that he had placed a 45 day limit on the earliest a firefighter could request vacation leave. President Hernandez expressed his disapproval with the policy as being contrary to the Memorandum of Agreement. (Tr.p. 37-8, 53, 66).

14. The subsequent June 28th letter was issued pursuant to a request from President Hernandez to have a written statement of the policy. (Tr.p. 33, 38, 50, 67). It was posted on the bulletin board in the fire station where all official memos are displayed. Such documents are usually posted on the date shown on the document, and the policy was considered officially in effect on that date. (Tr.p. 32, 38, 50, 68).

15. Prior to the Union's receipt of the June 28, 1993 letter, there had been no negotiations between the City and the Union over setting a limit on the earliest a request for vacation leave could be submitted, (Tr.p. 11), and no discussions or negotiations on that specific 45 day limit proposal. (33, 38). The Union never consented to set a 45 day limit on requesting vacation leave. (Tr.p. 11). The records of the Kansas Public

Employee Relations Board reveal no request from either the Union or the City for appointment of a mediator or fact-finder pursuant to K.S.A. 75-4332, during the period of time of concern here, on the issue of earliest date a request for vacation leave may be submitted to the employer. Upon receipt of the June 28, 1993 letter, the Local filed a prohibited practice complaint with the Kansas Public Employee Relations Board on July 8, 1993. (Tr.p. 51).

16. At the time of issuing the June 28, 1993 letter, Chief Bruzda was unaware of the existing past practice for when vacation leave could be requested, and made no attempts to determine is any practice existed. He relied solely upon the language of the 1992-93 Memorandum of Agreement. (Tr.p. 78). Chief Bruzda agrees there is no language in the 1992-93 Memorandum of Agreement establishing a 45 degree limit. (Tr.p. 75). After issuing the June 28, 1993 letter, Chief Bruzda learned that in the past there were no limits on how early one could request a vacation. (Tr.p. 78-79).

17. The long-standing procedure for submitting a request for vacation was for a firefighter to fill out a personal action form setting forth the dates vacation leave was desired, and submit the form to the Captain through the shift supervisor. The Captain signs the form and submits it to the Fire Chief. The Fire Chief acts on the request and forwards the form to the City Manager. (Tr.p. 23-24).41. The vacation scheduling problem Chief Bruzda cited was caused by the Captains sitting on requests for vacation and not submitting them to the Chief until one shift before the vacation was to begin. This made it difficult for the Chief to manage the man power needs of the Fire Department. (Tr.p. 81). The Chief being notified by the Captains of scheduled vacations too late rather than the firefighters reqeusting vacation leave too early was the root of the problem. Prior to the June 28, 1993 letter changing the vacation scheduling policy, there were no problems providing adequate staffing at the stations or having the necessary expertise under the existing scheduling practice on how early a request for vacation leave could be submitted. (Tr.p. 86). No emergency situation developed in staffing shift expertise or manning requirements during June, 1993 that necessitated the change to the 45 day limit policy, other than the Fisher-Ross incident, which dealt with a request for vacation being submitted too late rather than too early. (Tr.p. 87).

18. It is helpful to the employer and the employees, in meeting manning and expertise requirements, to have vacation schedules set far in advance, especially given the Fire Fighter's 24-on-48-off work schedule, (Tr.p. 15), and the 45-day limit assists the Fire Chief in that area. The Union agrees that the 45 day limit is beneficial in assisting the City in meeting these staffing requirements, but contends knowing even futher in advance than 45 days that vacations are being scheduled is equally as beneficial and presents no problem. (Tr.p. 17). Further, by being able to lock-in vacation dates far in advance, the firefighters are able to better plan vacations and take advantage of travel bargains. (Tr.p. 15-16). The Union was unaware of any problems that allowing the Fire Fighters to schedule a vacation earlier than 45 days would create for the City. (Tr.p. 18). Chief Bruzda felt the 45 day limit was equitable to allow an employee to get a thirty-day advance discount air fare or excursion rate on any travel or vacation, would not negatively impact the employee, and would positively assist with the proper management of the Fire Department. (Tr.p. 67).

19. There was no proposal by the City during negotiations on the 1994 Memorandum of Agreement to amend Article 10 to include a 45 day limit as the earliest a request for vacation leave could be submitted. (Tr.p. 76). Chief Bruzda testified that he urged the Union come forward with a proposal to schedule vacations prior to the bargaining of each calendar year, and would have supported it, but no such proposal was offered. (Tr.p. 66, 76-77). His support for such a plan was based on the premise that the farther ahead one knows who is going to be gone on vacation, the better the control one has over staffing and assignment of duties. (Tr.p. 80-81).

22. Article 19 of the 1992-93 Memorandum of Agreement contains a three-step grievance procedure. (Tr.p. 40; Ex. 1). The final step calls for a hearing before an impartial fact-finder who makes a recommendation to the City Manager who may accept, reject or modify the recommendation in rendering a final decision on the grievance. (Ex. 1).

ISSUE 1

WHETHER THE CITY OF JUNCTION CITY, KANSAS COMMITTED A PROHIBITED PRACTICE AS SET FORTH IN K.S.A. 75-4333(b)(1) AND (5) WHEN IT UNILATERALLY CHANGED THE TIME FOR REQUESTING VACATION LEAVE FROM THAT SET FORTH IN PARAGRAPH 7, ARTICLE 10, OF THE MEMORANDUM OF AGREEMENT.

a) **WHETHER THE CHANGING OF TIME REQUIRED FOR REQUESTING VACATION LEAVE IS A MANAGERIAL PREROGATIVE THAT DOES NOT REQUIRE NEGOTIATION PRIOR TO IMPLEMENTATION.**

b) **WHETHER THERE HAS BEEN ESTABLISHED A PAST PRACTICE BETWEEN THE PARTIES RELATIVE TO THE TIME REQUIRED FOR REQUESTING VACATION LEAVE WHICH IS ENFORCEABLE EVEN THOUGH CONTRARY TO THE MEMORANDUM OF AGREEMENT.**

c) **WHETHER THE FIRE FIGHTERS WAIVED THEIR RIGHT TO MEET AND CONFER ON THE PROPOSED CHANGE WHEN IT FAILED TO REQUEST NEGOTIATIONS AFTER BEING INFORMED OF THE PROPOSED CHANGE.**

The legislative parameters of the duty to bargain under the Kansas 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"* to mean:

> *"[T]he 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 representative 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).

Only after the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, and either reached agreement or completed the impasse procedure set forth in K.S.A. 75-4332, have they 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).

Unilateral Changes

The Union alleges the City violated the Kansas Public Employer-Employee Relations Act, (PEERA") specifically K.S.A. 75-4333(b)(5), by unilaterally implementing the new policy placing a 45 day limit on the length of time prior to a desired vacation leave that a request for leave may be submitted. K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from refusing to meet and confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations. Specifically, that section states:

> *"(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:*
> * * * * *

"(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4328. . . ."

[1] The concept of refusal to bargain means more than simply refusing to discuss a subject. An employer is also deemed to have violated the Act when it fails to bargain in good faith, or makes unilateral changes in a memorandum of agreement. The objective the Kansas legislature hoped to achieve by the meet and confer process can be equated to that sought by the Congress in adopting the National Labor Relations Act ("NLRA") as described by the U.S. Supreme Court in H.K. Porter Co., 397 U.S. 99, 103 (1970),[2] and

---

[2] Where there is no Kansas case law interpreting or applying a specific section of the Kansas Professional Negotiations Act, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et seq. (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA, Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992); See also Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 wherein the same conclusion has been reached under the Kansas Public Employer-Employee Relations Act.

Because the language of K.S.A. 75-4333 is almost identical to the corresponding section contained in the NLRA, we presume our legislature intended what Congress intended by the language employed. See Stromberg Hatchery v. Iowa Employment Security Comm., 33 N.W.2d 498, 500 (Iowa 1948). "[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." Hubbard v. State, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. Peasley v. Telecheck of Kansas, Inc., 6 Kan.App.2d 990, 994 (1981)[Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive]; See also Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974).

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task. In particular, as it relates to the case under consideration here, the legislature created a definition, very much like the one in the NLRA, of those characteristics which, if possessed by an employee, would disqualify that employee from participation in a bargaining unit.

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, §116, p. 370; 50 Am.Jur., Statutes, §323; 82 C.J.S., Statutes, §371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy. Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, §52.02, p. 329-31 (4th ed. 1973); Benton v. Union

cited with approval in City of Junction City, Kansas v. Junction City Police Officers Association, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)("Junction City"):

> *"The object of this Act [the NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act 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."*

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 term of that agreement, the public employer, acting unilaterally, may not make changes in items included in that agreement or changes in items which are mandatorily negotiable. It is a well established principle of labor law 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. City of Junction City v. Junction City Police Officers Association, 75-CAEO-2-1992 (July 31, 1992). It is also well settled, however, that a unilateral change is not always a *per se* prohibited practice. As the court concluded in NLRB v. Cone Mills, Corp., 373 F.2d 595 (CA 4, 1967):

Pacific R. Co., 430 F.Supp. 1380 (19)[A Kansas statute adopted from another state carries with it the construction placed on it by that state.]; State v. Loudermilk, 208 Kan. 893 (1972).

> *"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."*

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).

Mandatory Subjects

Employers are not legally *"frozen"* for the length of a memorandum of agreement to the terms of that agreement. As noted by the court in Pittsburg State, negotiations may extend to all matters relating to conditions of employment "*except proposals relating to employer and employee rights defined by the Act. K.S.A. 75-4330(a).*" The text of PEERA on this subject seems to speak with two voices. Whereas K.S.A. 75-4327(b) and 75-4322(t) grants public employees the right to meet and confer with respect to wages, hours and other terms and conditions of employment,

K.S.A. 75-4326 stipulates that the right does not extend to matters of inherent managerial policy. The dilemma, however, is that virtually any rule, regulation or policy that is promulgated under an assertion of employer rights in some way alters wages, hours or conditions of employment. Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 21 (Jan. 28, 1994); Central Telephone Co. of Nevada, 92 LA 390 (1989).

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

> *"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."*

"Conditions of employment" is defined in K.S.A. 75-4322(t) to mean:

> *"salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."*

K.S.A. 75-4326 states:

> *"Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:*
> *(a) Direct the work of its employees;*
> *(b) Hire, promote, demote, transfer, assign or retain employees in positions within the public agency;*
> *(c) Suspend or discharge employees for proper cause;*

> *(d) Maintain the efficiency of governmental operation;*
> *(e) Relieve employees from duties because of lack of work or for other legitimate reasons;*
> *(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and*
> *(g) Determine the methods, means and personnel by which operations are to be carried out."*

The problem, then, in every case presenting the issue of the proper scope of meet and confer is to balance the employees' interest in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and direction of the enterprise. In First National Maintenance Corp. v. NLRB, 452 U.S. at 675-76 the Court described the relevant inquiry under Section 8(d) of the NLRA, 29 USC §158(d), the federal equivalent to PEERA K.S.A. 75-4327(b):

> *"Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to matters of 'wages, hours, and other terms and conditions of employment.' A unilateral change as to a subject within this category violates the statutory duty to bargain and is subject to the [NLRB's] remedial order . . .*
> *"Nonetheless, in establishing what issues must be submitted to the process of bargaining Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. . . .*
> *"Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship."*

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

> *"A determination of the interrelationship between sections 701 and 702 calls upon us to strike a balance wherein those matters relating directly to "wages, hours and other terms and conditions of employment" are made mandatory subjects of bargaining and reserving to management those areas that the public sector necessarily*

> *requires to be managerial functions. In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question."*

It is interesting to note that in adopting the balancing test for use in determining the mandatory nature of subjects under the Pennsylvania act, the Pennsylvania Supreme Court cited the Kansas case of National Education Ass'n of Shawnee Mission, Inc. v. Bd. of Ed. of Shawnee Mission, U.S.D. 512, 212 Kan. 741 (1973)("Shawnee Mission"), as the leading case on the balancing test. Pennsylvania Labor Relations Board v. State College Area Sch. Dist., 90 LRRM 2081 (1975).

While the Shawnee Mission case was decided under the Kansas Professional Negotiations Act, K.S.A. 72-5413 et seq., the balancing test was similarly approved by the Kansas Supreme Court in Pittsburg State for use under PEERA:

> *"PERB, as the arbiter between employer and employee, has fashioned the 'significantly related' test in an effort to steer a middle course between minimal negotiability, with nearly absolute management prerogative, and complete negotiability, with few management prerogatives.*[3] *In so doing it has devised a commonsense approach to the problem of sorting out matters which cannot be easily defined or neatly categorized, in order to determine their negotiability."*[4] 233 Kan. at 819.

---

[3] The legislature has assigned the Public Employee Relations Board with the primary task of construing K.S.A. 75-4327(b), 75-43322(t) and 75-4326 in the course of adjudicating charges of refusing to meet and confer in good faith, K.S.A. 75-4333(b)(5), and because the classification of bargaining subjects as conditions of employment is a matter concerning which the PERB has special expertise, See Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 685-86 (1965). It is the responsibility of PERB to identify on a case-to-case basis those conditions of employment over which an employer is required to meet and confer. See Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1979).

[4] While the Court referred to the test as the "significantly related test," a review of the test as described and applied by the PERB, and as applied by the Court in Pittsburg State reveals that it is a balancing test which the Court approved.

In Kansas Association of Public Employee v. State of Kansas, Adjutant General's Office, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)("Adjutant General"), the PERB adopted a three prong approach in applying the balancing test. According to that test:

> (1) A subject is negotiable only if it intimately and directly affects the work and welfare of public employees.
> (2) A subject is not negotiable if it has been completely preempted by statute or constitution.
> (3) A subject that affects the work and welfare of public employees is negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.[5] Id. at p. 34.

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

[2] In applying the balancing test it is necessary to distinguish between subjects which, while central to the employer's interest in the preservation of its legitimate managerial prerogatives, affect the employees only minimally, and those which, although not essential to the employer's freedom to conduct its

---

[5] The PERB in its Adjutant General order explained the test as follows:

> "The requirement that the interference be 'significant' is designed to effect a balance between the interest of public employees and the requirements of democratic decision making. A weighing or balancing must be made. Where the employer's management prerogative is dominant, there is no obligation to negotiate even though the subject may ultimately affect or impact upon public employee terms and conditions of employment.
>
> "The basic inquiry therefore, must be whether the dominant concern involves an employer's prerogative or the work and welfare of the public employee. The dominant concern must prevail. Since the line which divides these competing positions are often indistinct, it must be drawn on a case by case basis." Id. at page. 35.

enterprise, do have a significant impact on the employees. Moreover, when there is a conflict between an employer's freedom to manage in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck which will take into account the relative importance of the proposed actions to the two parties. Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 31 (Jan. 28, 1994); *See also* Newspaper Guild Local 10 v. NLRB, 636 F.2d 550, 561-62 (DCCC 1980).

Application of Balancing Test

1. Fundamental Concern to the Interests of Employees

K.S.A. 75-4322(t) makes *"vacation allowances"* a *"condition of employement"* and therefore a mandatory subject of meet and confer. Certainly, the procedures one must follow to avail oneself to the the bargained for vacation allowances are a fundamental concern to the employees. *See* Brewster-NEA v. U.S.D. 314, Case No. 72-CAE-2-1991 (1991). What good is a bargained-for vacation allowance if the procedures are such as to make that benefit a nulity. As the Union noted, by being able to lock-in vacation dates far in advance, the firefighters are able to better plan vacations and take advantage of travel bargains. The City offered no evidence to prove that placing time limits on the earliest a

firefighter could submit a request for vacation leave is not a fundamental concern to the bargaining unit members, nor does it appear to so argue.

2. Preemption by Statute or Constitution

Before examining the issue of inherent employer rights it is necessary to determine first whether any constitutional or statutory provisions relating to the subject sought to be negotiated would remove it from the area of mandatory negotiability. None can be found, and the City does not cite any such statutory provisions.

3. Inherent Managerial Right

The final prong of the three-prong test employed to determine the mandatory negotiability of the City's 45 day limit is to ascertain whether a subsequent negotiated agreement would significantly interfere with the exercise of inherent managerial prerogatives. Stated another way, the duty to bargain covers the *"working environment"* except for those *"managerial decisions which lie at the core of entrepreneurial concern."* Allied-Signal Inc., Kansas City Division and District 71, IAM Case 17 CA 14800 (Dec. 28, 1991). The concept of a *"core purpose"* is derived from the circuit court's citation in Peerless Publications, 95 LRRM 1611 (1977), to Justice Stewart's concurring opinion in Fiberboard Corp v. NLRB, 379 U.S. 203 (1964). The court in Peerless Publications

rejected the union's contention that every matter touching in any way conditions of employment is mandatorily bargainable under the NLRA. The court cited Justice Stewart's Fiberboard concurrence for the proposition that the language of Section 8(d) of the NLRA, while sweeping, must be construed to exclude various kinds of management decisions from the scope of the duty to bargain if the principle of management control over basic decisions concerning the enterprise is to be preserved. The court explained that such decisions *"lie at the core of entrepreneurial control, . . . are fundamental to the basic direction of a corporate enterprise, . . . or concern its basic scope. . . ."* 636 F.2d at 559-60. American Elec. Power Co., 137 LRRM 1199, 1201 (1991). As to matters strictly of entrepreneurial concern, an employer has no duty to bargain. W-I Forest Products, 138 LRRM 1089, 190-91 (1991).

Implementation of work rules have been found to *"lie at the core of entreprenurial control"* where there is substatial evidence of a direct, immediate, and proximate relationship between the work rule and the employer's legitimate business interest in safety, productivity, quality control, or public appearance. Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 31 (Jan. 28, 1994); *See also* Schien Body & Equip. Co., Inc., 69 LA 930 (1977); National Pen & Pencil Co., 87 LA 1081, 1084 (1984).

In the present case, the relationship between the work rule and the City's legitimate business interests in safety, productivity, quality control, or personal appearance are not supported by the evidence in the record. The City has made no contention, nor would the evidence support a finding, that submitting a request for vacation leave any time in excess of the proposed 45 day limit would interfer demonstratably with productivity of the firefighting shifts by affecting manning or expertise requirements. Likewise, the City produced no evidence that a change to the 45 day limit is necessary to insure the quality of fire and emergency rescue services provided by the Fire Department.

The evidence further reveals that prior to the June 28, 1993 letter changing the vacation scheduling policy, there were no problems providing adequate staffing at the stations or in having the necessary expertise under the past practice. Additionally, no emergency situation developed in staffing personnel or shift requirements during June, 1993 that necessitated the change to the 45 day limit policy, other than the Fisher-Ross incident, which dealt a request for vacation being submitted too late rather than too early.

It is a general principle of labor law that a matter which affects the terms and conditions of employment will be presumed a

subject of mandatory bargaining. Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 37 (Jan. 28, 1994); Chemical Workers v. Pittsburg Plate Glass Co., 404 U.S. 157, 178-79 (1971); American Electric Power Co., 137 LRRM 1199, 1201 (1991); GHR Energy Corp., 133 LRRM 1069 (1989).[6] In order to overcome this presumption, therefore, it is clear the employer, here the City, has the burden to come forward with evidence to show that the subject matter sought to be addressed by the change in the vacation scheduling policy goes to the *"protection of the core purposes of the enterprise."* Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 31 (Jan. 28, 1994); Peerless Publications, 124 LRRM 1331, 1332 (1987).

The City has failed to produce substantial evidence that the change to the 45 day limit bears a direct, immediate, and proximate relationship to its legitimate business interests in safety, productivity, quality control or public appearance so as to overcome the presumption that the vacation policy, a determined term and condition of employment and presumed mandatory subject of bargaining, thereby permitting unilateral changes by the City. Based on the evidence in the record, it cannot be said that the probable effect upon operation of the Fire Department, of having to

---

[6] This should be read to mean that once the employee organization has provided proof sufficient to satisfy the first two prongs of the three prong test, it has established a prima facie case and the presumption of manditory negotiability attaches.

negotiate the change to the 45 day limit, outweights the impact upon the interest of the firefighters in the bargaining unit if the City is allowed to take unilateral action. In this case, the procedure for requesting vacation leave is a mandatory subject of bargaining.

Past Practices of the Parties

The Union contends that a past practice has developed between the parties which has allowed firefighters to submit a request for vacation leave any time later than one shift before the beginning of the proposed vacation leave. While the 1992-93 Memorandum of Agreement does not specifically provide an unlimited time frame for requesting vacation leave neither does it place any limitations on how early such request can be sumbitted. It is silent on the subject. Therefore, as to any past practice in existence at the time the Memorandum of Agreement was negotiated and ratified, the City and the Union would be required to abide by that past practice during the term of that memorandum of agreement.

[3] A past practice is a consistent prior course of conduct between the parties to a collective bargaining agreement that may assist in determining the parties' further relationship. Lindskog v. U.S.D. 274, Case No. 72-CAE-6-1992, at syl. 8 (December 11, 1992). In Lindskog the Kansas Secretary of Human Resources, applying the Kansas Professional Negotiations Act, recognized four

situations in which evidence of past practices may be used to ascertain the parties' intentions. These four situations are:

> *"(1) To clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement."* County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977).

The fourth situation appears to be applicable here.

Two views relative to the impact of past practices upon a memorandum of agreement have developed. Under the first view, it is reasoned that the only restrictions placed upon the parties are those contained in the written agreement. Each party continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. If an agreement does not require the continuance of existing conditions, a past practice would have no binding force regardless of how well established it may be. Under this view, the City may abide by or disregard the practice without the Union's consent.

The second view emphasizes past practices as part of the contract, particularly those practices which have come to be accepted by employees and the employer alike, and have thus become an important part of the employment relationship. The written agreement is thought to be executed in the context of this working

environment, and on the assumption that existing practices will remain in effect. Therefore, to the extent that existing practices are unchallenged during negotiations, the parties must be held to have adopted them and made them a part of their agreement.[7] Cox and Dunlop, in an article dealing with national labor policy, urged that *"a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed."* See Cox & Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv.L.Rev., 1097, 1116-17 (1950).

[4] The latter is the more prevalent view. Smith, Merrifield & Rothschild, Collective Bargaining and Labor Arbitration, p. 253 (1970). The reasoning behind this view begins with the proposition that the parties have not set down on paper the whole of their agreement. As was observed *"[o]ne cannot reduce all the rules*

---

[7] The implication here that existing practices must be continued until changed by mutual consent during the term of the memorandum of agreement or by repudiation during negotiations, is drawn from the nature of the agreement itself and form the collective bargaining process.

> "It is more than doubtful that there is any general understanding among employers and unions as to the viability of existing practices during the term of a collective agreement. . . . I venture to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that 'all existing practices, except as modified by this agreement, shall be continued for the life thereof, unless changed by mutual consent.' And I suppose that execution would also be blocked if the converse provision were demanded, namely, that 'the employer shall be free to change any existing practice except as he is restricted by the terms of this agreement.' The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitment, and the relentless search for cost-saving changes. . . ." Shulman, Reason, Contract and Law in Labor Relations, 68 Harv.L.Rev. 999, 1012 (1955).

governing a community like an industrial plant to fifteen or even fifty pages." Cox, Reflections upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1499 (1959).[8] Thus the union-management contract includes not just the written provisions stated therein but also the understandings and mutually accepted practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain.

Archibald Cox not only agrees with this view but states the argument more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

> *"Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words. See* Cox & Dunlop,

[8] It is also argued that no matter how clear the language of the collective bargaining contract seems to be, it does not always tell the full story of the parties' intentions. Anyone familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics. It is hardly surprising, therefore, to find in the typical contract an "inartistic and inaccurate use of words that have a precise and commonly accepted meaning in law." Aaron, The Uses of the Past in Arbitration, Arbitration Today, Proceedings of the Eighth Annual Meeting of the National Academy of Arbitrators 6, 11 (1955). The language used in a contract may merely be attributable to an inexperienced or over-eager draftsman. Where contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties. The past practices of the contracting parties are entitled to great weight in determining the meaning of ambiguous or doubtful contractual terms. See Hall v. Bd. of Ed., 593 A.2d 304, 307 (N.J. 1991). Absent any original intention with respect to this problem, the long-standing practice should be controlling.

The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv.L.Rev., 1097, 1116-17 (1950).

This view has apparently been accepted by the U.S. Supreme Court. In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), the Court concluded the collective bargaining agreement *"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."* Mr. Justice Douglas, speaking for the majority in the Warrior & Gulf case, reasoned a collective bargaining agreement may encompass more than what has been reduced to writing so in interpreting the collective bargaining agreement, one may look for guidance to various sources:

> *"The . . . source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it."*

See also Wyo. Val. West Educ. v. Wyo. Val. West Sch., 500 A.2d 907 (Pa. 1985). The common law of the shop would include, at the very least, past practices of the parties.

[5] To establish a past practice it must be proved both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice. Five indices that assist in determining this mutual acceptance are: (1) clarity and consistency throughout the course of conduct; (2) longevity and repetition

creating a consistent pattern of behavior; (3) acceptance of the practice by both parties; (4) mutuality in the inception or application of the practice; and (5) consideration of the underlying circumstances giving rise to the practice. Lindskog, at syl. 10; R.I. Court Reporters Alliance v. State, 591 A.2d 376, 379-80 (R.I. 1991).

Whether a past practice has been established, and the exact nature of such practice, is a question of fact for the presiding officer. Lindskog, at p. 44; Unatego Non-Teaching v. PERB, 522 N.Y.S.2d 995 (1987). The record clearly reveals that, prior to execution of the 1992-93 Memorandum of Agreement, the practice existing within the Junction City Fire Department, relative to when a firefighter could submit a request for vacation leave was that the request had to be submitted no later than one shift prior to the date the vacation was to begin. As Chief Bruzda admitted, there was no limit on how far in advance of the vacation a request for leave could be submitted. The City produced no evidence proving: 1) that no such practice existed; 2) that the City was unaware of or had not aquiested in the practice; or 3) that the practice was other than established by the Union.

During negotiations for the 1992-93 Memorandum of Agreement neither the Union nor the City presented proposals that would have shortened the unlimited time frame. Likewise, there is nothing in

the record to prove that during those negotiations the City manifested an intent to no longer be bound by the established past practice. The reasonable inference to be drawn from the lack of specific language in the 1992-93 Memorandum of Agreement changing that established practice, and the actions of the City, is the parties intended to continue to be bound by the existing past practice of no limit on how far in advance of the vacation a request for leave could be submitted. Accordingly, the practice became a term and condition of employment for the firefighters as if it had been recited in the Memorandum of Agreement. As such, the City could not unilaterally change that past practice during the term of the agreement without first submitting it to the meet and confer process. Lindskog v. U.S.D. 274, Case No. 72-CAE-6-1992 (December 11, 1992); Liberal-NEA v. U.S.D. 480, Case No. 72-CAE-8-1992 (March 5, 1993).

In summary, it is a prohibited practice for a public employer to refuse to negotiate in good faith with the certified representative of its employees. Included in the public employer's obligation to negotiate in good faith "*is the duty to continue past practices that involve mandatory subjects of negotiation.*" Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995, 997 (1987). *See also* Liberal-NEA v. U.S.D. 480, Case No. 72-CAE-8-1992 (March 5, 1993); Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228

(1981); Carolina Steel Corp., 132 LRRM 1309 (1989) [Employer violated LRMA when, without bargaining to impasse, it discontinued 20 year practice of granting Christmas bonus]. A change in terms and conditions of employment is lawful when consistent with past practices or authorized by a collective bargaining agreement. *See* Gorman and Robery, Labor Law, p. 400 (1976); Maywood Bd. of Ed. v. Ed. Ass'n, 102 LRRM 2101, 2106 (1978).

The City does not deny that it, through the Fire Chief, adopted and implemented the 45 day limit. Since it has been determined that the procedure for requesting request vacation leave is a mandatory subject of meet and confer, and a past practice had been established relative to that subject, the showing by the Union of a repudiation of that past practice by the City by implementation of the 45 day limit established a prime facia refusal to bargain in good faith by the City.

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 City 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."*

As concluded in City of Junction City v. Junction City Police Officers Association, 75-CAEO-2-1992 (July 31, 1992):

> *"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 memandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and time notice of the intented 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. 74-4333(b)(5)."*

The record shows that the 45 day limit policy became official on June 28, 1993 with the posting of the letter from Chief Bluzda to Local President Hernandez. Prior to implementation, the City did not seek to meet and confer with the Union over the proposed changes. Neither did the City provide adequeate and timely notice to the Union of its intent to change the vacation scheduling policy to allow the Union an opportunity to request negotiations prior to implementation.

Notice of the specifics of the policy change was officially served upon the Union upon receipt of the June 28th letter. The 45 day limit policy became effective on that same day. Such cannot be considered adequate and timely notice prior to implementation. Neither can any *"conversations"* between the Chief and Union

President from June 10th to June 28th be considered a request to meet and confer or actual negotiations.[9] The City has also failed to point to any provision of the Memorandum of agreement that authorizes it to make such unilateral changes.

Union Waiver

[6] The City argues that even if the vacation scheduling policy is a mandatory subject of meet and confer, the Union should be deemed to have waived its right to negotiate by its failure to request bargaining following notice to the Union of the change in the vacation scheduling policy by the June 28th letter. Certainly, when an employer announces plans for a change in working conditions, a union, having sufficient notice of the contemplated change, will ordinarily be deemed to have waived its right to bargain prior to implementation if it fails to request the opportunity to meet and confer. Further, it is incumbent on the union to act with due diligence in requesting bargaining. Kansas Education Ass'n, 119 LRRM 1213 (1985). Although a union may waive this right, such a waiver must be "clear and unmistakable." Kansas Education Ass'n, 119 LRRM 1213, 1214 (1985).

---

[9] Even assuming, arguendo, that such conversations did constitute negotiations, the evidence reveals no agreement resulted. Accordingly, pursuant to K.S.A. 75-4332, the City was required to complete the mediation and fact-finding steps of the impasse procedure prior to unilaterally changing the vacation policy. Here the City failed to go submit the impasse to mediation or fact-finding, but rather unilaterally implemented the change in policy. This also constitutes a failure to meet and confer in good faith.

The problem here is that the notice the Union received of the change in the vacation policy coincided with its implementation. Certainly the Union could have sought to negotiate the change after June 28th, but it was not so required. The prohibited action had already occurred. Accordingly, the cause of action relating to the failure to bargain in good faith had accrued at the time the new policy was implemented. The Union chose to file a prohibited practice complaint with PERB seeking relief from the City's prohibited activity, rather that seek to negotiate the change in policy. This it had a statutory right to do under K.S.A. 75-4334. The fact that the Union choose this alternative cannot be considered a waiver of its right to negotiate the change in a mandatory subject of bargaining. In fact, it is consistent with an intent not to waive such right.

The Union has produced sufficent evidence to show the City made a unilateral change in a term and condition of employment that is a mandatory subject of meet and confer, thereby establishing a prima facie violation of the City's duty to bargain in good faith and a prohibited practice as set forth in K.S.A. 75-4333(b)(5). The City failed to demonstrate that the Union was in fact given an opportunity to bargain on the subject prior to implementation, or that the collective bargaining agreement authorized the change, or

that the union waived its right to bargain. Accordingly, it must be concluded that the City has committed a prohibited practice.

ISSUE 2

WHETHER THE KANSAS PUBLIC EMPLOYEE RELATIONS BOARD IS AUTHORIZED, WHEN PRESENTED WITH ALLEGATIONS OF UNFAIR LABOR PRACTICES, TO DEFER HEARING OF THOSE CHARGES UNTIL AFTER AN ARBITRATION AWARD HAS BEEN MADE PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT, WHERE THE SUBJECT MATTER OF THE ALLEGED UNFAIR LABOR PRACTICE IS ARGUABLY COVERED BY THE COLLECTIVE BARGAINING AGREEMENT IN QUESTION.

The threshold issue to be addressed is the propriety of PERB adoption of a deferral policy fashioned after that espoused by the NLRB in Collyer Insulated Wire, 77 LRRM 1931 (1971). The initial focus is whether the Public Employee Relations Board ("PERB") has the statutory authority to refuse to consider unfair labor practice charges. This will entail a consideration of the federal rationale in adopting the Collyer policy, and an examination of PEERA to ascertain whether the federal rationale is applicable to the Kansas labor law structure.

Federal Consideration of Deferral

The Collyer deferral doctrine had its origin in the National Labor Relations Board's resolution of a dilemma presented by two expressed, and potentially conflicting, Congressional policies. The first of these statutory policies is the National Labor

Relations Act's ("NLRA's") directive that the NLRB should have exclusive jurisdiction to prevent unfair labor practices in the private sector. The second statutory policy is that of the Labor Management Relations Act ("LMRA"), 29 U.S.C., §141 et seq., which favors the fullest use of collect bargaining and the arbitral process to promote voluntary resolution of private sector labor disputes. The result of the NLRB's effort to resolve the dilemma presented by opposing expressions of Congressional intent has been a policy favoring discretionary deferral authority in both post-award, or Spielberg Mfg. Co., and pre-arbitral, or Collyer Insulated Wire, deferral situations.

The doctrine of discretionary deferral takes two forms; pre-arbitral deferral first adopted in Collyer Insulated Wire, 77 LRRM 1931 (1971), and post-award deferral addressed in Spielberg Mfg. Co., 36 LRRM 1152 (1955). In as much as the doctrine of discretionary pre-arbitral deferral, under consideration here, emanated from the decisional rational and authority supporting post-award deferral, the Spielberg doctrine must be understood.[10]

Post Award Deferral

In Spielberg the parties agreed to submit their dispute to contractual binding arbitration. The arbitration panel found in

---

[10] Since the issue of post-award deferral is not presented in this case, it need not be extensively discussed. Only a summary of the Spielberg policy is discussed to give the reader an understanding of the reasons underlying the development of this doctrine by the NLRB.

favor of the employer and the union filed an unfair labor practice complaint with the National Labor Relations Board ("NLRB") covering the same dispute. The NLRB upheld the arbitrator's award holding that it was not legally bound by the private tribunal's resolution pursuant to §10(a) of the NLRA, but concluded that it would not upset it where:

> *"* * * the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desired objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award."*

The Spielberg doctrine was elaborated upon and clearly reaffirmed in International Harvester Co., 51 LRRM 1155, 1157 (1962). The Supreme Court, in Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964), approved the deferral doctrine, quoting with approval the following statement from International Harvester:

> *"There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.*
>
> *"The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective."*

In Raytheon Co., 52 LRRM 1129 (1963), the NLRB supplemented Spielberg, by requiring that the unfair labor practice charge cognizable under the parties' agreement have been presented to, as well as considered by, the arbitral tribunal before post-award deferral would be proper.

In summary, it has been determined that the NLRB is empowered with discretion to abstain from entertaining an unfair labor practice charge arguably covered by the parties' binding collective bargaining agreement, and to defer to the arbitral tribunal's award where the charge has been properly decided through private arbitration.

Spielberg is intended to promote economy of litigation. It is based on the policy that a party, having had the opportunity fairly to litigate an issue in one forum and lost, ought not to be permitted to try the same issue in another forum. As stated by the NLRB in The Timken Roller Bearing Co., 18 LRRM 1370 (1946):

> *"[I]t would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits. In the interest of ending litigation and otherwise effectuating the policies of the Act, we shall dismiss that portion of the complaint relating to the [arbitrator's award]."*

Pre-Arbitral Deferral

The seminal decision on pre-arbitral deferral is Collyer Insulated Wire, 77 LRRM 1931 (1971). It represents, what the NLRB called, *"an accommodation between, on the one hand, the statutory*

policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress's grant to the Board of exclusive jurisdiction to prevent unfair labor practices." Id. at 841.

In Collyer, the union committed an unfair labor practice by allegedly undertaking unilateral changes in working conditions. The employer maintained the changes were authorized by the contract, and the dispute should, therefore, be resolved through the parties' contractually binding grievance arbitration machinery. The NLRB concluded this was *"essentially a dispute over the terms and meaning or the contract."* The breath of the arbitration provision satisfied the majority that *"the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes."* Id. at 839. Noting that *"the dispute between these parties is the very stuff of labor contract arbitration"*, the NLRB emphasized that *"[t]he competence of a mutually selected arbitrator to decide the issue and fashion a appropriate remedy, if needed, can no longer be gainsaid."* Id. at 842. Sensitive to the dissent's objection that deferral to private arbitral consideration would strip the parties of statutory rights and henceforth mandate private compulsory arbitration of otherwise statutory disputes, the NLRB majority responded:

> *"We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to*

> *their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement."* Id. at 842.

The NLRB concluded that the threshold issue of whether to defer arises *"only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration."* Id. at 841. Elaborating on those factors favoring pre-arbitral deferral, the majority of the NLRB observed that:

> *"[t]he contract and its meaning * * * lie at the center of [the] dispute, [such that] * * * the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes * * * under the contractually prescribed procedure."* Id. at 842.
>
> *"We conclude that the Board is vested with authority to withhold it processes in this case, and that the contract here made available a quick and fair means for the resolution of this dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred."* Id. at 839.

The NLRB announced that, per Spielberg, it would reserve jurisdiction pending arbitration to *"guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of out law."* Id. 843.

The legal basis for the NLRB's adoption of the deferral policy was its finding in Collyer that the federal labor laws intended arbitration to be, as far as practicable, the means of resolving labor disputes. The NLRB decided that in such a situation federal

policy favors use of only one forum, and the preferred forum for resolution of labor contract issues is arbitration. [11]

The U.S. Supreme Court, in dictum, indicated its approval of the deferral doctrine when Mr. Justice Brennan remarked in William E. Arnold Co. v. Carpenters District Council of Jacksonville, 417 U.S. 12, 16-17 (1974):

> *"Indeed, Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure. * * * The Board said in Collyer, 'an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. * * * We believe it to be consistent with the fundamental objectives of Federal law to require the parties * * * to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.' * * * The Board's position harmonizes with Congress' articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is * * * the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."*

---

[11] The NLRB quoted its previous decision in Jos. Schlitz Brewing Co., 70 LRRM 1972 (1969):

"Thus we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union, and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that arbitral interpretation of the contract will resolve both the unfair labor practice issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an unusually long established and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and significantly, the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which, although it firmly believed in good faith in its right under the contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action. Accordingly, under the principles above stated, and the persuasive facts in this case, we believe that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established. Collyer Insulated Wire, 77 LRRM 1931, 1936 (1971).

In summary, the NLRB has exercised discretionary deferral both prior to and following the decision of the parties' arbitral tribunal. Spielberg, and its progeny generally indicate that the Board will defer to a prior arbitral award, provided:

(1) the unfair labor practice dispute cognizable under the parties' collective bargaining agreement was presented to and considered by the arbitral tribunal;
(2) the arbitral proceedings were fair and regular;
(3) all parties to the arbitral proceedings agreed to be bound thereby; and
(4) the decision of the arbitral tribunal was not clearly repugnant to the purposes and the policies of the NLRA.

Collyer and its progeny generally indicate that the NLRB will defer an alleged unfair labor practice charge to the parties' binding grievance-arbitration procedures memorialized in their collective bargaining agreement, subject to Spielberg post-award review, provided:

(1) a stable collective bargaining relationship exists between the parties;
(2) the respondent is willing to resort to arbitration under a binding arbitration clause broad enough to embrace the dispute; and
(3) the contract and its meaning are at the center of the dispute.[12]

State Consideration of Deferral

---

[12] For a collection of cases considering both the NLRB's development of these two doctrines see generally, Morris, The Developing Labor Law, Chap. 18.

Public employee relations boards from other states have been reluctant to embrace the Collyer-Spielberg doctrine dictating automatic deferral, and the state appellate courts have generally held that a state labor agency is not required to defer to contractual grievance arbitration procedures where the state law counterpart of an unfair labor practice is alleged. Of particular interest is Fasi v. State Public Employment Rel.Bd., 591 P.2d 113 (Hawaii 1979). There the union filed a grievance and pursued it through the first three of four steps. The employer then sought a declaratory ruling from the PERB that its actions were lawful. The PERB found it had jurisdiction but on appeal the circuit court concluded:

> *"[T]he parties were bound by the collective bargaining agreement to submit the dispute to an arbitrator, who should first determine that he has jurisdiction, and if he should so determine, should proceed to decide the matter on its merits. . . ."*

The Supreme Court of Hawaii reversed, recognizing the PERB's power to refuse to defer to contractual grievance arbitration mechanisms in the unfair labor practice case. Neither the existence of applicable arbitration processes, nor the inevitability of a measure of contractual interpretation by the PERB, was sufficient to deter the court from holding that:

> *". . . [The statute] empowers the Board, upon complaints by employers, employees and employee organizations, to 'take such action with respect thereto as it deems necessary and proper.' Since the meaning and effect of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a*

> *prohibited practice, the meaning and effect of the agreement between [the employer] and [the union] was a question which related to an action which the Board might take in the exercise of its powers. The applicability of [the unfair practice statute] to the collective bargaining agreement is therefore a question which was properly placed before the Board by the petition."*

Thus, construing a statute no more conclusive on the issue than the Kansas PEERA, the Supreme Court of Hawaii held that Hawaii's PERB is not required to defer its unfair labor practice jurisdiction to pending grievance arbitration proceedings. *See also* PSEA v. Alaska, 135 LRRM 3137, 3144 (AK 1990)[Presence of grievance and arbitration provisions in the PSEA-State contract neither deprived PSEA of its statutory right to press its unfair practice claim before the Board, nor deprived the Agency of jurisdiction to hear that claim].

Some state courts have gone further, holding that a state labor agency must not defer to arbitration. In Portland Ass'n of Teachers v. School Dist. No. 1, 555 P.2d 943 (Or.App. 1976) the Oregon Employment Relations Board had deferred to an applicable, bargained-for grievance procedure, holding that whether the claim asserted could be grieved under the contract had to be determined by an arbitrator in the first instance. The appellate court reversed, holding that the Board's statutory mandate required it to investigate and decide unfair labor practice cases:

> *"The initial issue is whether [the state Board] had a duty to determine if [the union's] complaint constituted a grievance under the agreement. The resolution of this issue turns upon the scope of [the Board's] duties as defined by . . . the statute which*

> *prescribes the procedures to be followed by the agency. Upon the receipt of an unfair labor practice complaint, [the Board] is required to first investigate the complaint to determine if a hearing on the complaint is warranted. . . . After a hearing, [the Board] must then determine whether any person named in the complaint was engaged in or is engaging in any unfair labor practice charged in the complaint. . . . These requirements as applied to this case can only mean that [the Board] had to determine whether the District was required by the terms of the professional agreement with [the Union] to process [the Union's] complaint as a grievance. . . . It necessarily follows that in order to so determine, [the Board] was required to look to the professional agreement's definition of grievable matters."*

Similarly, in Detroit Fire Fighters v. City of Detroit, 293 N.W.2d 278 (Mich. 1980), the court, interpreting a statute which did not directly address deferral, held that the Michigan Employment Relations Commission could not, upon being presented with allegations of unfair labor practices by a public employer, defer hearing of those charges until after private arbitration, even though the subject matter of the alleged unfair practices was arguably cover by the collective bargaining agreement. In so holding the court stated:

> *"[O]ur legislature has determined that our state's policy is best served when public employment disputes, implicating statutory rights, are resolved under a system which provides a significant procedural, and appellate review, protection."*

This holding was reaffirmed in Bay City School Dist. v. Bay City Educ. Ass'n, Inc., 390 N.W.2d 159, 165 (Mich. 1986), but the court provided some discretion to the PERB by stating, *"The disputes that could not be deferred and delegated to arbitration were statutory claims."* Id. at p. 164.

The courts of Pennsylvania have reached a similar result. The Pennsylvania Supreme Court, addressing the issue of deferral in Hollinger v. Pa. Dept. of Public Welfare, 94 LRRM 2170, 2173 (1976), concluded:

> *"Thus, if a party seeks redress of conduct which arguably constitutes one of the unfair labor practices listed in [the Act], jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice is in the PLRB, and nowhere else."*

Later, in Pennsylvania Labor Relations Bd. v. General Braddock Area School Dist., 380 A.2d 946 (Pa. 1977), the court reaffirm its position:

> *"[W]here a party seeks redress of an unfair labor practice, 'jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice, is in the [Pennsylvania Labor Relations Board] and nowhere else." We cannot, therefore, conclude that the PLRB is powerless to investigate charges of unfair labor practices merely because a collective bargaining agreement exists under which grievance arbitration is available for the determination of issues similar to those upon which the charges are based. Nor, on the facts here, can we find error in the common pleas court's affirmance of the PLRB's refusal to defer to arbitration."* *See also* Philadelphia Hous. Auth. v. Commonwealth, Pa. Labor Rel. Bd., 461 A.2d 649 (Pa. 1983).

While the Kansas appellate courts have not addressed the issue of deferral, in In the Matter of Diane Marie Taylor, Complainant v. Unified School District #501, Topeka, Kansas, Shawnee County District Court Judge James M. MacNish, Jr. addressed the jurisdiction issue in response to a Motion for Reconsideration in Case No. 81-CV-1137. In his Memorandum Decision and order dated October 17, 1985 Judge MacNish stated:

"An arbitrator has the power to rule on matters concerning the interpretation and application of a professional agreement. Diane Taylor claimed her contract was violated by the Board's anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under 72-5430. That power is given to the Secretary of Human Resources under K.S.A. 72-5430(a).

PEERA Deferral

Statutory Considerations

The NLRB's finding that federal law grants pre-eminence to arbitration rests on a three-part construct: (1) many labor disputes are resolvable in arbitration as well as in NLRB proceedings; (2) the NLRB's exercise of jurisdiction over cases that could be resolved in either forum discourages use of arbitration; and (3) national policy prefers resolution of such disputes in arbitration rather than by the NLRB. If the same construct can be built under PEERA, in the absence of contrary statutory language, there exists a sound foundation for the PERB to promulgate a Collyer-like automatic deferral policy.

The first two parts of the NLRB's rationale can be accepted as valid under PEERA with little hesitation. First, many disputes cognizable as unfair labor practices under PEERA are resolvable in arbitration. The second part is likewise satisfied. It is a reasonable assumption that some of those who file charges would not pursue arbitration if PERB remains willing to adjudicate their

disputes. As the NLRB reasoned in Consolidated Aircraft Corp., 12 LRRM 44 (1943):

> *"[I]t will not effectuate the statutory policy of encouraging the practice and procedure of collective bargaining for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which this dispute has arisen."*

Meeting the third part of the NLRB's construct is not as simple. The NLRB based its deferral policy on a statutory provision that has no analogue in PEERA, i.e. the Taft-Hartley Act's declaration that *"[f]inal adjustment by a method agreed upon by the parties [arbitration] is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."* 29 U.S.C. §203(d). Although K.S.A. 75-4330(b) provides the parties may include a grievance procedure in a memorandum of agreement,[13] such procedures are not required, and there is nothing in PEERA

---

[13] K.S.A. 75-4330(b) states:

"Such memorandum agreement may contain a grievance procedure and may provide for the impartial arbitration of any disputes that arise on the interpretation of the memorandum agreement. Such arbitration shall be advisory or final and binding, as determined by the agreement, and may provide for the use of a fact-finding board. The public employee relations board is authorized to establish rules for procedure of arbitration in the event the agreement has not established such rules. In the absence of arbitrary and capricious rulings by the fact-finding board during arbitration, the decision of that board shall be final. Appeals shall be taken in accordance with the provision of K.S.A. 60-2101.

that gives arbitration the pre-eminence that section 203(d) of the LMRA vests it with under federal law.

At the same time, the Kansas Legislature gave PERB concurrent jurisdiction over disputes that are resolvable in arbitration. Two provisions of PEERA govern the duty of the PERB to adjudicate prohibited practice charges. K.S.A. 75-4323(d)(3) states that the PERB may:

> *"Make, amend and rescind, from time to time, rules and regulations, and to exercise such powers, as may be appropriate to effectuate the purposes and provisions of this act."*

Another provision, K.S.A. 75-4323(d)(1), provides, in part that the PERB may:

> *"Establish procedures for prevention of improper public employer and employee practices as provided in K.S.A. 75-4333, . . ."*

Finally, K.S.A. 75-4334[14] provides:

---

[14] K.S.A. 75-4334(a) provides:

> "Any controversy concerning prohibited practices may be submitted to the PERB. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six (6) months of the date of such alleged practice by service upon it by the board of a written notice, together with a copy of the charges. The accused party shall have seven (7) days within which to serve a written answer to such charges, unless the board determines an emergency exists and requires the accused party to serve a written answer to such charges within twenty-four (24) hours of their receipt. A strike or lockout shall be construed to be an emergency. The board's hearing will be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. compliance with the technical rules of evidence shall not be required. The board may use its rule-making power, as provided in K.S.A. 75-4323, to make any procedural rules it deems necessary to carry on this function.
>
> "(b) The board shall state its findings of facts upon all the testimony and shall either dismiss the complaint or determine that a prohibited practice has been or is being committed. If the board finds that the party accused has committed or is committing a prohibited practice, the board shall make findings as authorized by this act and shall file the same in the proceedings. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the district court, in the judicial district where all of the major geographic area of the public employer is located, by filing in such court a petition praying that the order of the board be modified or set aside, . . ."

1) Any controversy concerning prohibited practices may be submitted to PERB;
2) Following the filing of the complaint and the answer, a hearing will promptly be held to take evidence on the complaint;
3) PERB is then required to make findings of fact, and to either dismiss the complaint or determine that a prohibited practice has been or is being committed;
4) If a prohibited practice is found, PERB shall file the same in the proceeding and grant or deny in whole or in part the relief sought by the complainant; and
5) PERB can file petitions in district court to enforce its orders.

The route of PERB relief of prohibited practices, like the route of arbitration relief, is one of the procedures designed to protect the rights guaranteed by PEERA and thereby to achieve the ultimate goal of preventing unresolved disputes from disrupting the supply of public services.[15] Neither is predominant. The foregoing analysis of PEERA does not reveal the clear preference for arbitration that is found in the LMRA. Rather, PEERA creates a system of meet and confer negotiations and a system for resolution of prohibited labor practices, and designates no preference for either. On cannot say that PEERA makes arbitration the preferred method of dispute resolution. The final part of the three-part construct on which the NLRB's adoption of its deferral

---

[15] K.S.A. 75-4321(a)(3) states it is the policy of the state of Kansas that:

"[T]he state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government;"

policy is based cannot be built under PEERA. Accordingly, no statutory basis for requiring automatic deferral to a grievance and arbitration procedure included in a memorandum of agreement can be statutorily found. It cannot be said that the Kansas legislature intended the degree of delegation to private arbitration that would be effected under the Collyer-Spielberg deferral doctrine. PERB is not faced with the kind of conflicting expression of legislative intent which led the NLRB's adoption of the Collyer pre-arbitral deferral doctrine.

Policy Considerations

The fact that PERB is not required, by statute, to automatically defer to private arbitration a prohibited practice complaint arguably covered by both the parties' memorandum of agreement and K.S.A. 75-4333 prohibited practice provisions, does not necessarily prohibit PERB from exercising its discretion to so defer. Meeting and conferring in the public sector is obviously greatly affected by political pressures and concerns, as well as economic factors. The services performed by public employees, such as the fire fighters in this case, tend to be essential to the public health, safety and welfare. Certainly, the Legislature was cognizant of these considerations when it enacted PEERA, as is evidenced by that Act's prohibition of public employee strikes, K.S.A. 75-4333(c)(5). At the same time, however, it is clear that

the Legislature intended to provide public employees with nearly the same collective bargaining rights as are possessed by private sector employee, to the extent that public policy will allow.[16] Toward that end, the Legislature has, through PEERA, assured public employees of protection against unfair labor practices, and of remedial access to a state level administrative agency with special expertise in statutory unfair labor practice matters. Additional safeguards with which PERB must comply have been provided: compliance with the Administrative Procedures Act, written findings of fact to support a decision, and reviewability by the courts. These processes seem well designed to promote and maintain the confidence and morale of public employees, who, being prohibited from striking, must rely heavily on the statutory protections afforded under PEERA.[17]

---

[16] K.S.A. 75-4332(d) reserves to the public employer the ultimate determination of the terms and conditions of employment by allowing for unilateral action by the employer following unsuccessful meet and confer negotiations and subsequent mediation and fact-finding procedures.

[17] The right of private sector employees to strike has a significant role in private sector collective bargaining. The union is normally willing to give up that right in exchange for the employer's agreement to acceptable methods of grievance resolution. See e.g. Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974):

> "The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the Court stated in Boys Markets v. Retail Clerks Union, 398 U.S. 235, 248 (1970), 'a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration.'"

It would seem reasonable then in concluding that the PEERA's important procedural grantees were intended to offset the bargaining detriment to public employees which results from PEERA's prohibition of public employee strikes.

Analysis of PEERA, however, reveals no legislative intent forbidding or discouraging voluntary private arbitration of public employee grievance disputes. Rather, the Kansas legislature made it an expressed purpose of PEERA to:

> *"obligate public agencies, public employees and their representatives to enter into discussions with affirmative willing to resolve grievances and disputes relating to conditions of employment, acting within the framework of law."* K.S.A. 75-4321(a)(3).

While K.S.A. 75-4334 does provide a procedure to be followed by PERB once a prohibited practice complaint is filed, it should not be construed that such represents the sole means through which disputes may be resolved. As previously quoted, 75-4323(d)(1) authorizes PERB to establish other procedures for prevention of prohibited practices. This provision vests PERB with a measure of discretion to determine the appropriate manner in which such preventative action should be administered. Conceivably, deferral to arbitration could be a useful tool for use by PERB in preventing prohibited practices.

Certainly, pre-arbitral deferral has its advantages and disadvantages. In the Dickinson Law Review article Deferral to Arbitration by the Pennsylvania Labor Relations Board, 80 Dickinson L.Rev. 666, 681 (1977), the author lists policy considerations both favoring and opposing adoption of a deferral policy:

Policy Considerations Cited as Favoring Adoption of a Deferral Policy:

1. Avoids fragmentation of issues between different forums, and potential conflicting decisions.
2. Protects the union-employer relationship from disruption caused by Board intervention.
3. Permits caseload reduction and more efficient utilization of resources.
4. Permits resolution of contractual issues by arbitrators with special expertise in labor relations.
5. Power in impartial third party has beneficial effect.
6. Arbitration expense encourages voluntary resolution.

Policy Considerations Cites as Opposing Adoption of a Deferral Policy:

1. Remedies available in arbitration are inadequate to remedy unfair labor practices.
2. Deferral results in delay of dispute resolution.
3. Board action affords better protection to the aggrieved.
4. The high cost of arbitration means that unfair labor practices will go unresolved.
5. The availability of Board procedures as an instrument of coercion leads to voluntary settlement.
6. Deferral forces an aggrieved party to arbitrate against his will and sometimes in contravention of his contractual obligations.

[7] From a policy perspective, it must be concluded that PEERA does not require exhaustion of contractual grievance or arbitration procedures in every case before PERB may entertain a prohibited practice complaint, but instead vests PERB with discretion to determine, once a complaint has been filed, whether to defer to the memorandum of agreement grievance procedure or to adjudicate such

dispute in furtherance of its statutory prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334. *See* PSEA v. Alaska, 135 LRRM 3137, 3145 (AK 1990).

The benefits to be gained by a policy allowing PERB to defer to arbitration outweigh the factors which mitigate against deferral. Questions, as those presented in the instant case, depend on what the memorandum of agreement provides, and this, in turn, involves questions of interpretation and application of the memorandum of agreement provisions. As noted by the Michigan Supreme Court in Detroit Fire Fighters v. City of Detroit, 293 N.W.2d 278, 296 (1980), pre-arbitral deferral is appropriate where the dispute arises under the memorandum of agreement since:

> *"[D]isputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application . . . of a particular provision of our statute."*

A policy which leaves these questions to PERB seems highly undesirable, since in most situations, the formal K.S.A. 75-4334 prohibited practice procedures would subject the parties to unnecessary costs and delays in resolving the dispute.[18]

In contrast, a policy which makes a private arbitrator the final and finding interpreter of the PEERA law is equally improper

---

[18] It should be noted that with the present low levels of staffing and budget available to PERB to administer PEERA, prohibited practice complaints usually require approximately twelve months from filing to Initial Order, with a potential for an additional six months if an appeal is taken to the full Board. Decisions from private arbitrators require considerably less time.

and untenable. Accordingly, when a dispute implicates statutory rights, deferral would be inappropriate. Therefore, in considering whether to defer a prohibited practice complaint to a memorandum of agreement's established grievance and arbitration mechanism, **the subject matter of the complaint must arguably be covered by the provisions of the memorandum of agreement and not be primarily statutory in nature.** Pre-arbitral deferral should be denied where the issue in dispute concerns the scope of the statutory duty to bargain and does not turn upon the interpretation of an existing memorandum of agreement. Additionally, even though a dispute may be arguably contractual in nature, deferral is inappropriate where interpretation of the contract becomes subordinate to the resolution of the statutory question, e.g. representation questions, discipline for grievance activities, or freedom of employees to engage in protected activities.

In summary, mirroring the Collyer doctrine, pre-arbitral deferral by PERB presumes satisfaction of three requirements: 1) a stable bargaining relationship between the parties; 2) intent by the respondent to the prohibited practice complaint to exhaust the memorandum of agreement grievance procedure culminating in final and binding arbitration; and 3) the underlying dispute centers on

the interpretation or application of the memorandum of agreement.[19] A condition precedent to conditional dismissal of the prohibited practice complaint is an issue that may be determined through the memorandum of agreement grievance and arbitration procedure. It must be a dispute which directly involves the application, enforcement or interpretation of the memorandum of agreement. A statutory issue may also be the basis for the dispute, but unless there is a dominant memorandum of agreement issue, deferral is inappropriate. As stated above, even though a dispute may arguably be contractual in nature, deferral will be inappropriate where interpretation of the contract becomes subordinate to the resolution of statutory questions.

---

[19] The PERB will not police memorandums of agreement by attempting to resolve disputes by interpretation of the agreement and then deciding whether disputes as to the meaning and administration of the memorandum of agreement constitute a prohibited practice.

Under the pre-arbitral deferral policy announced here, when PERB decides that deferral to arbitration is appropriate, it procedure will be to dismiss the complaint conditionally without prejudice to either party and without deciding the merits of the dispute. PERB will retain jurisdiction to ensure that the prospective arbitration award complies with the standards set forth in Spielberg. In keeping with this policy, the right of either party to secure further PERB review of the dispute, upon a showing that the arbitration award has not satisfied the Spielberg standards, is explicitly preserved.

In accordance with these Spielberg standards, PERB will not adjudicate the merits of a dispute previously arbitrated where: 1) the arbitration proceedings were fair and legal; 2) all parties had agreed that the arbitration proceedings were final and binding; and 3) the arbitration award was not clearly repugnant to the purpose and policies of PEERA. Also required is that the prohibited practice issues giving rise to the complaint be considered and decided by the arbitrator.

If PERB determines review of the arbitration award is appropriate and should PERB and the arbiter disagree, the PERB interpretation would take precedence. See Carey v. Westinghouse, 375 U.S. 261, 268 (1964). See also Gorman, Labor Law, p. 733, ["in the event of a conflict between an arbitral interpretation of a contract and a Board interpretation of the Labor Act . . . the Board as guarantor of the public interest must prevail.

Application of the Collyer Test

1. Prior Stable Bargaining Relationship

Applying the three factor Collyer test to the facts in this case, insofar as the first factor concern, the Union failed to produce any evidence that there exists an anti-union history on the part of the City, or sufficient anti-union animosity toward the meet and confer process or the parties's contractual grievance resolution procedure to render pre-arbitral deferral inappropriate.

3. Arguably Contractual Nature of the Alleged Prohibited Practice Charge Centering on the Interpretation or Application of the Contract

As to the third factor, the issue of procedures and time-frames for submitting requests for vacation leave are arguably covered by Article 10 of the Memorandum of Agreement. The scope of Article 19 the parties' agreement is broad enough to embrace grievances on the vacation leave issue. Accordingly, the "arguably contractual" factor of pre-arbitral deferral has been satisfied.

2. Willingness to Arbitrate

There is no question that the City has manifest a willingness to arbitrate the dispute under the terms of the grievance procedure set forth in Article 19 of the Memorandum of Agreement. The problem, however, is that the grievance procedure does not meet the requirement that such procedure culminate in final and binding

arbitration. Pursuant to Article 19, the final step in the grievance procedure calls for a hearing before an impartial fact-finder who only makes a recommendation to the City Manager. The recommendation is not final and binding but may be accepted, rejected or modified by the City Manager. Having failed the second element of the three-part Collyer test, it would be inappropriate to defer the prohibited practice compliant of the Union to the grievance procedure set forth in the Memorandum of Agreement. The complaint is correctly before the PERB, which maintains jurisdiction to resolve the dispute.

ORDER

IT IS THEREFORE ADJUDGED, that the City of Jun0tion City, Kansas has, for the reasons set forth above, failed to meet and confer in good faith with the International Association of Firefighters, Local 3309 as required by K.S.A. 75-4327, and thereby committed a prohibited practice as set forth in K.S.A. 75-4333(b)(1) and (5).

IT IS FURTHER ADJUDGED, that the Kansas Public Employee Relations Board is not required to defer action on a prohibited practice complaint where the alleged prohibited practice is one arising out of the interpretation or application of the terms or a memorandum of agreement which could be resolved through the

grievance or arbitration provisions contained in that agreement, but has the discretion to so defer under those circumstances set forth above.

IT IS THEREFORE ORDERED, that the City of Junction City, Kansas shall recind the 45 day limit policy implemented on June 28, 1993, and restore the status quo relative to the earliest a request for vacation leave may be submitted prior to the date of the proposed vacation that existed prior to implementation of that new policy.

IT IS FURTHER ORDERED, that the City of Junction City, Kansas shall post a copy of this order in a conspicuous location at all duty stations where members of the employee unit represented by the International Association of Firefighters, Local 3309 are assigned to work.

Dated this 29th day of July, 1994.

Monty R. Bertelli, Presiding Officer
Labor Conciliator III
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Human Resources, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on August 30, 1994 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, 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 12th day of August, 1994, a true and correct copy of the above and foregoing Initial Order was served upon each of he parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

James R. Waers, attorney
Blake & Uhlig, P.A.
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, Kansas 66101

David W. Tritt, Personnel Director
City of Junction City, Kansas
P.O. Box 287
Junction City, Kansas 66441

And to the members of the PERB on August 15, 1994.

Sharon Tunstall