BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

OF THE STATE OF KANSAS

IN THE MATTER OF THE COMPLAINTS AGAINST EMPLOYER FILED BY NAGE LOCAL R14 - 141 vs. DEPARTMENT OF SRS - TOPEKA STATE HOSPITAL	)	Case Nos. 75-CAE-5-1989 75-CAE-6-1989 75-CAE-8-1989

ORDER

Comes now this 18th day of MAY, 1989, the above captioned matter for consideration by the Public Employee Relations Board.

APPEARANCES

Complainant - NAGE Local R14-141 appeared through Mark B. Clevenger, Attorney at Law.

Respondent - Department of Social Rehabilitation Services-Topeka State Hospital appeared through Linda Jane Kelly, Attorney at Law.

PROCEEDINGS BEFORE THE BOARD

1. Subsequent to receipt of the answers in the three above captioned matters the parties met in a pre-hearing on November 17, 1988.

2. The pre-hearing identified a preliminary question of

law in need of resolution.

3. The question of law referenced in "Proceeding" number 2 is common to all three above referenced cases which were, therefore, combined for purposes of this order.

4. Initial briefs were due and to be postmarked not later than February 15, 1989.

5. Rebuttal briefs were due and to be postmarked not later than March 15, 1989.

6. Initial briefs received in accordance with briefing schedule.

7. No rebuttal briefs submitted by either party.

FINDINGS OF FACT

1. That the only issue to be determined in the instant order is solely a question of law.

2. That this matter is properly filed before the Public Employees Relations Board for determination.

3. That no facts in regard to the merits of the above captioned cases have been presented to or found by the examiner.

CONCLUSIONS OF LAW/DISCUSSION

It does not appear to the examiner that there is a great deal of dispute regarding the facts behind these cases. There may, in fact, be nothing more than a negotiability dispute when the merits of these cases are heard. In this order, however, the examiner will not rule on the negotiability of any par-

ticular issue but will limit his discussion to the issue framed at the pre-hearing, specifically,

> "Is there a requirement under PEERA for management to meet and confer regarding changes in conditions of employment covered under PEERA which are not addressed in the memorandum of agreement?"

In order to address that issue, certain assumptions must be made. The first is that the question addressees the relationship between a "public agency" and a "recognized employee organization" as those terms are defined by the act. The second is that the "conditions of employment covered under PEERA", refers to the mandatory subjects of bargaining defined at K.S.A. 75-4322(1). Certainly in the eyes of the examiner, that was the intent of the parties and is the only approach which makes sense. To do otherwise would have the effect of resulting in an order which would be meaningless.

In the actual consideration of this question, the examiner believes it is important to consider the entire law in concert rather than to focus on any specific provisions at the risk of losing the overall picture. An appropriate starting place is K.S.A. 75-4321. Subsection (a)(1) and (2) say, quite simply, that the State of Kansas and its citizens desire a stable, satisfied, productive, harmonious, cooperative, employer-employee relationship in their public agencies which can be destroyed by less than full communication between the parties. Subsection (a)(3) then cautions that government services are critical and, therefore, not to be interrupted. Subsection

(a)(4) reminds us not to lose sight of the fact that there are differences between the public and the private sector, and subsection (a)(5) finally underlines the fact that the public employer runs the public agency and cannot abdicate that responsibility.

With the background provided by K.S.A. 75-4321(a) subsections 1 through 5, the legislature then summarizes the methods through which the objectives outlined in those subsections are to be accomplished at K.S.A. 75-4321(b) which states in pertinent part;

> ". . .it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies."

The intent statement is translated into a legislative mandate in subsections (a) and (b) of K.S.A. 75-4327 which states;

(a) "Public employers shall recognize employee organizations for the purpose of representing their members in relations with public agencies as to grievances and conditions of employment. Employee organizations may establish reasonable provisions for an individual's admission to or dismissal from membership."

(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."

Subsection (g) of that section then describes the only period of time that the employer may refuse to meet and confer with the recognized employee organization with any degree of immunity from the bargaining mandate. It is also worthy of note that the legislature has seen fit to charge the parties with the mutual obligation to meet and confer in good faith regarding the establishment of conditions of employment. The examiner finds, therefore, that it is reasonable to require not only the employee organization but also the employer to divulge to each other those conditions of employment over which they wish to meet and confer toward the ultimate goal of change. This view of the examiner is fully consistent with the policy of full communication and an orderly exchange of information, opinions, and proposals between the parties.

Any other interpretation would serve to compound and confuse what was designed as an orderly process. The legislature has attempted to provide a mechanism to reduce conflict rather than create it. To permit an employer to change any condition of employment which is not specifically addressed in the memorandum of agreement sends a clear message to the employee organizations. That is; be sure to notice for

negotiations each and every issue, item, and article which may even creatively be considered as a mandatory subject, whether or not it is a problem, and whether or not any changes are proposed because to do otherwise puts you in the precarious position of accepting unilateral changes even in mandatory areas of bargaining which aren't noticed. An unscrupulous employer could, under such an interpretation, approach the bargaining table with an agenda which is devoid of any issues in need of discussions while secretly harboring a multitude of desired changes. At the table such an employer could respond only to the issues raised by the employee organization, and upon leaving the table could turn the employee's life topsy-turvey by the alteration of any number of their conditions of employment. One need not be a professional in the study of human behavior to realize that the actions outlined above would serve to develop suspicion, discord, and contempt rather than the harmony and cooperation sought by the act.

In keeping with the statutory intent of full and open communications in a good faith effort to reach agreement over conditions of employment, the examiner is convinced that not only the employee organizations, but the employers as well, are mutually required to "notice up" and negotiate over the establishment of, or changes in, mandatory subjects of bargaining. Any other interpretation removes the incentive for the employer to approach the process willingly, openly, and in good faith as a mechanism for the orderly addressing of problems and

attainment of bilateral change in conditions of employment.

The central issue in this order, however, goes one step further to inquire regarding the obligation of the employer to bargain over mandatory subjects of bargaining which are not included in the memorandum of agreement prior to the time those subjects may be changed. Certainly when one understands the purpose and intent of the act the answer to that question becomes quite clear.

The Public Employer-Employee Relations Act exists, among other reasons, in order to establish a structured problem solving forum. It is reasonable to conclude that not all employee organizations will find fault with every action that has been taken by management prior to the certification of the employee representative. Many conditions of employment established by the employer are the product of much study, thought, experience, labor market considerations, government mandate, or some combination of all the above and more. Prior to the time that the employees empower a representative to speak in their behalf all of their conditions of employment have been set by the employer and practiced perhaps for a lengthy period of time. Prior to the certification of an employee representative, the unilateral authority of the employer to fix conditions of employment is unfettered except as provided for by law. For example, wages could not drop below the mandated statutory minimum. But once a representative is selected, the conditions of employment in existence at that time serve as a "base line"

from which changes must be bargained. Even conditions of employment which exist during the organizational phase and prior to certification of a representative possess a certain degree of sanctity from unilateral change. Those changes are addressed and prohibited by K.S.A. 75-4333(b)(1)(3) and (4) which state:

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

That is not to say that any and all changes are prohibited, only those which are made in regard to mandatory subjects of bargaining and which do not qualify as emergencies. The act, in fact, recognizes that there will be times when conditions of employment must be changed on little or no notice in response to unforseen circumstances. That acknowledgement is expressed at K.S.A. 75-4326(f) which states;

> "Take actions as may be necessary to carry out the mission of the agency in emergencies;"

An example of such an emergency might be as follows. Assume that an organized agency had never experienced a lay-off and therefore their memorandum of agreement did not address lay-offs. Assume further that an accounting error has caused

the agency to be thousands of dollars over budget necessitating immediate action. In such a case, the examiner believes that good faith emergency action would be warranted. Very obviously, any such action would still be judged on its own individual merits but it is reasonable to assume that truly good faith actions in response to an emergency would be held by the Board to be valid and lawful.

The Respondent in this matter, however, takes the position that K.S.A. 75-4326 provides a much broader meaning. Read in total, that section of the statute 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 and 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 on."

That section of the statute must be read in concert with the sections of the act dealing with employee rights and the obligations placed on the employer when the employees have exercised those rights. Of particular note are sections 75-4321(b) 75-4324 and 75-4328.

A narrow interpretation of the managements rights portion of the act could disqualify virtually anything from the heading of a mandatory subject of bargaining. Similarly, virtually anything could be proposed by the employee organization in a

manner that would translate into one of the enumerated "conditions of employment" listed in the act. Recognizing that fact, the Public Employees Relations Board has adopted what has been referred to as a "balancing test" in order to determine the negotiability of proposals.

As the Respondent has correctly noted, the test as first explained in PERB case number 75-CAEO-1-1982 between the Kansas Board of Regents and the Pittsburg State University chapter of KHEA stated that if an item is substantially related to an express condition of employment, and if negotiating the item does not unduly interfere with management rights, the item is mandatorily negotiable. In the adoption of the test, the Board recognized the employer's continuing right to manage and direct the agency, and further to do so free from the restrictions inherent in bargaining. For example, K.S.A. 75-4326(b) clearly gives the employer the right to hire, promote, demote, transfer, assign and retain employees in positions within the public agency. Translated into practice, assume that the employer has decided to completely change the mission and work of a particular department. It might be necessary to hire some new employees with new skills. It might be possible to promote others, while job duties and responsibilities of others may diminish warranting demotions. Still others might need to be transferred or assigned to the new department and finally, the employer may retain yet others as deemed appropriate.

The decision to accomplish the above listed activities

remain in the hands of the employer. It cannot be denied, however, that those activities have the effect of dictating certain conditions of employment rather than simply being "related to an express condition of employment". For that reason, it also cannot be denied that some part or portion of the activities are mandatorily negotiable. It would appear then that one subsection of the act serves to make nearly anything negotiable while another subsection appears to reserve nearly everything to the discretion of management. That apparent inconsistency has caused much confusion through the years to employers and employee organizations alike. It is, in fact, at the very heart of the instant complaint. The balancing test developed by PERB is the answer to this apparent inconsistency in the act. And with the application of the "test" the apparent inconsistencies cease to exist. The right of the employer to decide <u>that</u> certain actions should be taken to meet the agencies goals remains intact. The determination of <u>how</u> those actions are to be taken is subject to bargaining. Returning for a moment to my earlier example, assume that the employer decides the new department should be staffed by means of promotions. That is solely the employers decision to make. A promotion, however, clearly changes one's salary or wages. Promotional procedures, therefore, are a mandatory subject of bargaining and could include the requirements one must fulfill to qualify for a promotion, to apply for a promotion, the amount of time a promotional opportunity must be posted, and potentially a

multitude of other facets of the promotional procedure. There can be no doubt that the legislature intended public managers to manage their respective public agencies but it is equally clear that they intended public employees to enjoy stability in their place of employment. To meet that end, the legislature has mandated a communications tool designed with the express purpose of stabilizing the work force through the attempted joint resolution of grievances and disputes relating to conditions of employment. In the view of this examiner, the duty to bargain in good faith over enumerated conditions of employment interferes in no way with management's right to manage. The parties are charged by law to do their best to reach agreement over conditions of employment with the direction of the agency reserved to the public employer. It is illogical, however, to assume that the obligation to discuss conditions of employment ceases with the limited list appearing in a memorandum of agreement. To adopt such an interpretation ignores the realities of the bargaining process and surely runs contrary to the statutory goals of cooperation and harmony. Under such an interpretation an unscrupulous employer could consistently refuse to agree or to reduce an agreement to the form of a memorandum of agreement, and then alter any such unstated condition of employment on a daily basis with complete impunity. The examiner is totally unable to imagine such a legislative intent.

In addition, the employment, and necessarily the conditions

of employment applicable to the employees, exists before the employee organization comes on the scene. Every request to negotiate, therefore, is a request to negotiate a change in a condition of employment. For example, assume an employer even had no policy in regard to lay-offs. If the union notices up lay-offs for negotiations it would actually be seeking a change from indiscriminate lay-offs to lay-offs that follow a structured predictable pattern. In the instant case, the dispute exists over the employer's obligation to meet and confer over conditions of employment which are not reduced to, or contrary to a memorandum of agreement. K.S.A. 75-4328 places no limits on mandatory "conditions of employment" over which an employer must meet and confer nor does the definition of meet and confer found at K.S.A. 75-4322(m) impose such limits. As a final indication of legislative intent, K.S.A. 75-4322(u) lists a "traditional work practice" as a grievable item. It is, therefore, necessary to first understand that a "traditional work practice" is a condition under which one is employed and which has become the accepted norm because of its historical use. It is important in defining a traditional work practice to make a distinction between a "condition of employment" as that term is defined by the act and a "condition under which one is employed". Statutory "conditions of employment" are the mandatory subjects of bargaining over which one must negotiate. "Conditions under which one is employed" could include those terms which are subject to mandatory bargaining as well as those

terms which are established pursuant to management's rights. Since the legislature has seen fit to enumerate management's rights at K.S.A. 75-4326 and further has precluded those management rights from inclusion in a memorandum of agreement at K.S.A. 75-4330, it seems clear to the examiner that the traditional work practices established pursuant to management's rights are similarly not grievable. The only traditional work practices which would be grievable under the language of K.S.A. 75-4322(t) would, therefore, be those which exist relative to statutory "conditions of employment". Any other interpretation renders meaningless the reference to "traditional work practices" at K.S.A. 75-4322(t). If the ability to change a traditional work practice without benefit of bargaining was intended by the legislature to be a management right, it certainly would not be listed as a grievable subject. Management rights only become grievable when they are included in a contract of employment as a negotiated provision, and as stated earlier, those rights are precluded from inclusion in the employment contract by the provisions of K.S.A. 75-4330(a)(3). The examiner concludes, therefore, that since the legislature makes past practices which are not addressed in a memorandum of agreement grievable, no change in those practices may precede their full negotiation. One might argue that the requirement to negotiate in some way hampers the operation of the agency through imposition of a time consuming bargaining process. The examiner, however, wishes to remind the parties that negotia-

tions may be commenced at virtually any time, and further, that emergency situations may be dealt with without benefit of bargaining. Legislative intent, therefore, is only met by bargaining over past practices before those practices are changed.

Based on all the foregoing, it appears clear to the examiner that once the employees are represented by a "recognized employee organization" the statute mandates exhaustion of the meet and confer process prior to the establishment or change in any "condition of employment" whether that conditions appears in a previous memorandum of agreement or not. It further appears to the examiner that the above conclusion is the only one which would serve to fulfill the stated statutory intent of the development of harmony and cooperation between public employers and their employees through full communication regarding grievances and disputes relating to conditions of employment. And finally, it appears to the examiner that the only exemption from the above stated requirement to bargain would be during those times when emergency conditions would dictate immediate actions to fulfill the mission of the agency.

It is therefore the finding of the examiner that the act mandates the exhaustion of the meet and confer process over all "conditions of employment" as defined at K.S.A. 75-4322(t) prior to their unilateral change, except, in cases of emergency where delay would prohibit fulfillment of the mission of the agency.

It is so ordered this 18th day of MAY, 1989.

Paul K. Dickhoff, Hearing Examiner