

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS

Kansas State Troopers Association, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 75-CAE-6-1990  
 )  
Kansas Highway Patrol, )  
 )  
Respondent. )  
\_\_\_\_\_ )

INITIAL ORDER

I. Appearances

Jeffrey L. Collier, President, Kansas State Troopers Association, Route 1, Box 139, Fort Scott, Kansas 66701, for Petitioner.

Adele Ross Vine, #10115, Department of Administration, 900 Jackson #107, Topeka, Kansas 66612, Attorney for Respondent.

II. ISSUES

Did Respondent violate K.S.A. 75-4333 (5) by refusing to meet and confer on:

1. Should automatic weapons be considered "wearing apparel" pursuant to K.S.A. 75-4322(t) and thereby be a mandatory item to meet and confer?

2. Is the troopers "Bill of Rights" a mandatory subject for meet and confer? The Bill of Rights topics are:

- # 1 Polygraph Examination
- # 2 Electronic Surveillance
- # 3 Right to Sue for Abridgment of Civil Rights
- # 4 Investigatory Interview of Employee (A-P)
- # 5 Criminal Investigation
- # 6 Conclusion of Investigation

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- # 7 Written Memoranda
- # 8 Line-up
- # 9 Compulsory Statements
- #10 Representation of Counsel during Investigations
- #11 Representation in Civil Investigation
- #12 State/National Constitutional or Statutory Rights
- #13 Political Activity
- #14 Conduct toward Superiors
- #15 Limitation for disciplinary action (90 days)
- #16 Complaints Against Supervisors

III. PROCEEDINGS BEFORE THE BOARD

1. Petition filed August 24, 1989.
2. Answer filed September 13, 1989.
3. Pre-hearing conference held November 14, 1989.
4. Stipulations of Fact received January 5, 1990.
5. Petitioner and Respondent's briefs filed January 16, 1990.
6. Reply Briefs of Petitioner and Respondent filed February 1, 1990.
7. Receipt of Exhibit 1 attached to Stipulations of Fact on March 8, 1990.

IV. FINDINGS OF FACTS

Findings 1-12 are the parties stipulated facts

1. The Kansas Highway Patrol (KHP) is a state agency as defined in K.S.A. 75-4322.
2. The Kansas State Troopers Association (KSTA) is an employee organization as defined in K.S.A. 75-4322.

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ceases 3. On or about July 8, 1982, the KSTA was certified by the Public Employee Relations Board (Case No. 75-UDC-2-1982) as the exclusive representative of all employees of the agency in the permanent status of Trooper.

4. That on April 26, 1989 the KSTA sent via U.S. Mail, notice of their desire to meet and confer to the KHP.

5. On May 25, 1989 the KSTA and the KHP began meet and confer sessions for the purpose of amending the current memorandum of agreement, then in effect.

6. The KSTA offered several proposals, two of which were the "Troopers Bill of Rights" and "Equipment".

7. Meetings between the KSTA and the KHP for the purpose of meeting and conferring were conducted on May 25, June 19 and 20, and July 20 and 21, 1989.

8. That on July 21, 1989, meet and confer proceedings ceased due to the position of the KHP that the "Troopers Bill of Rights" and "Equipment" were not subjects of mandatory negotiations under the definition of "Conditions of Employment".

9. The KHP has a new policy (implemented 3-01-89) called an Employee Conduct Complaint procedure which is utilized for the agency's internal investigations. The investigations are based on complaints brought by agency employees or other persons. The procedures to be followed in completing internal investigations based on complaints are contained in the KHP Manual of

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Administrative Operations and Procedures, Volume 1, Article V, Section 10 (copy attached and incorporated herein).

10. That on August 22, 1989, the KSTA filed a complaint with the Public Employee Relations Board alleging bad faith on the part of the KHP in failing to meet and confer in good faith regarding the proposals of "Troopers Bill of Rights" and "Equipment".

11. That on November 14, 1989 at a pre-hearing conference, it was determined that the two issues before PERB would be as follow:

A. Should automatic weapons be considered wearing apparel" pursuant to K.S.A. 75-4322(t) thereby being a mandatory item for meet and confer?

B. Is the Trooper's Bill of Rights a mandatory subject for meet and confer under the Public Employer-Employee Relations Act?

12. This complaint is properly before the Public Employee Relations Board for a decision.

13. That Petitioner and Respondent are the proper parties in this dispute.

14. Petitioner's agents are members of the classified service, and subject to the Kansas Statutes concerning the Civil Service Board. K.S.A. 75-2949.

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V. DISCUSSION AND DECISION

A. This hearing officer concludes as a matter of law that automatic weapons are not wearing apparel pursuant to K.S.A. 75-4322(t), and concludes the proposal concerning weapons is not a mandatory item for the meet and confer process. My rationale for the conclusion includes:

a) Weapons are not listed as a separate item in K.S.A. 75-4322(t).

b) Weapons are not considered "wearing apparel" when using the common definition and usage of the term. Rogers vs. Shannahan 221 Kan. 221, at 223, 224; 565 P2d 1384 (1976)

c) The firearm used by State Troopers has traditionally been a management prerogative. Management may have several reasons to utilize a particular firearm, including budgetary & safety factors.

d) Even assuming that Respondent met and conferred in the past concerning automatic weapons the law is clear that:

1) "Either party may bargain about a permissive topic as if it were a mandatory subject without losing the right, at any time before agreement is reached, to take a firm position that the matter shall not be included in a contract between the parties..." Developing Labor Law Chp. 18, 2d Edition, Vol. I, p. 847.

2) Neither party has a duty to meet and confer on permissive subjects of bargaining.

3) A permissive subject of bargaining is not transformed into a mandatory subject by inclusion in a prior agreement. Columbus Printing Pressmen 543 F 2d 1161, (Ill. 1976)

e) K.S.A. 75-4326(d) and (g) allows management to retain its traditional rights to maintain the efficiency of

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governmental operations; and determine the methods, and means by which operations are to be carried on.

f) The "balancing test" of Kansas Board of Regents v. Pittsburg State Univ. Chapter of K-NEA. 233 Kan. 801 (1983) is not applicable to the issue of automatic firearms being mandatorily negotiable.

g) Even if the "balancing test" were proper, I conclude the weapon proposals unduly interfere with management rights to determine the methods and means of operations.

To hold otherwise would allow the Troopers to personally purchase and carry automatic weapons.

BILL OF RIGHTS

INTRODUCTION

The concept of KSTA "Bill of Rights" (attached hereto as Exhibit 2) is not a novel concept. Troopers, like other professions, have lobbied for legislative recognition of their particular employment issues. Several legislatures have passed additional procedural rights for police officers (California, Indiana, Florida, Rhode Island, Maryland). The legislative rights have included notice of impending charges, explicit self-incrimination warning, and to see evidence during the course of an investigation.

The Kansas legislature has not passed a Troopers "Bill of Rights". The determination of the topics being "mandatory subjects of bargaining" must be answered through a review of the Kansas Public Employer-Employee Relations Act. K.S.A. 74-4321 et seq.

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(PEERA), and how PEERA is affected by the Kansas statutes and constitution.

Both parties argue that the Pittsburg supra, "significantly related balancing test" is the applicable law to determine whether any of the 16 proposals are mandatory subjects of bargaining.

Respondent argues that the Board should review the 16 proposals as one. Petitioner argues that the Board should review the proposals individually. I agree with Petitioner and have reviewed the proposals individually by topic, before deciding each proposal. For the purpose of brevity I will discuss the investigative topic in one conclusion of law.

The factual background of this dispute concerns a recently implemented management policy for KHP investigating KSTA members. Evidently, troopers are individually, without counsel, summoned before a three (3) member tribunal of supervisors for questioning. The Troopers are allegedly not given advance warning of the subject or scope of the questioning. A basis for discipline may be found before this Board, and allegedly the individual is not given an adequate opportunity to prepare and present his version of the case.

KSTA wishes to mandatorily bargain for a "Bill of Rights" that would have management agree to the "procedural aspects" of managements investigations. Hence the 11 articles (and 15 sub-

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articles) concerning the procedural aspects of the investigative process.

KSTA argues that Pittsburg, at 824 is applicable to the instant proposals. In Pittsburg "retrenchment and discipline" procedures were held to be mandatorily negotiable, while the decision to lay-off or reduce the number of professors was held to be management's sole prerogative.

KSTA requests this Board to rule its Bill of Rights is similar to Pittsburg's proposals, and hold the procedures for investigations mandatorily negotiable.

KSTA also argues that the investigation is the precursor to the discipline, which effects salaries, wages and hours of work. Step 1, the investigation, effects the decision to discipline, Step 2 and 3 the implementation of discipline. So Step 1 significantly impacts salaries, wages and hours of work. Hence, all procedures are mandatorily negotiable.

KHP replies that: 1) hiring, firing, promoting, and demoting are management rights by statute and practice. (K.S.A. 75-4326)

2) The management employee conduct complaint procedures protects the employees from false accusations and affords them due process, and grants employee uniformity in disciplinary actions.

3) In 97% of the approximate 229 cases no disciplinary action was taken or proposed against the individual trooper.



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4) Internal management procedures are not used to determine whether to initiate discipline. (However uniform discipline is one of its stated purposes). The procedures that management devises to initiate discipline are management's sole prerogative.

5) The procedure complained of is used to gather data for a variety of purposes, not all of which is involved with trooper discipline. Management uses the information to assess the effectiveness of its policies, training methods and supervisory needs.

Both parties agree that the issues are ripe for a decision by this agency.

I conclude, as a matter of law that each proposed topic, with the exception of 4 and 10 (in part) involving right to counsel, involves permissive topics of bargaining and therefore are not mandatory topics of bargaining.

My rationale for the conclusion includes:

1) The investigation authority of management is implicitly reserved to management in K.S.A. 75-4326.

2) The topics of negotiation concern managements decision to effect a condition of employment through a suspension or discharge, with proper cause. The Kansas Civil Service Act, not any balancing test, allows management to investigate possible discipline.

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3) Procedures for resolving proposed disciplinary actions of management are not mandatorily negotiable under the Pittsburg test, but are preempted by the legislatively enacted Kansas Civil Service Act, K.S.A. 75-2935(2) for classified employees.

4) That the legislature specifically mentioned KSTA representation at K.S.A. 75-4321(b).

5) That Kansas Statutes preempt several of the topics.

I will now set forth a synopsis of the Employee Conduct Complaints (ECC), with emphasis added.

B. SYNOPSIS OF EMPLOYEE CONDUCT COMPLAINTS

The ECC (attached hereto as Exhibit 1) has a stated purpose of implementing a fair and effective employee conduct complaint process as place are held to higher standards of conduct than the average citizen, the KHP can be held liable for failing to take corrective measures in circumstances where the agency knew or merely should have known, that a citizens Civil Rights were being violated through the actions of its employees.

Uniform documentation of all allegations of employees conduct addresses the aforementioned legal concerns, and serves to increase public confidence in the agency's actions; it also protects the agency's employees from false accusations and afford them due process; provides citizens with an avenue for redress of legitimate

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grievances; identifies policy failures, training needs, supervisory needs, and uniformity in disciplinary actions.

The policy concerns investigation of police conduct, criminal violations, civil rights violations, false arrest, search and seizure, use of excessive force, use of force, competency and efficiency, arrest and charge, use of weapon, and any other form of alleged misconduct. (See III of Exhibit 1).

The policy allows employees to be notified in writing, of the allegations against them. Notification of a pending investigation shall not be required when such notification would jeopardize or hinder the investigation. The employees are notified of the results of the investigation as soon as practicable.

The investigation process is initiated in order to determine the validity of the complaint, and to gather information for defense of the agency and its's employees should civil litigation result, and is related to the performance in the officer's official duty and fitness for office. (See Paragraph C, No. V of Exhibit 1). Employees are entitled to all rights and privileges guaranteed by the laws and Constitution of Kansas, and the Constitution of the United States.

Employees who are involved in the investigation may be required to file statements; testify at administrative hearings' and submit to medical or laboratory examinations', blood, breath, or urine examinations (Pursuant to K.S.A. 75-4362; psychological

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examinations; polygraph examinations, if the allegation is of a serious nature and all other investigative leads have failed to produce a preponderance of evidence, which would either prove or disprove the allegation, employees may not refuse to submit to a polygraph examination when so ordered by the Superintendent and the investigation is used for administrative purposes but may refuse to take the polygraph test, of which no inference will be made, submit financial disclosure statements, participate in a lineup, and be photographed.

Failure to comply with and complete any of the requirements constitutes insubordination on behalf of the involved employees. [Insubordination is grounds for dismissal, demotion, or suspension, pursuant to K.S.A. 75-2949(f) (1).]

Section 5 (e) of Exhibit 1 states that the employee interview shall be conducted while the employee is on duty during normal working hours, whenever possible; shall be in private; and the employee shall not be afforded representation in an administrative fact finding investigation.

Paragraph 5 (f) of Exhibit 1 states that interviews conducted in conjunction with investigations of a serious nature shall be tape recorded.

Troop commanders who are conducting the investigation shall not offer disciplinary recommendations.

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Paragraph 6 of Exhibit 1, states that upon completion of the investigation and review by the superintendent the allegations shall be held, sustained; not sustained; unfounded; exonerated, or misconduct not alleged in the complaint but supported by facts determined during the investigation may be found.

No. VII of Exhibit 1 states that confidentially shall be met at all times and the investigation shall be merely accusations and all contents of the investigation file shall be regarded as confidential and be treated accordingly. It shall not be released without written authorization of the superintendent.

C. Analysis of the Proper Law to Be Applied  
To Each Topic.

PROCEDURAL DUE PROCESS

The critical fact of this case, which distinguishes this case from Pittsburg, is that KSTA members are members of the classified service, and are covered by the Civil Service Act K.S.A. 75-2925 et seq.

The Pittsburg Teachers were not members of the Civil Service. The Supreme Court noted the distinction in granting the unclassified Pittsburg teachers the right to bargain discipline procedures utilizing the balancing test. (See Pittsburg at p. 827). The Pittsburg employees were not covered by Kansas legislation concerning the pre-termination or pre-discipline due process of the Civil Service Board.

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KSTA members are classified employees. They are protected and limited by several statutes which cover their rights, after management has made the decision to discipline. K.S.A. 75-2949 - 2949(f). These rights are commonly referred to as procedural due process.

Procedural due process is a constitutional right of employees who have a property interest in continued employment. The property rights are created by statutes, rules and regulations which limit the ability of the employer to take disciplinary action except for cause or just cause. (K.S.A. 75-2949 - 2949(f); K.S.A. 75-4326 (c) and (e)).

The common law of administrative due process provides that "an employee who is to be disciplined or discharged, is entitled to certain basic procedural rights at all stages prior to, during, and subsequent to administration review." See Silver Public Employee Discharge and Discipline, Wiley Publications, 1989, § 7.3 p. 7-13 to 7-19.

The due process need not be elaborate. The principle of notice and a minimal opportunity to respond reflect the practical truth that the best opportunity to convince an employer either that one is innocent or that discharge is excessive arises before action is taken. The notice requirement usually requires inclusion of such basic information as the date, place and nature of the

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misconduct alleged, and agency rules violated. (Silver, p. 7-13 to 7-19)

The administrative due process, is what the KSTA policy refers to at § I (B) (2) when it states one of its purposes is to afford due process. The KSTA proposals concern topics of due process at proposals 4-10, 12, and 15.

In broad terms, I have concluded (as a matter of law) that most of those topics are, not mandatorily negotiable because:

1) The rights to due process, are constitutionally protected rights. K.S.A. 75-4322(f) states, "nothing in this act shall authorize the adjustment of such matters which have been fixed by statute or constitution of this state."

2) The ECC policy cannot, by its own terms, abridge the rights and privileges guaranteed by Kansas laws, or State and Federal constitutions. If the State abridges an employees rights, he has access to the Civil Service Board or courts for redress.

3) The cases which awarded substantial damages to Kansan employees, and acknowledge their right to redress, specifically mention the error of the State, in not following the legislatively enacted Civil Service Act rights. (See Kansas Dept. of SRS vs. Goertzen 245 Kan 767 (1989); Parker vs. KNI 12 KA 685, 687 (1989); Derstein v. Benson 714 F Supp. 481 (1989);

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4) The legislature gave KHP, through the auspices of the Civil Service Act; the right to set the terms and conditions upon which state discipline is warranted. K.S.A. 75-2949.

5) The KSTA's procedural due process rights come from the state's own rules and regulations. Therefore it is inconsistent to allow the KSTA to negotiate their rights.

6) Management may allow KSTA to negotiate the topics as permissive topics.

7) The ECC policy appears to be promulgated by the Kansas Legislature, for classified employees, at K.S.A. 75-3747. See also K.A.R. 1-10-7. While the policy is not specifically set forth in the Kansas Administrative Code, it appears the policy was at least inferentially conferred to KHP by statute.

8) When discussing mandatory - permissive issues, I conclude that the PEERA Board must look to the classification of the employees, when construing the PEERA statutes. Non-classified employees, such as Pittsburg, are allowed a wider range of mandatory topics, under the balancing test, because the Legislature has not enacted statutes covering those topics of bargaining. Classified employees have more statutes concerning them, and thus have less of the balancing test, and more topics are statutorily preempted. Local government and city employees have rights consistent with their statutory scheme. See Gorham vs. Kansas City, 225 Kan. 369, 590 P2d 1051 (1979), in which city police



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officers were deemed to have collectively bargained away their due process pre-termination hearing rights.

9) Several topics sought to be mandatorily negotiable are covered by Kansas Statutes concerning polygraphs, electronic surveillance, and political activity. Such topics are not negotiable, because the agreement may not alter subjects preempted by state law (K.S.A. 75-4330(a).)

DISCUSSION OF EACH TOPIC

**Topic #1. Polygraph - Non-Mandatory K.S.A. 75-744(e)**

The polygraph portion of the ECC policy is ambiguous, inconsistent and confusing. However, as a topic of collective bargaining I conclude same is a permissive subject of bargaining, as the legislature has directly addressed the topic.

The ECC polygraph policy, as written is duplicitous as it refers to insubordination if a Trooper refuses to take the test, but also states no conclusion will be based upon the results, refusal or consent to take the examination. The policy states that the polygraph will be utilized only when a serious offense is alleged, and all investigation leads have failed to produce a preponderance of evidence. Yet it states no conclusion will be based on the results.

The Kansas Legislature in K.S.A. 75-740 (L. 1987) established the Kansas Board of Polygraphists. The legislation set the procedure for taking a polygraph which includes: 1) That the

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taking of the exam is a voluntary act. K.S.A. 75-744(a) (1). This section is significant because the polygraph authorities are in general agreement that the voluntariness of the test is the first consideration for the optimum accuracy of the test. See Bailey & Rothblatt, Investigation and Preparation of Criminal Cases, Bancroft-Whitney 1970 § 370 p. 292-298.

The Kansas Legislation has also stated at K.S.A. 75-744(e):

"Nothing in this section shall be construed to prevent the use of polygraph examination by a law enforcement agency in connection with non-criminal investigation or other inquiries involving officers or employees of that agency or shall this section be construed as a basis or authority for any such officer to decline or refuse to participate in a polygraph examination."

In non-criminal investigations the law arguably requires a Trooper take a polygraph test.

In criminal investigation the law is clear that, absent stipulation of the parties, no Trooper need take the polygraph. State vs. Lassely 218 Kan. 758 (1976) 29 Am Jur 2d Evidence § 831, p. 923; State vs. Hammond 245 Kan 450 (1989), State v. Green 245 Kan 398 (1989).

The Legislature has directly spoken to this topic and the PERB Board must follow the legislative mandate.

**Topic #2 Electronic Surveillance - Non-Mandatory - criminally covered by Kansas and Federal Constitution and Statutes; civilly covered by ECC policy.**

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The topic of electronic surveillance is adequately covered by State criminal statutes concerning wiretapping, see K.S.A. 21-4001; see also Title II of the Omnibus Crime Control and Safe Street Act 18, USCA § 2510 et seq., which provides the minimum standards against which state or federal interception of communication and their use must be judged. See also State v. Mally 8 KAN. App 2d 553; (KAN App. 1983); the 4th Amendment to the U. S. Constitution; and Article 15 of the Kansas Constitution.

Concerning civil matters relating to electronic surveillance, there is no evidence of same being conducted by KSTA. There are no K.A.R. sections relating to wiretapping and nothing in the Civil Service statutes of the state concerning same.

The general rule was that even illegally obtained evidence may be used in a disciplinary proceeding. Pr. Social Service Union v. Commonwealth Bd. of Probation & Parole 95 PA Commo 461, 508 A 2d 360 (1986).

However, the U. S. Supreme Court in O'Connor v. Ortega, 480 U.S. 709 (1987) held, in a plurality decision that 4th Amendment rights applied to "private property" in the work place, under a balancing test applied on a case by case basis. I do not speculate how the Kansas Supreme Court would rule when considering the same issue, however, that decision will be based on the particular facts, if and when, it arises.

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Since, the wiretapping - electronic surveillance issue, concerns constitutional rights guaranteed by the ECC, I will conclude it is a permissive topic of collective bargaining. I conclude the legislature protected both parties from this potentially unconstitutional activity, when it stated at K.S.A. 75-4322 (t), that the constitution of the State of Kansas is not a topic for collective bargaining.

**Topic #3 - Right to Sue - Non-Mandatory**

Both parties have all of their constitutional and common law statutory rights to sue, defend, or claim immunity for any action.

This topic is one which the parties may waive, if collectively bargained, see Gorham, supra. However, the policies of state employees bargaining under the PEERA does not contemplate either party being forced to mandatorily bargain access to the Courts.

**Topic #4 Investigatory Interview**

The topics in this section are matters which most closely resemble the Pittsburg topics.

The application of the Pittsburg test would allow KHP to set policy, and KSTA to mandatorily bargain procedures, if the topics would not unduly interfere with management rights.

At the investigatory stage, KHP has the right and duty to conduct a fair investigation. KSTA has valid concerns if their members are not given adequate notice and a right to respond. KSTA

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wishes to negotiate a procedure which they feel give them adequate notice and a right to respond.

After considering the evidence, arguments, and applicable statutory and case law, I conclude that the topics are not mandatorily negotiable, with the exception of KSTA's right to have a representative or counsel present during the investigation or administrative hearing stage of the process.

My rationale for allowing counsel includes:

1) K.S.A. 75-4321 (b) states:

"(b), 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 organizations in their employment relations and dealings with public agencies.

2) I find the legislature meant what it stated, and find their statement a strong inference of public policy for KSTA's position. At a minimum, PEERA allows representation of KSTA's choosing to the employee in his dealings with KHP.

3) I do not agree with KHP that the ECC policy is solely an administrative fact-finding process. The "facts" are delivered to the Superintendent who may immediately suspend, demote or discharge

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an employee based on the "facts". The policy itself repeatedly refer to potential disciplinary action.

(The KHP argument that only 2.9% of the cases investigated have been found to warrant discipline, is taken at face value.)

The last statutory phrase

"be represented by such organization in their employment relations and dealings with public agencies."

logically includes all matters of employment. The presence of representation will not unduly hinder management rights to conduct a fair and effective complaint process.

4) Any other employee of the State has the right to retain and be represented by counsel concerning his civil service employment.

5) The KSTA member is in a position to know the seriousness of the charges either after notice from KHP, or based on his recollection of the events. The employee, at that time, will have to make his decision to seek KSTA representation. Representation is one of the reasons why individuals join employee organizations.

My rationale for not allowing KSTA to mandatorily negotiate the procedures are:

1) The KHP has a duty to conduct investigations for a myriad of reasons (See ECC §3).

2) The KHP may not know the full scope of the investigation, when it begins.

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The KHP hands should not be tied by procedural conditions in a collective bargaining agreement in fulfilling its legislative obligation to the citizens of Kansas.

3) The ECC policy by its terms to affords the KSTA due process.

4) The purpose of administration due process is to afford both parties an opportunity to quickly and efficiently resolve the matter under investigation as both parties have an interest in doing so.

5) K.A.R. 1-10-7 specifically refers to the investigation conducted by the KHP. The Legislature has by statute and regulations confirmed the rights to investigate to management. (See also K.S.A. 75-3747 implementing K.S.A. 75-2949).

6) The legislative scheme has directed the KHP and Department of Administration to conduct investigations covering employee complaints.

**Topic #5 Criminal Investigation: Non-Mandatory - except for the presence of counsel.**

I conclude that KSTA members have their constitutional rights protected, by the terms of the KHP procedures.

KSTA members have no right to bargain for additional procedural or substantiate rights, just as the KHP may not abridge the constitutional rights of the KSTA and its members.

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The KHP and KSTA have equal right and access to counsel during any criminal or civil investigation.

**Topic #6 Conclusion of Investigation**

The KHP policy already provides for notification of the results of the investigation (See § 1V C.)

I conclude this topic is non-mandatory as :

- 1) the investigation is an obligation of KHP pursuant to Federal and State laws and regulations K.S.A. 75-3747,
- 2) the investigation may continue for whatever period of time that KHP determines is necessary to effectuate the purposes of the investigation.

**Topic #7 - Written Memorandum - Non-Mandatory**

The ECC process contemplates the ability of the KSTA member to give his version of the facts, in writing, or to submit, any evidence which he deems pertinent. [§ V(6)(3)(L)], where the policy references any other related materials, evidence, etc.: and at § V (D) when it states employee may be required to file statements....

The investigated employee has not relinquished the right to write his version, at any stage of the proceedings.

**Topic #8 Line-Up**

The constitutional requirements of line-up procedures for criminal matters is not at issue in KSTA's proposal. Therefore it need not be addressed as a topic.



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KSTA wishes to bargain line-up as a condition of employment. I conclude that management has the right to require an employee stand in a line-up, if management believes a line-up is necessary for its fair and effective employee conduct complaint process.

**Topic #9 Compulsory Statements - Garrity Rule Non-Mandatory -**

The Kansas Court of Appeals, in an unpublished opinion, recently upheld the Garrity Rule in certain instances. (See State of Kansas v. Hough, et al. #63,834, filed 3-2-90, unpublished)

Under the appropriate facts and circumstances the Garrity Rule is applied in Kansas. There is no obligation to negotiate constitutionally protected rights.

The particular facts and circumstances of Garrity v. New Jersey 385 U.S. 493, 496, 17 L. Ed 2d 562, 87 S. Ct. 616 (1967) concerns a situation whereby law enforcement officers faced disciplinary action for failure to make an incriminatory statement. Any statement then made becomes involuntary, because the officer has been denied the constitutional right to refuse to answer. See State v. Mzhickteno 8 Kan App. 2d 389, 658 P 2d 1052 (1983), wherein the Court of Appeals held the threat of disciplinary action rendered the statement involuntary. (Similar to the threat of insubordination at § V. (D) of the ECC)

However, like other constitutional issues discussed herein, the Courts, Civil Service Board, or grievance procedures negotiated

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by KSTA and KHP, will determine who is correct in applying the constitutional rights.

**Topic #10 Representation - Mandatory - but limited in scope**

This topic was not numbered in KSTA's proposal, but must be treated separately for discussion herein. (I have numbered this topic §10, and numbered the subparagraphs 1-6. I have borrowed #1, 2, 3 from what was previously §9, for ease of discussion.)

I conclude that since PEERA contemplates representation in employment relations, that the presence of counsel or a representative is consistent with the entire legislative scheme of PEERA and the CSB actions.

As counsel to DHR, I am aware of the common practice of allowing any employee of the state access to counsel, at any employer-employee stage of proceedings.

I conclude that the presence of counsel will not hinder the KHP in its investigation of serious employer-employee matters, that do not reach the level of emergency action.

I conclude that a brief delay for counsel to be present during questioning will not hinder management's rights to make a full and adequate investigation.

The presence of counsel might actually resolve many issues as KSTA employees will be hard pressed to claim inadequate or unfair questions.

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Counsel may record the investigation to insure the accuracy of questions and answers statements made.

**Topic #11. Representation in Civil Litigation - Non-Mandatory**

This topic is not one normally bargained for.

The decision for representation or non-representation in civil litigation is best left to KHP, after the investigation is conducted.

**Topic #12. State, National, Constitutional and Statutory Rights**

This topic is non-mandatory; Neither KHP or KSTA may deny the other their respective constitutional or statutory rights.

**Topic #13 Political Activity**

K.S.A. 74-2113(e) and 75-2953 refer to and set forth the statutory guidelines for protected political activity.

The Kansas Constitution Bill of Rights § 11 will regulate KSTA members freedom of speech. § 11 states in part,

"all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights..."

**Topic #14 and Topic #16 Conduct Towards Supervisors and Complaints Against Supervisors.**

The conduct toward supervisors topics is governed by the Civil Service Board, and not subject to collective bargaining.

As to complaints against supervisors, the ECC policy appears to be an available proper procedure to present complaints against supervisory employees of the KHP.

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**Topic #15. Limitation - Non-Mandatory**

KHP does not have an obligation to limit its investigation in scope or time. Even though the ECC policy states "complaint investigation shall be completed within 30 days from the date the investigation is assigned" § V. (C). The obligation of the state to its employees, and the citizens of Kansas, is a continuing one. An investigation may have to be reopened 2 years after it was concluded. New facts may be alleged or found then, which allows the KHP to re-initiate their due process complaint investigation procedure.

Entered in Topeka, Kansas this 11 day of April,  
1990.

This is an initial order of a presiding officer. It will become a final order fifteen (15) days after service unless a petition for review is filed with the Public Employee Relations Board in accordance with K.S.A. 77-527.

  
\_\_\_\_\_  
William J. Pauzauskie, Presiding Officer

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CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Secretary III for the Department of Human Resources, hereby certify that on the 11th day of April, 1990, a true and correct copy of the above and foregoing Initial Order was deposited in the U.S. Mail, first class, postage prepaid, addressed to:

Jeffrey L. Collier, President  
Kansas State Troopers Association  
Route 1 - Box 139  
Fort Scott, KS 66701

Adele Ross Vine, Counsel  
Kansas Department of Administration  
Legal Section  
Landon State Office Bldg.  
900 Jackson - Room 107  
Topeka, KS 66612

Cpt. Don Brownlee  
Kansas Highway Patrol  
122 SW 7th Street  
Topeka, KS 66603

Donald L. Pickert, Superintendent  
Kansas Highway Patrol  
122 SW 7th Street  
Topeka, KS 66603

Chuck Mason, Personnel Director  
Kansas Highway Patrol  
122 SW 7th Street  
Topeka, KS 66603

Gary D. Leitnaker  
Director of Labor Relations  
Kansas Department of Administration  
Landon State Office Building  
900 Jackson - Room 951-South  
Topeka, KS 66612

  
\_\_\_\_\_  
Sharon L. Tunstall

- b. In the event an agency supervisor is unavailable to receive the complaint, the employee talking to the complainant shall obtain their name, address, and telephone number and inform them that an agency supervisor will contact them as soon as one is available.

- (1) Information regarding the complainant shall be forwarded to an agency supervisor for reply.

- 2. The completed Employee Conduct Complaint form and any related information shall be forwarded to the affected employee's troop commander or section supervisor, whichever is applicable.
  - a. Routing of the form and any subsequent investigation of the allegation shall be accomplished as prescribed in subsection V.

- C. Complaints in which the complainant requests no investigation or further action by the agency shall be noted as such on the Employee Conduct Complaint form, HP-161.

- 1. An investigation will normally not be conducted in these instances.

### III. COMPLAINT ASSIGNMENT AND CLASSIFICATION

- A. Complaints of a serious nature which, if substantiated, have a high probability of resulting in disciplinary action consisting of suspension, demotion, or dismissal shall immediately be forwarded by the troop commander to the Superintendent for review and assignment. The Superintendent shall determine whether or not the seriousness of the allegation warrants referral to the Professional Standards Section. Examples of complaints which shall be forwarded to General Headquarters include, but are not limited to:

- 1. Criminal violations
  - 2. Civil rights violations such as false arrest, search and seizure, etc.
  - 3. Use of excessive force

- B. Complaints of a less serious nature regarding an employee's attitude, language, or manner in which a particular situation was handled shall be investigated at the troop level.

- 1. The troop commander of the affected employee(s) shall assign a troop supervisor to investigate the complaint.

- C. Classification of complaints and the subsequent assignment of case numbers shall be accomplished by the Professional Standards Section. The following classifications shall be utilized:

Category 1: Conduct

Category 2: Use of Force

SECTION 10 EMPLOYEE CONDUCT COMPLAINTS

I. PURPOSE

- A. Recent court decisions regarding police conduct necessitate the implementation of a fair and effective employee conduct complaint process. Initially, courts have held that the standard of conduct to which law enforcement personnel must adhere is on a higher level than that of the average citizen. Secondly, an agency can be held liable for failing to take corrective measures in circumstances where the agency knew, or merely should have known, that a citizen's civil rights were being violated through the actions of its employees.
- B. Uniform documentation of all allegations of employee misconduct not only addresses the aforementioned legal concerns, but also serves to:
  1. Increase public confidence in the integrity of agency actions.
  2. Protect agency employees from false accusations and afford them due process.
  3. Provide citizens with an avenue for redress of legitimate grievances.
  4. Identify policy failures, training needs, supervisory needs, and uniformity in disciplinary actions.
- C. The need for investigation of employee conduct complaints should not constitute an affront to agency personnel, but rather a reminder of the sensitive nature of law enforcement work and the need for maintaining the high standards of the profession.

II. RECEIPT AND PROCESSING OF COMPLAINTS

- A. This process is primarily used for receiving and recording employee conduct complaints which originate from outside the agency.
  1. Complaints originating from within the agency will normally be handled in accordance with established policies and practices.
    - a. The Employee Interview Worksheet, HP-142, will generally be used for documenting information in this regard.
- B. Complaints regarding employee conduct shall be accepted from any source, including telephone calls and anonymous tips.
  1. Only agency supervisors may record complaints and shall do so by completing an Employee Conduct Complaint form, HP-161.
    - a. Complaints naming an agency supervisor as the involved employee shall be referred to and recorded by a higher ranking supervisor or the Professional Standards Section.

Category 3: Competency/Efficiency

Category 4: Arrest/Charge

Category 5: Use of Weapon

Category 6: Other: Any form of alleged misconduct which does not fall within the scope of another classification.

#### IV. NOTIFICATION

- A. When the identity of the complainant is known, they shall be notified, in writing, that the agency is investigating the incident, that an agency representative (investigator) may contact them in this regard, and who they may contact if they have questions or need additional information.
1. The foregoing may be accomplished by the Superintendent when the complaint is received at that level, otherwise, it shall be the responsibility of the troop commander or section supervisor in charge of the investigation.
  2. The letter of notification shall be made a part of the investigation file.
- B. The involved employee(s) shall, whenever practicable, be notified in writing of the allegation(s) against them, that an investigation to determine the facts involved will be conducted, and the name of the employee assigned to conduct the investigation.
1. The foregoing shall be accomplished by the Superintendent if Professional Standards is assigned and by the troop commander if handled on the troop level.
    - a. The affected troop commander shall receive a copy of the notification letter when accomplished by Professional Standards.
    - b. Notification of a pending investigation shall not be required when such notification would jeopardize or hinder the investigation.
  2. The letter of notification, when utilized, shall be made a part of the investigation file.
- C. Notification of results of the investigation shall be sent, as soon as practicable, to the involved employee(s) and complainant and accomplished by the Superintendent if Professional Standards is assigned and by the troop commander or section supervisor when the investigation is conducted on that level.
1. The letter shall be made a part of the investigation file.
  2. Letters sent to the complainant shall be general in nature and shall not contain specifics regarding disciplinary actions, etc.

*Handwritten initials*



V. INVESTIGATION OF COMPLAINTS

- A. Allegations of misconduct by agency employees must be investigated, to the extent possible, in order to determine the validity of the complaint and to gather information for defense of the agency and its employees should civil litigation result.
1. Complaint investigations will primarily be for the administrative purposes of the agency and only for use within the agency.
  2. Complaints which implicate criminal activity will generally be referred to another criminal justice entity for disposition.
  3. Investigation of employee conduct complaints will be specifically directed and narrowly related to the performance of the employee's official duties or fitness for office.
    - a. Employees are entitled to all the rights and privileges guaranteed by the laws and Constitution of the State of Kansas and the Constitution of the United States.
- B. Anonymous complaints shall be investigated to the extent possible. If no corroborative information or evidence results from the investigation, and the complainant cannot be contacted for an interview, the complaint will be regarded as "NOT SUSTAINED."
- C. Complaint investigations shall be completed within 30 days from the date the investigation is assigned.
1. The troop commander or section supervisor in charge of the investigation may grant an extension when extenuating circumstances exist.
- D. Employee(s) who are involved in an internal administrative investigation may be required to file statements, testify at administrative hearings and submit to tests and examinations which are vital and specifically related to the investigation, including, but not limited to:
1. Medical or laboratory examinations
  2. Blood, breath, or urine (pursuant to K.S.A. 75-4362) tests to determine alcohol or drug influence
  3. Psychological examinations
  4. Polygraph examinations. A polygraph examination may be required when the allegation is of a serious nature and all other investigative leads have failed to produce a preponderance of evidence which would either prove or disprove the allegation.
    - a. Polygraph examinations shall be approved by the Superintendent and administered under the direction of the Professional Standards Section.
    - b. Only certified examiners shall be used.

*[Handwritten initials]*

- c. The complainant will generally be required to submit to the polygraph examination prior to the affected employee(s).
  - (1) The affected employee(s) may request to take the examination first, subject to the approval of the Professional Standards Section.
- d. Employee(s) may not refuse to submit to a polygraph examination when so ordered by the Superintendent and such investigation is for administrative purposes.
- e. Questions used in a polygraph examination shall be pertinent to the investigation.
  - (1) The examiner may utilize "control" questions which are necessary to validate an examination within the scope of acceptable polygraph procedure.
- f. Polygraph results shall be a part of the investigation file; however, no conclusion regarding the validity of the allegation shall be made based solely upon the results, refusal, or consent to take such examination.

- 5. Submitting financial disclosure statements
- 6. Participating in a lineup
- 7. Being photographed

When so directed, the employee's failure to comply with and complete any of the requirements set forth in this paragraph shall constitute insubordination on behalf of the involved employee(s).

- E. Employee interviews shall, whenever possible, be conducted while the employee is on duty during their normal working hours.
  - 1. The interview shall be in private and at a Patrol office whenever possible.
  - 2. No more than two investigators will be permitted to interview the employee at any one time.
  - 3. Interview sessions should not last more than two consecutive hours in any one day.
    - a. The employee shall be afforded periodic break time during the interview to take care of personal necessities.
  - 4. Questioning in the interview shall be specifically directed and narrowly related to the employee's performance of their official duties or fitness for office.
  - 5. The employee shall not be afforded representation in an administrative fact finding investigation.

6. Investigators shall conduct themselves in a professional manner at all times.
- F. Interviews conducted in conjunction with investigations of a serious nature may be tape recorded.
1. The tape recording shall be made a part of the investigation file.
- G. The investigator shall be responsible for completing the following:
1. An investigation report, completed in letter form in accordance with the guidelines established in the Manual of Administrative Operations and Procedures, Volume 2, Article XIII, page 33, "Correspondence Within the Agency."
    - a. The investigation report shall be addressed to the troop commander who initiated the investigation, or in the case of Professional Standards, the Superintendent.
    - b. The investigation report shall contain a brief synopsis followed by the facts involved. Personal opinions of the investigator shall not be expressed.
  2. The "Synopsis of Findings" on the Employee Conduct Complaint form, HP-161.
  3. Compiling of the investigation file and forwarding such file to the troop commander or section supervisor of the investigator. The investigation file shall consist of the following:
    - a. Employee Conduct Complaint, HP-161
    - b. Letters of Notification of Investigation for both the complainant and involved employee(s)
    - c. Related interviews and tapes of interviews (when applicable)
    - d. Witness statements
    - e. Complainant's letter of complaint (if applicable)
    - f. Photographs
    - g. Test and examination results (when applicable)
    - h. Any other related materials, evidence, etc.
- H. The completed investigation file shall be forwarded by the troop commander, via normal channels, to the Superintendent who will review the facts involved.
1. Troop commanders and section supervisors shall not offer disciplinary recommendations.

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2. The investigation file shall be retained in the Professional Standards Section for an amount of time to be determined by the Captain of Professional Standards in accordance with agency guidelines on records retention.
3. The investigation file is confidential and no portion of the file shall be retained, copied, reproduced, or disseminated for any reason without the consent of the Superintendent.

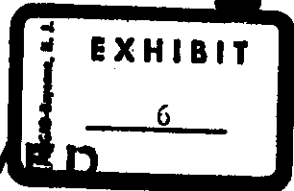
#### VI. DISPOSITIONS

- A. Upon completion of the investigation and review by the Superintendent, Professional Standards will assign one of the following dispositions to the case:
  1. SUSTAINED: The allegation is found to be factual and is substantiated by competent evidence.
  2. NOT SUSTAINED: Insufficient evidence exists to prove or disprove the allegation.
  3. UNFOUNDED: The allegation is not supported by the facts or is a false allegation.
  4. EXONERATED: The allegation is factual and did occur; however, the involved employee acted lawfully and properly within the bounds of policy and acceptable conduct.
  5. MISCONDUCT BASED UPON COMPLAINT: Misconduct not alleged in complaint, but supported by facts during the investigation.

#### VII. CONFIDENTIALITY

- A. Allegations of misconduct filed against agency employees are, until an investigation of the facts and competent evidence indicates otherwise, merely accusations which may potentially damage the employee's integrity and credibility. Consequently, all contents of the investigation file shall be regarded as CONFIDENTIAL and shall be treated accordingly.
  1. Information regarding the allegation and any subsequent investigation shall not be discussed with or disseminated to anyone who does not possess a bona fide and legitimate interest in the case.
    - a. Confidential investigation files, or copies thereof, shall not be released without written authorization of the Superintendent.

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KSTA PROPOSAL #1

ARTICLE \_\_\_\_\_

BILL OF RIGHTS

Section 1

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**POLYGRAPH EXAMINATION:** No person covered by this agreement shall be required to subject himself/herself to a polygraph examination. No disciplinary action shall be taken against any member for refusal to submit to a polygraph examination; however, if the member consents to a polygraph examination, the polygraph examination results shall not be used or offered in any court proceeding.

Section 2

**ELECTRONIC SURVEILLANCE:** Neither the Patrol, the Association nor employees shall utilize any type of electronic surveillance device to record or transcribe any conversation between the Patrol, the Association and/or the member(s) unless disclosure of such device is made prior to such conversation, except those telephone or radio communications which are routinely recorded and/or monitored as part of the daily operation of the Agency or except upon the authority of a court-authorized warrant. This provision shall not apply to criminal investigations.

Section 3

**RIGHT TO SUE:** Any member shall have the right to bring civil suit against any citizen, organization, or corporation for injuries or damages suffered, either pecuniary or otherwise, for abridgement of his/her civil rights arising out of the members' proper performance of official duties. The member shall advise his/her Troop Commander concerning said suit.

Section 4

**INVESTIGATORY INTERVIEW:** Whenever any member of this unit is subjected to an interview by any Patrol personnel for reasons that could lead to disciplinary action as defined in Volume 1 of the Patrol Operations and Procedure Manuals, such interview shall be conducted under the following conditions:

A. The member shall be fairly apprised in writing of the nature of the investigation, and the fact that the investigation does not entail criminal charges. The written notice shall indicate, to the extent then known by the Patrol:

(1) The name of the person making the complaint or the victim of the alleged wrongdoing, unless, at the sole discretion of the Patrol, it would substantially impede the investigation or adversely affect any requested anonymity of the complainant;

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(2) The dates (or time frame) of the alleged misconduct;  
(3) Description of the facts alleged by the complainant to constitute the misconduct.

B. The member shall be advised of the members right to have an employee representative present during any questioning and shall be given a reasonable opportunity to obtain such representation. Wherever practicable, the member shall be given 48 hours advance notice of the questioning.

C. At the time a formal disciplinary investigatory interview is scheduled, in addition to being advised of the right to have a representative present, the member shall be advised orally whether the allegation may result in a criminal prosecution and whether the member is then considered to be a principal or witness. The member shall be given sufficient pertinent information about the allegations to enable a reasonable person to identify the incident (if it in fact occurred), and to review his or her daily report, notes, official investigation/arrest reports or otherwise refresh his or her memory regarding the matter.

D. The interview shall be conducted at a reasonable hour, preferably, but not necessarily, limited to when the member is on duty. If such questioning occurs during non-duty hours of the member involved, the member shall be considered to be on duty for the purposes of compensation.

E. The member, at his/her request, shall have the right to have an Association representative present during such interview, in such cases where such Association attendance is requested, the interview may be postponed for the purpose of securing an Association representative up to the afternoon of the day following the notification of interview.

F. The presence of an Association representative will in no way, in and of itself, jeopardize either the member's or the Association representative's continued employment.

G. The supervisor/investigator is free to insist on hearing the member's own account of the matter under investigation. The supervisor/investigator is not obligated to negotiate with the member or the representative during the investigatory interview. The purpose of the interview is to seek evidence or facts to support a decision. The supervisor/investigator is entitled to ask questions of the member and to hear the member's own uninterrupted answer.

H. The Association representative's role at the investigatory interview is to consult with the member and to observe the propriety of the interview and not to interrupt, interfere with or otherwise obstruct the investigation. The Association

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representative shall be given the opportunity to assist the member by asking questions to clarify the facts or to provide the names of other witnesses who possess knowledge of the facts.

I. The member under investigation shall be informed of the nature of the investigation prior to any questioning. If it is known that the member is a witness only, he/she shall be so advised.

J. The interview shall be for reasonable periods of time and time shall be permitted for personal necessities; provided that no period of continuous questioning shall exceed one (1) hours without a ten-minute rest period, without the member's consent.

K. The member shall not be subjected to abusive language, questioning by more than one supervisor/investigator at a time, or to threats or promises to induce an answer to any question.

L. The members' name, home address or photograph shall not be given to the press or news media without the members' express consent, and his/her name shall only be released upon the proffering of formal criminal charges.

M. If a tape recording is made of the interview, the member, or representative authorized by the member, shall have access to the tape, or be given an exact copy thereof, at any time upon reasonable request. If the members' statement is reduced to writing, the member or representative authorized by the member, shall be given an exact copy of said statement upon request.

N. If any member is represented by another member who is on duty status, that duty status shall continue until the interview is completed.

O. In no event, except at the members' request, will the interview take place at the members' home.

P. No interview conducted hereunder on behalf of the Patrol shall be conducted by a member of the Association.

It is not the purpose of this Section to prevent discussions between members and their superiors with regard to work assignments, or to require representation of the member during guidance or counseling sessions between the member and his immediate supervisor, or to require representation when the member is interviewed solely as a witness. Opportunity for Association representation shall, however, be provided upon request, where either the member reasonably believes he/she will be disciplined for his/her conduct, the supervisor/investigator believes that a reasonable basis for discipline may exist, or the supervisor/investigator intends to make a report, to a superior

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officer which could lead to discipline of a member.

If, in the course of any routine inquiry, the supervisor/investigator forms a belief that a reasonable basis for discipline exists, he/she shall forthwith so inform the member, and permit the member an opportunity to request the presence of an Association representative. In any instance where the supervisor/investigator advises the member that his/her inquiries will not lead to discipline, no representation is required.

#### Section 5

**CRIMINAL INVESTIGATION:** In a criminal investigation interrogation, the member under investigation shall be informed of the rank, name and command of the officer in charge of the investigation, the interrogating officer and all persons present during the interrogation. The member under investigation shall be informed of the nature of the investigation prior to any interrogation and, where applicable, he/she shall be informed of the name(s) of the complainant. Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary. The member shall have the same right to Association representation by individual counsel; provided, however, that a criminal investigation and interrogation shall be conducted in the same manner and procedure, with the same constitutional and statutory safeguards, that all citizens under criminal investigation and interrogation are entitled to enjoy and exercise.

#### Section 6

**CONCLUSION OF INVESTIGATION:** A member will be informed in writing when an investigation conducted pursuant to Section 4 of the Article is complete and of the determination. Association representation is not required at any meeting where the sole purpose of which is to inform the employee of a previously made decision to administer disciplinary action. A copy of such memorandum shall be placed in his/her official personnel file. However, personnel complaints arising after the effective date of this Agreement, determined to be unfounded after investigation and/or adjudication, shall not be retained in the members' personnel file, nor given any further consideration with regard to continued employment.

#### Section 7

**WRITTEN MEMORANDA:** If there is a need for an inquiry into a members' official actions or activities either as a principal or as a witness so that there will be a recording of the facts for the protection of the member or of the Patrol, or to rebut, explain or clarify any allegations, criticism or complaints made



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against the member, under such circumstances the member may be required and is expected to properly respond in a truthful and complete manner, and if request, submit a written memoranda detailing all necessary facts. However, in instances where the members' conduct is under investigation, no member shall be required to submit such report without first having the opportunity to confer with an Association representative.

Section 8

LINE-UP: No member shall be required as a condition of employment to stand in any line-up. This provision is not applicable where the member is the subject of a criminal investigation.

Section 9

COMPULSORY STATEMENTS (GARRITY RULE): If the matter under investigation could lead to criminal charges, but the Patrol's inquiry is not directed at obtaining inculpatory statements from a member to be utilized in criminal proceedings against that member, but is merely for the purpose of determining the members' continued status with the Patrol, the member shall be advised that the members' constitutional rights prohibit coerced statements obtained under threat of discharge from use in subsequent criminal proceedings against him/her. When the Patrol advises the member that such statements given will not be used against him/her in any subsequent criminal proceedings, the member shall also be advised that:

Section 10 (as per hearing officer)

1. A. The member has the right to counsel or Association representation during questioning;
2. B. The presence of counsel or an Association representative will in no way, in and of itself, jeopardize his/her continued employment;
3. C. The member is required to fully and truthfully answer the questions or be subject to discharge.

If a member requests and is denied representation when he/she is entitled to same, the member may:

4. A. Refuse to answer any questions or write any memoranda until representation is permitted. Such refusal shall not result in any separate disciplinary action against the member.
5. B. Respond to said questions. However, said responses may not thereafter be used against said member in any proceedings without his/her consent, and shall not be part of any official file retained by the Patrol.
6. C. Take whatever other action or remedies are available under this Agreement.

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**REPRESENTATION IN CIVIL LITIGATION:** A. Whenever any civil action is commenced against any member alleging negligence or other actionable conduct, if the member was in the course of employment at the time of the alleged conduct and had a reasonable basis for believing that the conduct was within the scope of the authority delegated to the member, the Patrol shall, at its option, pay for or engage or furnish the services of an attorney to advise the member as to the claim and to appear for and represent the member in the action. No such legal services shall be required in connection with prosecution of a criminal suit against a member. Nothing in this Section shall require the reimbursement of any member or insurer for legal services to which the member is entitled pursuant to any policy of insurance.

B. The Patrol may also indemnify a member for the payment of any judgment, settlement, reasonable attorney fees or court costs where the member is found to have committed an intentional tort, if the members' intentional conduct occurred while fulfilling his/her necessary duties and functions and was carried out pursuant to a direct order of his/her supervisor, was conduct required by the direct order, or was conduct in keeping with well-established and approved past practices of the Patrol; provided, the member shall have the right to select counsel of his/her own choosing, with mutual agreement with the Patrol.

**Section 12**

**STATE/NATIONAL CONSTITUTIONAL OR STATUTORY RIGHTS:** Nothing contained in this Article shall deny any member any right or benefit extended to him/her under the Constitution or any laws of the United States or the State of Kansas. Claims or assertions of such rights, however, shall not be brought under the grievance procedures set forth in this Agreement.

**Section 13**

**POLITICAL ACTIVITY:** Members covered by this Agreement shall have the same rights, privileges and immunities as all other citizens of the United States and of the State of Kansas, to engage in the political process, run for public office or otherwise express his/her personal views so long as said activities are not engaged in during duty hours of the member, do not interfere with the performance of all duties and functions and/or the operation of the Patrol, do not utilize any equipment or facilities of the Patrol and are in keeping with the Constitution of the State of Kansas and Civil Service regulations and requirements for all other State employees.

**Section 14**

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**CONDUCT TOWARD SUPERIORS:** Members in the bargaining unit shall conduct themselves in an orderly and respectful manner when addressing their superior officers and shall in return receive fair and courteous treatment from their superiors.

Section 15

**LIMITATION:** Disciplinary action shall be taken within ninety days of the occurrence or the Patrols knowledge of the occurrence giving rise to the disciplinary action, whichever occurs last, except in the event of ongoing criminal investigation or prosecution of the member. However, nothing contained herein shall preclude the Patrol from using such prior employee conduct during any disciplinary proceeding or from using such conduct to demonstrate a course of unsatisfactory performance or conduct.

Section 16

**COMPLAINTS AGAINST SUPERVISORS:** In the event a member has a complaint against a supervisor, where no other remedy is provided for by this Agreement, the employee may use any procedure provided by law.

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