BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

SERVICE EMPLOYEES UNION LOCAL 513, Petitioner,	)	
vs.	)	Case No. 75-CAE-8-1990
CITY OF HAYS, KANSAS, Respondent.	)	

INITIAL ORDER

ON THE 18th day of September, 1990 the above-captioned matter came on for formal hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-517 before presiding officer Monty R. Bertelli in the City Commission Room, City Hall, Hays, Kansas.

APPEARANCES

Petitioner: Appeared by Art J. Veach, Business Agency, Service Employees Union Local 513, 417 East English, Wichita, Kansas 67202

Respondent: Appeared by John T. Bird, City Attorney, c/o GLASSMAN, BIRD & BRAUN, 113 West 13th Street, Hays, Kansas 67601.

ISSUES PRESENTED FOR DETERMINATION

I. WHETHER THE EXISTENCE OF A GRIEVANCE PROCEDURE IN A MEMORANDUM OF AGREEMENT BARS A PARTY FROM SEEKING RELIEF IN ACCORDANCE WITH K.S.A. 75-4333 UNTIL SUCH TIME AS THE GRIEVANCE PROCEDURE IS EXHAUSTED.

II. DID THE CITY OF HAYS ENGAGE IN A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(b)(1) AND (c) WHEN IT ISSUE A REPRIMAND TO MIKE PIPKIN?

75-CAE-8-1990

SYLLABUS

1. **PROHIBITED PRACTICES** - Jurisdiction of Public Employee Relations Board - Necessity of exhausting grievance procedure. The power to determine any controversy concerning prohibited practices is reserved to the Public Employee Relations Board, K.S.A. 75-4334, while grievance procedures are limited to the impartial arbitration of any disputes that arise on the interpretation of the memorandum of agreement, K.S.A. 75-4330(b). The two actions are mutually exclusive, and a party need not exhaust the grievance procedure before proceeding with a prohibited practice complaint.

2. **PROHIBITED PRACTICES** - Burden of Proof - Presumptions. The party alleging a violation of the Public Employer-Employee Relations Act has the burden of proving the complaint by a preponderance of the evidence. The filing of the complaint creates no presumption of a prohibited practice.

3. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Interpretation - Examination of federal decisions. While differences exist between collective negotiations by public employees and collective bargaining in the public sector, federal decisions cannot be regarded as controlling but have value and the reasoning persuasive in areas where the language and philosophy of the acts are analogous.

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

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

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

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

5. **PROHIBITED PRACTICES** - Employer Interferes With, Coerces, or Restrains Employees - K.S.A. 75-4333(b)(3) discrimination complaints. In most cases, K.S.A. 75-4333(b)(3) discrimination complaints can be prosecuted on an interference or coercion theory under K.S.A. 75-4333(b)(1). If a public employer deprives an employee of any rights guaranteed by K.S.A. 75-4324, and protected by K.S.A. 75-4333(b)(1), the public employer may be deemed to have discouraged employee

organization membership within the meaning of K.S.A. 75-4333(b)(3).

6. **PROHIBITED PRACTICES** - Duty to Meet and Confer in Good Faith - When duty ends. The duty to "meet and confer" does not cease with the signing of a memorandum of agreement. It is a continuing process.

7. **RIGHTS OF PUBLIC EMPLOYEES** - Employee Organization Representative - Settlement of Grievances. The certified or recognized employee organization has the right and obligation to represent unit employees in the settlement of grievances or disputes concerning conditions of employment and interpretation of memorandum of agreement. The right to representation clearly embraces all aspects of the public employee-employer relationship whereby dissatisfaction with work practices, conditions of employment or contract interpretation is resolved.

8. **PROHIBITED PRACTICE** - Employer Interferes With, Coerces, or Restrains Employees - Protected employee activity - Inherently destructive conduct. Once it has been established that an employee was engaged in an activity protected by K.S.A. 75-4324, if the employer's conduct is so "inherently destructive" of employee interests, the employer has the burden of establishing a legitimate and substantial justification for the conduct.

9. **PROHIBITED PRACTICE** - Employer interferes With, Coerces, or Restrains Employees - Protected employee activity - Comparatively slight impact. If the employer's conduct is not sufficient to be considered "inherently destruction," the harm is considered "comparatively slight," and the burden is upon the employee or employee organization to establish that the employer would not have acted "but for" a union animus or the employee's employee organization affiliation or participation in organization activities.

10. **RIGHTS OF PUBLIC EMPLOYEES** - Participation in Concerted Activities - Discipline. Membership in an employee organization or participation in concerted activities does not immunize an employee against discipline. Maintaining discipline in the work place is a part of managerial prerogative and not restricted by the Public Employer-Employee Relations Act unless in retaliation for employee organization activity or affiliation.

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

12. **PUBLIC EMPLOYER RIGHTS** - Employee Interference With - Standard to be applied. Most decisions made by a public employer involves some managerial function, and to end the inquiry at that point would all but eliminate the legislative authority of the employee or employee organization representative to meet and confer with respect to grievances and conditions of employment. The standard to be applied to resolve the conflict is one of "significant interference" requiring a balancing of the interests of public employees and the requirements of management prerogatives.

13. **RIGHTS OF PUBLIC EMPLOYEES** - Waiver - Memorandum of agreement. As a general rule the waiver of an employee or employee organization right must be clear and unmistakable.

FINDINGS OF FACT

1. The Petitioner, Service Employees Union Local 513, is an employee organization as defined by K.S.A. 75-4322(i) and the "recognized employee organization", as defined by K.S.A. 75-4322(j), for certain public employees of the City of Hays, Kansas (Pet. Exh. 1).

2. The Respondent, City of Hays, Kansas, is a "public agency or employer", as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c).

3. The Public Employee Relations Board has jurisdiction over the parties and the subject matter of the case, i.e. a prohibited practice complaint.

4. Mike Pipkin is a "public employee", as defined by K.S.A. 75-4322(a), employed as a cemetery caretaker and assigned to the Service Department of the City of Hays, Kansas (Tr.p. 10-28).

5. Mike Pipkin was serving as Chairman and steward of the Service Employees Union Local 513 at all time subject to this inquiry (Tr.p. 10-11, 84, 90, 100). He has served in that position for a period of four years (Tr.p. 10).

6. Mike Pipkin, as representative of the Service Employees Union Local 513, filed grievances on behalf of, and represented, employees to resolve disputes against their employer, the City of Hays, Kansas (Tr.p. 5, 156).

7. Mike Pipkin, as representative of the Service Employees Union Local 513, personally signs each grievance filed with the employer, City of Hays, Kansas (Tr.p. 107).

8. Mike Pipkin, as Chairman, executed the 1988-90 memorandum of agreement and 1989 addendum on behalf of the Service Employees Union Local 513 (Tr.p. 63, Pet. Exh. 1).

9. Leo Wellbrock is the Public Works Director for the City of Hays, Kansas, and has served in that position since 1971 (Tr.p. 107).

10. Ralph Smith is the Service Department Public Works Superintendent for the City of Hays, Kansas (Tr.p. 104).

11. Leo Wellbrock is the direct supervisor of Ralph Smith who, in turn, is the direct supervisor of Mike Pipkin (Tr.p. 114, 160).

12. Jim Lyddane, Rocky Hammerschmidt, Homer Edwards, Fred Seitz and Kurt Sulzman are "public employees", as defined by K.S.A. 75-4322(a), members of the bargaining unit represented by the Service Employees Union Local 513, and are supervised by Ralph Smith (Tr.p. 160).

13. Ralph Smith and Leo Wellbrock authored "File Memos" dated January 8, 15, 16, 19, 22 and February 8, 1990 concerning incidents involving Mike Pipkin and which allegedly account his interference with the right of management to direct and assign the work of its employees and determine the method, means and personnel by which operations are to be conducted (Resp. Exh. B, C).

14. Kurt Arnold and Kyle Sulzman had sought permission from their immediate supervisor to change off on street sweeper shifts which was denied. On January 3, 1990 Kurt Arnold contacted Mike Pipkin to discuss his assignment to the night shift on the street sweeper. It was Mr. Pipkin's belief such assignment might constitute a violation of the memorandum of agreement. Mr. Pipkin and Mr. Arnold met with Leo Wellbrock on January 3, 1990 to discuss the possible violation and to seek a switch of hours with another employee. The conversation deteriorated into a heated argument between Mr. Pipkin and Mr. Wellbrock with nothing being resolved at the meeting. Mr. Arnold and Mr. Wellbrock met again later in the day and were able to reach an agreement acceptable to both. No formal grievance was filed by the Service Employees Union Local 513 as a result of the alleged violation of the memorandum of agreement or the conflict at the earlier meeting. No disciplinary action was taken against Mr. Pipkin or Mr. Arnold for bringing the concern to Mr. Wellbrock's attention.

15. On January 5, 1990, Mr. Pipkin and Marcian Hammerschmidt chanced to meet at the city shop just before 4:00 PM. During their conversation Mr. Pipkin inquired why Mr. Hammerschmidt had used the radio after completing his refuse collection route by 10:30 AM to coordinate the rest of the day's trash pick up rather than waiting until 11:00 when he would see the other refuse drivers at lunch. Mr. Hammerschmidt advised that was the policy concerning refuse pick up. During the

conversation Mr. Pipkin did not tell Mr. Hammerschmidt he was not to use the radio to coordinate refuse collection routes but apparently that is the way Mr. Hammerschmidt took the conversation (Tr.p. 19-20, 16).

On January 8, 1990, Mr. Hammerschmidt met with Ralph Smith to discuss his conversation with Mr. Pipkin. Mr. Hammerschmidt stated he took Mr. Pipkin's comments to mean he was to stay off the radio. Mr. Smith advised him to continue in accordance with the refuse pick up policy, and that he would talk to Mr. Pipkin (Tr.p. 16).

Later on January 8, 1990, Mr. Smith met Mr. Pipkin in the office at the Service Department. He explained the refuse pick up policy and the reason for it. There is no written policy on the use of radios to coordinate refuse collection. Mr. Pipkin indicated he understood and the conversation ended. (Tr.p. 21, 184).

16. On January 15, 16 and 19, 1990, Ralph Smith and Dave Myers met with Fred Herman and Ron Seitz to discuss an incident of the two employees not "getting along on the job". At some point after the January 19, 1990 meeting Mr. Smith learned from Dave Meyers that Fred Herman told him Mr. Pipkin stated he should have been present and involved in the discussions. (Pet. Ex. C, Tr.p. 165-166). Mr. Smith did not know if Mr. Pipkin actually made the statement, and never spoke to him concerning the statement or its accuracy (Tr.p. 174, 177). Mr. Pipkin testified that he did not learn about the problem with Herman and Seitz until January 20 or 21, 1990 (Tr.p. 16).

17. On February 7, 1990 James Lyddane and Mr. Pipkin met with Ralph Smith to discuss the problem Mr. Lyddane was having with two other employees concerning the body odor of Homer Edwards and the profane language used by Marcian Hammerschmidt. Mr. Pipkin was there at Mr. Lyddane's request but Mr. Lyddane presented his own complaint during the meeting. There was a difference of opinion between Mr. Smith and Mr. Pipkin whether this constituted a "Union problem". After Mr. Smith stated he would take care of the problem he told Mr. Lyddane and Mr. Smith to return to work. At that point a short, heated exchange took place between Mr. Smith and Mr. Pipkin, it being unclear who initiated the confrontation (Tr.p. 14, 167-170).

18. Mike Pipkin was given a memo from Leo Wellbrock and a disciplinary notice of written reprimand by Susie Billinger on February 12, 1990. The memo stated the basis for the disciplinary action was interferrence with management rights to assign and direct the work of its employees. It further advised that "In the future, any interference with management rights to 'direct and assign the work of its employees' or 'determine the methods, means and personnel by which operations are to be conducted' will not be tolerated and will be subject to further disciplinary action." (Tr.p. 11, Pet. Ex. B).

19. Mike Pipkin was not informed by Mr. Wellbrock that his actions on behalf of employees in the bargaining unit were inappropriate or, if continued, would lead to disciplinary action (Tr.p.151).

20. Mike Pipkin filed on February 23, 1990 a formal grievance action against the City of Hays, Kansas pursuant to Section 11 of the memorandum of agreement. The Service Empoyees Union Local 513 filed this prohibited practice complaint with the Kansas Public Employee Relations Board bases upon the same disciplinary action while the grievance was pending and the grievance had not been resolved at the time of the hearing in this case (Pet. Ex. A).

21. Ralph Smith testified that employees can come in and ask any question any time they want. That was part of their job. (Tr.p. 180-181). Leo Wellbrock concurred that employees should have that right (Tr.p. 120-158).

22. Mike Pipkin's actions on behalf of the employees in the bargining unit were the result of his belief that such required from the certified employee organization (Tr.p. 26, 31, 32, 48, 52, 53, 59, 62, 68).

CONCLUSIONS OF LAW AND ORDER

<u>ISSUE I</u>

WHETHER THE EXISTENCE OF A GRIEVANCE PROCEDURE IN A MEMORANDUM OF AGREEMENT BARS A PARTY FROM SEEKING RELIEF IN ACCORDANCE WITH K.S.A. 75-4333 UNTIL SUCH TIME AS THE GRIEVANCE PROCEDURE IS EXHAUSTED.

While this issue has not been addressed by the courts under the Public Employer-Employees Relations Act ("PEERA"), K.S.A. 75-4321 <u>et seq.</u>, the grievance procedure and prohibited practice provisions of PEERA are similar to those provisions contained in the Professional Negotiations Act, K.S.A. 72-5413 <u>et seq</u>. upon which limited case law exists which is instructive to this case.

(1) Shawnee County District Court Judge James M. MacNish, Jr. addressed the jurisdiction issue in response to a Motion for

Reconsideration in Marie Taylor v. Unified School District #501, Topeka, Kansas, Case No. 81- CV 1137. In his Memorandum Decision and Order dated October 17, 1985, Judge MacNish stated:

> "An arbitrator has the power to rule on matters concerning the interpretation and application of a professional agreement. Diane Taylor claimed her contract was violated by the Board's anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under 72-5430. The power is given to the Secretary of Human Resources under K.S.A. 62-5430(a)."

Similarly, the power to determine "any controversy concerning prohibited practices" is reserved to the Public Employees Relations Board ("Board") pursuant to K.S.A. 75-4334, while grievance procedures contained within a memorandum of agreement are limited to "the impartial arbitration of any disputes that arise on the interpretation of the memorandum of agreement," K.S.A. 75-4330(b). The two actions are mutually exclusive.

As a general rule the Board does not have authority to interpret a memorandum of agreement where the issue is solely one of interpretation or application of the agreement. See NEA-Wichita vs. Unified School District No. 259, Case No. 72-CAE-10-1990. An arbitrator is likewise without authority to determine a prohibited practice complaint. One action is based upon rights and obligations imposed by statute, the other on rights and obligations provided by contract. No purpose is served by requiring a party

to exhaust the grievance procedure set forth in a memorandum of agreement prior to filing a prohibited practice complaint, since the arbitrator is without authority to resolve prohibited practices.

Accordingly, the City of Hays ("Employer") is not correct in claiming contention that the Board does not have jurisdiction over the prohibited practice complaint filed by the Service Employees Union, Local 513 ("Union") until the Union has exhausted the grievance procedure contained in the memorandum of agreement is exhausted. Both actions may be maintained simultaneously without prejudice to either. Therefore Employer's request to dismiss must be denied.

ISSUE II

DID THE CITY OF HAYS ENGAGE IN A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(b)(1) AND (6) WHEN IT ISSUED A REPRIMAND TO MIKE PIPKIN?

BURDEN OF PROOF

(2) Although Kansas Courts have not addressed the standard of proof necessary to establish a prohibited labor practice.

". . . the mere filing of charges by an aggrieved party . . . creates no presumption of unfair labor practices under the Act, but it is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence." Boeing Airplane Co., v. National Labor Relations Board, 140 F.2d 4323 (10th Cir. 1044). Findings of unfair labor practices must be

supported by substantial evidence. Coppus Engineering Corp. v. National Labor Relations Board, 240 F.2d 564, 570 (1st Cir. 1957).

STATUTORY LANGUAGE

K.S.A 75-4333(b) of the Kansas Public Employer-Employee Relations Act provides:

> "[i]t shall be a prohibited practice for a public employer or its designated representative wilfully to:
> (1) Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;
>
> * * *
>
> (6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328;"

The employee rights referred to in K.S.A. 4333(b)(1) are set forth in general terms in K.S.A. 75-4324 as follows:

> "Public employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers of their designated representatives with respect to grievances and conditions of employment. Public employees also shall have their right to refuse or join or participate in the activities of employee organizations"

K.S.A. 75-4329 provides:

> "A public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A. 75-4327, during the

> twelve (12) months following the date of certification or formal recognition."

(3) There is little, if any, Kansas case law interpreting K.S.A. 75-4324, 75-4329 and 75-4333(b)(1) and (6). However those statutes are similar to Section 7 and Sections 8(b)(1) and (3) of the National Labor Relations Act ("NLRA"). It is appropriate, in light of the close parallel between these sections of PEERA and the NLRA, to examine federal interpretations of the NLRA, where those decisions are consistent with the purposes of the Kansas PEERA. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that the legislature intended a different result, and, with respect to those areas where PEERA differs from the NLRA federal authority may be of limited value.

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

> "In reaching this conclusion we recognize the differences, noted by the court below, between collective negotiations by public employees and 'collective bargaining' as it is established in the private sector, in particular by the National Labor Relations Act. Because of such differences federal decisions cannot be regarded as controlling precedent, although some may have value in areas where the language and philosophy of the acts are analogous. See K.S.A. 1972 Supp. 75-4333(c), expressing this policy with respect the the Public Employer-Employee Relations Act."

K.S.A. 75-4333(b)(1) Complaint

K.S.A. 75-4333(b)(1) makes it a prohibited practice for the Board to willfully interfere with, restrain or coerce professional

employees in the exercise of their rights under the Public Employer-Employee Relations Act. K.S.A. 75-4333(b) sets forth eight categories of conduct which, if undertaken by the public employer, constitute a prohibited practice and evidence of bad faith in meet and confer proceedings. However, such conduct is to be considered a prohibited practice only if engaged in "willfully". The Act however, does not contain a definition of "willful."

Black's Law Dictionary, 5th ed., provides the following definitions for the work "willful":

> "An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the intent to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.
>
> "Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."

The Kansas Supreme Court in the case of Weinzirl v. Wells Group, Inc., 234 Kan. 1016 (1984) defined the term "willful act" present in the Kansas Wage Payment Law, K.S.A. 44-313 et seq., as an act "indicating a design, purpose, or intent on the part of a person to do wrong or cause an injury to another."

As a result, the inclusion of the word "willfully" in 75-4333(b) indicates a legislative intent to impose a requirement of some blameworthiness, as K.S.A. 75-4333(b) is patterned after section 158(a) of the federal Labor Management Relations Act, which does not contain the word "willfully", and which has been

interpreted as not requiring specific intent. See NLRB v. Burnup Sims, Inc., 379 U.S. 21 (1964). It would appear the Kansas legislature added the work "willfully" with the intent that proof of a prohibited practice be more difficult under the Kansas Act than under federal law. A reasonable interpretation of K.S.A. 75-4333(b) therefore requires proof of anti-union animus or specific intent to violate employee's or recognized employee organization's rights as essential to establish a prohibited practice.

(4) To determine whether the public employer's conduct interferes with, coerces or restrains public employees, several inquires must be made:

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

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

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

a. **Protected Activity**

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

Here the right the Public Employer-Employee Relations Act seeks to protect is the right of public employees to organize for the purpose of meeting and conferring with respect to grievances and conditions of employment, without public employer interference. This right must be considered in the context of the policy of the Act, which fosters cooperation between public employers, public employees, and employee organizations. This policy necessarily envisions a balance to the extent that the rights of all parties are recognized and safeguarded to the maximum degree possible. So long as the acts of the public employer do not interfere with the organizational rights of the public employees, there is no violation. See NLRB v. Valentine Sugars, Inc., 211 F.2d (6th Cir. 1969).

b. **Reasonable Probability Test**

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

> "It is well settled that the test of interference, restrain and coercion...does not turn on the employer's motive or on whether

the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably said, tends to interfere with the free exercise of employee rights under the Act."

As noted in NLRB v. Grower-Shipper Vegetable Ass'n., 122 F2d 368, 377 (9th Cir. 1941):

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

This test is equally applicable to the public sector employers and K.S.A. 75-4333(b)(1). The employer conduct complained of here is the disciplinary action taken against Mike Pipkin, Service Employee Union 513, president and steward. The Union alleges "[t]here can be no doubt then, that the disciplinary notice resulted from Mr. Pipkin's actions as a union representative. Mr. Pipkin was not disciplined for any action taken as an employee. And, such a disciplinary notice could not have been issued to an employee who was not an official of the union." While framed as a K.S.A. 75-4333(b)(1) "interference" complaint, the basis for the complaint appears founded in K.S.A. 75-4333(b)(3) which provides:

> "(b) It shall be a prohibited practice for a public employer...willfully to:

* * *

> (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."

(5) In most cases, K.S.A. 75-4333(b)(3) discrimination complaints could just as easily be prosecuted on an interference or coercion theory under K.S.A. 75-4333(b)(1), See 3 Labor Law, Section 12.03(3). The scope of the phrase "membership in any employee organization" has been given a broad and liberal interpretation to include discrimination to discourage participation in employee organization activities as well as to discourage adhesion to union membership. See Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1953). The result is that if a public employer deprives an employee of any rights guaranteed by K.S.A. 75-4324, and protected by K.S.A. 75-4333(b)(1), the public employer may be deemed to have discourages employee organization membership within the meaning of K.S.A. 75-4333(b)(3).

The essence of discrimination in violation of K.S.A. 75-4333(b)(3) is in treating like cases differently, See Mueller Brass Co. v. N.L.R.B., 544 F.2d 815, 819 (5th Cir. 1977). It is just such disparate treatment the Union alleges in its brief. PEERA does not require that the employees discriminated against be the ones discouraged for purposes of violations of K.S.A. 75-4333(b)(3), nor does it require that the change in employees' desire to join an employee organization or participate in organization activities have immediate manifestations, Radio Officers', supra at 51. It is hard to argue that the disciplining

of a union official for engaging in union activities does not have a chilling effect upon employee organization membership or participation in employee organization activities.

K.S.A. 75-4327(b) must be read in conformity with the general policy of PEERA to protect the right of public employees to act together to better their working conditions. While the Employer is correct that meet and confer can result in a memorandum of agreement, that is not its only purpose. The language of K.S.A. 75-4327(b) - "and may enter into a memorandum of agreement" - makes it clear a memorandum of agreement need not be the result of "meet and confer."

Further support is found in the statutory definition of "meet and confer in good faith", K.S.A. 75-4322(m):

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

Having established a right of public employees to form, join and participate in the activities of an employee organization, the inquiry must turn to whether Mr. Pipkin was engaged in conduct protected by K.S.A. 75-4324 on each occasion of alleged inappropriate conduct that served as the basis for the disciplinary action.

(6) It apparently is Employer's position the Union and Mr. Pipkin have no right to be involved in personnel matters concerning bargaining unit members unless and until the matter takes the form

of a formal grievance. The Employer disagrees with Mr. Pipkin's contention that he was attempting to "meet and confer" as the Union's representative. Its argument is as follows:

> "This is not the meaning of K.S.A. 75-4327(b), where it states that the employee organization and the appropriate employer shall meet and confer in good faith in the determination of conditions of employment, because it ignores the balance of that paragraph which sets out that the purpose for such meeting and conferring is to arrive at a memorandum of agreement between the entities. The Public Employer/Employees Relations Act does not contemplate or countenance an ongoing, 365 day per year meet and confer procedure. The parties met, conferred, and arrived at an agreement which was designed to govern their actions thence forth. The agreement arrived at, contained a grievance procedure which the employees are entitled to follow. The meet and confer process ends when the agreement is signed." (Resp. Brief p. 6)

The Employer's interpretation of the meet and confer requirement is incorrect. The duty to "meet and confer" does not cease with the signing of a memorandum of agreement. As the United States Supreme Court has noted:

> "Collective bargaining is a continuing process involving among other things day-to-day adjustment in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract." <u>Conly v. Gibson</u>, 344 U.S. 41, 46 (1957). See also <u>City of Livingston v. Mont. Council No. 9</u>, 571 P.2d 374 (1977).

The statement of Employer that the purpose of "meet and confer" as set forth in K.S.A. 75-4327(b) is "to arrive at a memorandum of agreement" is too restrictive. K.S.A. 75-4322(a) defines grievance to mean:

> "a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or <u>traditional work practice</u>." (emphasis added)

The grievance procedure set forth in Section 11, "GRIEVANCE PROCEDURES," limits the meaning of grievance to "any misunderstanding relating to interpretations arising from the specific language of the written agreement itself," (Pet. Ex. 1, p. 4) It is obvious the right of the Union to represent employees in the bargaining unit extends beyond misunderstandings relating to interpretation of the memorandum of agreement, to dissatisfaction of a public employee with work practices, and conditions of employment. The fact that a matter of concern to a public employee or employee organization does not fall within the limited jurisdiction of the contractual grievance procedure does not deprive an employee the opportunity to seek redress of his dispute nor relieve the public employer of the responsibility to meet and confer on the grievances or conditions of employment.

K.S.A. 75-4328 provides:

> "A public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances,..."

It is therefore clear the Union, and Mr. Pipkin as its president, has a right to represent employees in the bargaining unit in the settlement of grievances. The scope of meaning of "grievances" is in issue here. The Employer's position is that this right of the employee organization is limited solely to

representation during the formal grievance procedure provided by the memorandum of agreement. Again the Employer's interpretation is too restrictive.

Generally, employee dissatisfaction with work practices or conditions of employment begin as a complaint and are resolved informally without resort to a formal grievance procedure. In fact, the ability to resolve complaints at the informal level was found to be an important function of the successful supervisor. Steiner, The Arbitration Handbook, Fielding Complaints -- Guidelines For Supervisors to Prevent Formal Grievances, p. 58. A review of the Smith memos dated January 15, 16, 19, and 22, 1990 reveal an adherence to informal resolution of personnel problems or complaints. In each case, the problem or complaint was resolved informally by the supervisor rather than through a formal grievance process.

Surely, if the representative of an employee organization is to effectively represent an employee in the settlement of grievances or disputes concerning conditions of employment the right must extend to informal as well as formal procedures. The right to representation clearly embraces all aspects of the public employee-employer relationship whereby dissatisfaction with work practices, conditions of employment or contract interpretation is resolved, if that right is to have any substance.

Each of the four alleged acts of misconduct that lead the Employer to discipline Mr. Pipkin must be examined individually to determine if he was engaged in a K.S.A. 75-4324 protected activity.

On January 3, 1990 Mr. Pipkin accompanied Kurt Arnold to meet with Leo Wellbrock concerning Mr. Arnold's hours of work. He had been assigned to work the night shift on the street sweeper. Mr. Pipkin was of the belief this was a violation of Section 13 of the contract. The conversation deteriorated into a heated argument with nothing being resolved at the meeting. Mr. Arnold and Mr. Wellbrock met again later in the day and were able to reach agreement acceptable to both so no formal grievance was filed.

The complaint of a single employee will be deemed an activity of an employee organization protected by K.S.A. 75-4324, if motivated by the intent to enforce a provision of the memorandum of agreement. An employee need not know with certainty that a suspected grievance is founded upon a provision of the collective bargaining agreement. N.L.R.B. v. Adams Delivery Service, Inc., 623 F.2d 96, 100 (9th Cir. 1980) An employee organization representative is protected by K.S.A. 75-4324 when fulfilling his role in processing a grievance, just as any other employee is protected when presenting a grievance to an employer. Thus the employee representative is protected "even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified and departs from the res gestae of the grievance procedure." Union Fork & Hoe, Co., 101 L.R.R.M. 1014-1015 (1979).

Mr. Pipkin, as the Union's representative, attended the meeting on January 3, 1990 at the request of Mr. Arnold, a member of the bargaining unit, to discuss what was believed to be a

violation of the memorandum of agreement. Such activity is a right guaranteed to public employees by K.S.A. 75-4324 and protected by K.S.A. 75-4333(1) and (3).

On January 15, 16 and 19, 1990, Ralph Smith and Dave Myers met with Fred Herman and Ron Seitz to discuss an incident of the two employees not "getting along on the job". After the January 19, 1990 meeting Mr. Smith learned from Dave Meyers that Fred Herman told him Mr. Pipkin stated he should have been present and involved in the discussions.

In N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1974), the U.S. Supreme Court upheld an N.L.R.B. determination that Section 7 (employee rights section equivalent to K.S.A. 75-4324) gives an employee the right to insist on the presence of his union representative at an interview which he reasonably believes will result in disciplinary action.

> "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." Weingarten at 232-63.

The right to union representation was further expanded in Climax Molybdenum Co., 94 L.R.R.M. 1177 (1977):

> "Surely, if a union representative is to represent effectively an employee 'too fearful or inarticulate to relate accurately the incident being investigated' and is to be 'knowledgeable' so that he can 'assist the employer by eliciting favorable facts, and...

> getting to the bottom of the incident," These objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action . . . .
>
> * * *
>
> The right to representation clearly embraces the right to prior consultation..." Id. at 1178.

The refusal of an employer to allow a consultation with union representative prior to an investigatory-disciplinary interview constitutes unlawful interference, **even in cases where the employee organization representative and not the employee requests the consultation.** As the N.L.R.B. concluded in Climax Molybdenum:

> "Our dissenting colleagues' final argument is that no violation of Section 8(a)(1) occurred here, even if employees have a right to prior consultation, because the employees did not request an opportunity to confer with union representatives prior to the interview. Even if it did not, the Union must have the right to pre-interview consultation with the employee in order to advise him of his rights to representation if that right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. Thus, since, in our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request is a denial of representation." Id. at 1178. (emphasis added).

Since the Union has the right to request a pre-interview consultation and, if requested by the employee, to attend the interview and assist the employee, the statement by Mr. Pipkin that

he should have been present and involved is correct, and protected activity.

On February 7, 1990 James Lyddane and Mr. Pipkin met with Ralph Smith to discuss the problem Mr. Lyddane was having with two other employees concerning the body odor of Homer Edwards and the profane language used by Marcian Hammerschmidt. There was a difference of opinion between Mr. Smith and Mr. Pipkin whether this constituted a "Union problem". After Mr. Smith stated he would take care of the problem he told Mr. Lyddane and Mr. Smith to return to work. At that point a short, heated exchange took place between Mr. Smith and Mr. Pipkin, it being unclear who initiated the confrontation.

From the statements examining the above incidents it should be clear Mr. Pipkin's attendance with, and representation of, Mr. Lyddane at the meeting with Mr. Smith was protected activity under K.S.A. 75-4324. The issue presented here is whether Mr. Pipkin's behavior consequently results in the loss of that protection. In this case it does not. As the N.L.R.B. stated in Prescott Industries Products Company, 83 L.R.R.M. 1500 (1973):

> "The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service."

Later, the N.L.R.B., in the case of Fall River Savings Bank, 103 L.R.R.M. 1197 (1980), stated:

> "[Employee's] manner toward her supervisor may have been impolite. A more deferential approach would have been preferable, but the point she was making concerning the application of seniority to Saturday work at branches was protected concerted activity [because it related to a matter of common concern to the employees]. Her right to express her concern on the seniority issue, pursuant to a recently established company policy, is not lost because of her lack of deference to her supervisor, as her action was not so extreme as to fall outside the protection of the Act."

Mr. Pipkin's conduct certainly does not fall into the latter category, thereby removing the K.S.A. 75-4324 projections attached to his February 7, 1990 activity.

Finally, on January 5, 1990, Mr. Pipkin and Marcian Hammerschmidt chanced to meet at the city shop just before 4:00 PM. During their conversation Mr. Pipkin inquired why Mr. Hammerschmidt had used the radio after completing his refuse collection route by 10:30 AM to coordinate the rest of the day's trash pick up rather than waiting until 11:00 when he would see the other refuse drivers at lunch. Mr. Hammerschmidt advised that was the policy concerning refuse pick up.

On January 8, 1990, Mr. Hammerschmidt met with Ralph Smith to discuss his conversation with Mr. Pipkin. Mr. Hammerschmidt stated he took Mr. Pipkin's comments he was to stay off the radio. Mr. Smith advised him to continue in accordance with the refuse pick up policy, and that he would talk to Mr. Pipkin.

Later on January 8, 1990, Mr. Smith met Mr. Pipkin in the office at the Service Department. He explained the refuse pick up policy and the reason for it. Mr. Pipkin indicated he understood and the conversation ended.

A single employee's actions may be protected under K.S.A. 75-4324 as concerted activity if the nature of the action had significance and relevance under the memorandum of agreement to the interests of the public employees in the bargaining unit whose employment is governed by the memorandum of agreement. Roadway Express, Inc., 88 L.R.R.M. 1503 (1975). Here there is no evidence that the inquiry made by Mr. Pipkin was for any other purpose than his own edification. Accordingly, the action was not of the type protected by K.S.A. 75-4324. However, if the decision to discipline Mr. Pipkin because of this incident was motivated by this position or activities in the employee organization, a violation of K.S.A. 75-4333(b)(3) may still be found.

C. Substantial Business Justification

Once it has been established that an employee was engaged in an activity protected by K.S.A. 75-4324 activity the inquiry shifts to whether the public employer's conduct was motivated by a legitimate and substantial business justification. See Litton Dental Product, 90 L.R.R.M. 1592 (1975). Proof of an anti-union motivation may make unlawful certain public employer conduct which would in other circumstances be lawful. Some conduct, however, is so "inherently destructive" of employee interests that it may be deemed proscribed with out need for proof of an underlying improper

motive. Labor Board v. Brown, 380 U.S. 278, 287 (1965); American Ship Building Co. v. Labor Board, 380 U.S. 300, 311 (1965).

Some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." Labor Board v. Erie Register Corp., 373 U.S. 221, 231 (1963). This recognition that specific proof of intent is unnecessary where public employer conduct inherently encourages or discourages union membership is but an "application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." Radio Officers', supra at 45-46.

If the public employer's conduct falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." Erie Resister, supra at 228. And even if the public employer does come forward with counter explanations for his conduct, an inference of improper motive may be drawn from the conduct itself, and a proper balance must be drawn between the asserted business justification and the invasion of public employee rights in light of PEERA and its policy. Id. at 229.

As the U.S. Supreme Court concluded in Radio Officers', supra at 45:

> "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or

> discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established."

(9) If the public employer's conduct is not sufficient to constitute behavior "inherently destructive" of K.S.A. 75-4324 rights, the impact must be considered "comparatively slight." When the resulting harm to public employee rights is "comparatively slight," and a substantial and legitimate business end is served, the public employer's conduct is lawful, and an affirmative showing of improper motivation must be shown. N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, 34 (1967).

Thus, in either situation, once it has been proved that the public employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the public employer to establish that he was motivated by legitimate objectives since proof of motivation is most assessable to him. Great Dane Trailers, supra at 34.

Merely proffering a legitimate business reason for the disciplinary action does not end the inquiry, for it must be determined whether the reasons advanced are bona fide or pretextual. If the proffered reasons are a mere litigation figment or were not relied upon, then the determination of pretext concludes the inquiry. Marathon LeTourneau Co. v. N.L.R.B., 699 F.2d 248, 252 (5th Cir. 1983). However, where the employer advances legitimate reasons for the disciplinary action, and is

found to have relied upon them in part, then the case is characterized as on of "dual motive".

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

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

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

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

In other words, there must be a demonstrated causal connection between the employer's conduct and employee's union membership or activities, or the employer's anti-union animus.

(10) It should be pointed out here that membership in an employee organization or participation in concerted activities of the employee organization does not immunize employees against discipline. Florida Steel Corp. v. N.L.R.B., 587 F.2d 735, 743 (5th Cir, 1979). It is unlawful under PEERA for a public employer to discipline an employee only if the dominate motivation for that discipline is the employee's membership in or his activities on behalf of an employee organization. Subject to this qualification the Public Employer Employee Relations Act does not restrict a

public employer's right to discipline an employee for any reasons, whether it is just or not, and whether it is reasonable to not, as long as the discipline is not in retaliation for employee organization activities or affiliation. N.L.R.B. v. Ogle Protection Service, Inc., 375 F.2d 497, 505 (6th Cir. 1967).

Maintaining discipline among its employees is clearly a part of management prerogative, and is recognized by K.S.A. 75-4326. The Public Employee Relations Board cannot substitute its judgment for that of the public employer as to what constitutes reasonable grounds for disciplinary action. N.L.R.B. v. Wagner Iron Works, 220 F.2d 126 (C.A. 7 19___). The question of proper discipline of an employee is a matter left to the discretion of the employer. N.L.R.B. v. Mylan-Sparta Co., Supra at 745:

> "[M]anagement is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not discharge when the real motivating purpose is to do that which section 8(a)(3) forbids."

The public employer does not have the burden of disproving the existence of unlawful motivation in disciplining an employee. See N.L.R.B. v. Soft Water Laundry, Inc., 346 F.2d 930, 936 (5th Cir. 1965). As the court summarized in N.L.R.B. v. McGahney, 233 F.2d 406 (5th Cir. 1956):

> "The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a

free society, the fact of discharge creates no presumption, not does it furnish the ingerence than an illegal - not a proper - motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

When good cause for discipline is clearly established the burden is on the employee or employee organization to show that anti-union animus was the motivating factor. Clothing Workers, Midwest Regional Joint Board v. N.L.R.B., 564 F.2d 434, 440 (D.C. 1977). An employer's stated or avowed opposition to an employee organization is not, in itself, sufficient evidence to sustain a finding that his employees were disciplined because of discrimination against the employee organization. Ogle Protection, supra at 505.

In Frosty Morn Meats, Inc. v. N.L.R.B. 296 F.2d 617, 621 (5 Cir. 1961), the court stated:

> "If, however, the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union, since all will understand that the employee would have been fired anyway. It must be remembered that the statue prohibits discrimination, and that the focus on dominant motivation is only a test to reveal whether discrimination has occurred. Discrimination consists in treating like cases differently. If an employer fires a union sympathizer or organizer a finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently.

"When an employee gives his employer as much reason to fire him as Judkins did, by refusing to follow instructions and by giving not only his supervisors but also his fellow employees the impression that he was uncooperative, there is no basis for the conclusion that the employer has treated him differently than he would have treated a non-union employee. As a speculative matter, it may or may not be true that union animus loomed larger in the employer's motivation than Judkins' shortcomings as a worker. But when the evidence of just cause for discharge is as great as it is here, the record as a whole does not support the conclusion that the discharged employee was deprived of any right because of union activities.

(11). The question of whether a public employee is disciplined because of his employee organization affiliations and participation in K.S.A. 75-4324 protected activities is essentially a question of fact. Since motivation is a question of fact, the Public Employee Relations Board may infer discriminatory motivation from either direct or circumstantial evidence. In Radio Officers' the court stated:

"An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experience officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries." Id. at 48-49.

Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception:, Radio Officers', supra at 51, such that actual encouragement or discouragement need not be proved but that a tendency is sufficient, and such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination. A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers', supra at 50.

Anti-union motivation may reasonably be inferred from a variety of factors, such as an employer's expressed hostility towards unionizing, together with knowledge of the employee's union activities (Turnbull Cone Baking Co. v. N.L.R.B., 778 F.2d 292, 297 (6th Cir. 1985); proximity between the employee's union activities and their discharge (N.L.R.B. v. E.I. DuPonte De Nemours, 750 F.2d 524, 429 (6th Cir. 1984); disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action (Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902 905 (3d Cir. 1981); inconsistencies between the proffered reason for discharge and other actions of the employer (Turnbull, supra at 247); shifting explanations for the discharge (N.L.R.B. v. Dorothy Shamrock Coal Co., 833 F. 2d 1263 (7th Cir. 1987); Statements or conduct of the employer manifesting discriminatory intent (Instrite Mfg. Co., 99 L.R.R.M. 1577(1978); and absence of warnings for alleged misconduct and/or apparent condonation of infractions used to justify discipline (Boyles Galvanizing Co., 99 L.R.R.M. 1707 (1978).

Inherently Destructive Test

Once it has been established that an employee or employee organization was engaged in conduct protected by K.S.A. 75-4324 the initial determination must be whether the resulting harm from the public employer's action was "inherently destructive" or "comparatively slight" to that protected activity. Sometime after January 19, 1990 Mr. Pipkin allegedly stated to Fred Herman that he should be been present and involved in the discussions of Fred Herman and Ron Seitz with Ralph Smith on Dave Meyers on January 15, 16, and 19. Fred Herman is not a supervisor or member of Employer's management.

This incident is similar to that addressed in Pittsburg Press Co., 97 L.R.R.M. 1371 (1978). The N.L.R.B. found that the suspension of a steward who had stated his intention to keep the maximum possible number of employees working was "inherently destructive" of employee statutory rights under the N.L.R.B.:

> "Walkin's statement was clearly an expression of Walkin's intention to be an active union representative of the employees, and thus his statement was protected by the Act. Penalizing an employee for union-related conduct protected by Section 7 of the Act such as that considered here is inherently destructive of important employee rights and thus requires no proof of anti-union motivation."

When the employer's conduct is characterized as "inherently destructive," unlawful motivation is presumed to exist. Western Extermination Co. v. N.L.R.B., 565 F.2d 1114, 1118 n. 3 (7th Cir. 1977)

Additionally the statement by Mr. Pipkin is relative to the right of the Union to request a pre-interview consultation and, if requested by the employee, to attend the interview and assist the employee, Climax Molybdenum, supra at 1178. It must be noted the person to whom the statement was made was Fred Herman, one of the employees brought in for the interview. To penalize Mr. Pipkin for this union related activity protected by K.S.A. 75-4324 is inherently destructive of this important employee right. There can be no questions but that to allow the employer to discipline the employee organization representative for stating or asserting an employee right will have a chilling affect upon membership and inhibit qualified employees from holding office, thereby "creating visible and continuing obstacles to the future exercise of employee rights." Loomis Courier Service, Inc. v. N.L.R.B., 595 F.2d 491, 494 (9th Cir. 1979). Such action is deemed "inherently destructive."

On February 7, 1990 Mr. Pipkin accompanied James Lyddane to a meeting with Ralph Smith to discuss problems Mr. Lyddane was having with two other employees. Whenever a member of the bargaining unit is elected as a Union official which then necessitates that the employee act as an advocate representing the members of the bargaining unit, and as a watchdog to see that the employer is properly administering the memorandum of agreement between the parties, then the officer is protected by PEERA when fulfilling the responsibilities of his role. Union Fork & Hoe Co., 101 L.R.R.M. 1014, 1015 (1979).

In NLRB v. Weingarten, Inc., 420 U.S. 251, 262 (1975) the court concluded:

> "To that end the Act is designed to eliminate the 'inequity of bargaining power between employees and employers.' Ibid. Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of ... perpetuates the inequality the Act was designed to eliminate, and has recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'"

This same reasoning applies equally to the situation here, where an employee seeks resolution of a complaint and requests the assistance of the employee organization representative to present the complaint to the employer for resolution outside the formal grievance procedure.

As the arbitrator noted in Independent Lock Co., 30 Lab. Arb. 744, 746 (1958) "it can be advantageous to both parties if both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem." See also Caterpiller Tractor Co., 44 Lab. Arb. 647, 651 (1956):

> "The procedure...contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance.

> It is entirely logical that the steward will employ his office in appropriate cases so as to limit grievances to those which involve differences of substantial merit."

As with employee right to representation and employee organization right to pre-interview consultation discussed above, the discipline of an employee organization officer for fulfilling his responsibilities under PEERA will inhibit qualified employees from holding office; a right of employee organization participation protected by K.S.A. 75-4324. Accordingly the Employer's action must be considered "inherently destructive".

Finally, on January 3, 1990 Kurt Arnold met with Leo Wellbrock concerning Mr. Arnold's hours of work. Mr. Pipkin attended the meeting at Mr. Arnold's request. It was Mr. Pipkin's belief the assignment of Mr. Arnold's work hours was a violation of Section 13 of the contract.

In Fall River Savings Bank, 103 L.R.R.M. 1197, 1198 (1980) the employer was determined to have violated the Labor Management Relations Act for terminating an employee for "willfully questioning prerogatives of management." The employee had questioned the method of assigning Saturday work as contrary to the union contract. The NLRB concluded the employer's action related to a matter of common concern to the employees and therefore a protected activity.

According to the NLRB in Climax Molybdenum:

> "It is not necessary for employees to band together and overtly manifest by physical action their discontent before it will be found that their activity is concerted. . . Even individual protests which rebound to the

> groups benefit are protected concerted activity. . . .Individual complaints of this sort are similar to grievances, and since they will have an effect on all employees, the Board has taken the position that such conduct is protected by the Act." Id at 1178.

As noted previously, an employee organization representative is protected when fulfilling his duties and responsibilities as the exclusive or recognized employee organization. For the reasons set forth relative to the January 19 and February 7 incidents, the Employers' conduct of taking disciplinary action against Mr. Pipkin because of his actions on January 3 must also be considered "inherently destructive."

Having determined that three of the four incidents asserted by Employer as establishing a basis for its disciplinary action of Mike Pipkin involved protected employee or employee organization activity such that the Employer's conduct falls within the "inherently destructive" category, the Employer has the burden of explaining away, justifying or characterizing his actions as "something different than they appear on their face." Great Dane Trailers, supra at 33.

The Employer's business justification appears to be threefold:

> 1. Employee organization representatives cannot become involved in any matter considered by Employer to involve "management rights".
>
> 2. The memorandum of agreement does not provide for a Union Representative to accompany an employee to discuss job assignments or personnel problems.
>
> 3. The only recourse for an alleged violation of the memorandum of agreement is the formal grievance procedure.

(12) Management rights are recognized in K.S.A. 74-4326:

> "Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:
> (a) Direct the work of its employees;
> (b) Hire, promote, demote, transfer, assign or retain employees in positions within the public agency'
> (c) Suspend or discharge employees for proper course;
> (d) Maintain the efficiency of governmental operation;
> (e) Relieve employees form 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."

a. Management rights

As the New Jersey court observed in Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 410 A.2d 13211 (19):

> "Logically pursued, these general principles - managerial prerogatives and terms and conditions of employment - lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by public employer involve some managerial function, ending inquiry at that point would all but eliminate the legislative authority of the union representative to negotiate with respect to 'terms and conditions of employment.' Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives."

To resolve this conflict the court adopted a standard of "significant interference". This standard was adopted by the presiding officer in PERB case 75-CAE-9-1990, Kansas Association

of Public Employees v. State of Kansas, Adjutant General's Office. As the presiding officer concluded:

> "As quoted above, this prong of the test rests on the assumption that most decisions of the public employer affect the work and welfare of public employees to some extent, and that negotiation will always impinge to some extent on the determination of public policy. The two conflicting interests cannot be reconciled by focusing solely upon the impact or effect of managerial decisions but instead the nature of the terms and conditions of employment must be considered in relation to the extent of their interference with management rights as set forth in K.S.A. 75-4326.
>
> The requirement that the interference be "significant" is designed to effect a balance between the interests of public employees and the requirements of democratic decision making. A weighing or balancing must be made."

This concept of weighing or balancing of the interest of the employee against employer prerogatives or rights is consistent with the balancing requirement directed by the court in Erie Register, and reaffirmed in Great Dane Trailers, supra at 33-34:

> "As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality a far more delicate task...of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." Erie Register, supra at 228-229.

Mike Pipkin was involved in protected employee activities on each of the three occasions that gave rise to the disciplinary action. None can be characterized as "significantly" interfering with the Employer's rights under K.S.A. 75-4326. The Arnold incident was a single event covering a relatively short period of time. There is no record that Mr. Pipkin sought to continue the

dispute through formal grievance or to encourage Mr. Arnold to resist or oppose management's decision. Nor is there any evidence that Mr. Pipkin attempted to promote unrest or ill will among other employees in the unit toward the Employer because of management's decision.

The Herman statement amounted to hearsay upon hearsay by the time management got the story. No evidence was introduced of any investigation on the part of the employer to verify the truth or accuracy of the statement. There is no record that the statement was made to any employer other than Mr. Herman or that it resulted in problems with management supervision of employees or unrest among the employees. Mr. Pipkin made no claims upon management not attempted to reverse or involve himself in the incident. In fact, but for Mr. Herman telling his supervisor of the alleged statement, there is no evidence that Mr. Pipkin had even shown an interest in the Herman-Seitz incident.

Finally, Mr. Pipkin's attendance at the meeting between Mr. Lyddane and Mr. Smith on February 7, 1991 was, like the Arnold incident, a single event covering a short period of time. Mr. Pipkin again did not press the complaint to formal grievance nor is there evidence of other employee disciplinary problems related to Mr. Pipkin's conduct.

Viewing Mr. Pipkin's conduct on each occasion separately or as a whole, it cannot reasonably be characterized as significant. Any interference with employer rights certainly is outweighed by the consequences to protected employee rights should the employer

be allowed to continue to discipline employees for participating in employee organization activities.

b. Memorandum of agreement

(13) As discussed in detail above, and will not be repeated here, an employee has a right to the assistance of, and consultation with, the employee organization representative at any interview he reasonably believes will result in disciplinary action. The employee organization similarly has the right to a pre-interview consultation with the employee. Additionally, an employee has the right to the assistance of the employee organization representative during the presentation of a complaint or grievance to management. These rights are founded in K.S.A. 75-4324 and protected by K.S.A. 75-4333(b).

The fact that the memorandum of agreement does not specifically provide for such representation or consultation does not waive a right otherwise provided by law. The general rule is that a waiver of an employee or employee organization right must be clear and unmistakable. NLRB v. R.L. Sweet Lumber Company, 515 F.2d 785, 795 (10th Cir. 1975). See also NEA-Wichita v. U.S.D. 259, 234 Kan. 512, 518 (1983). No such clear and unmistakable waiver can be found in the memorandum of agreement.

c. Grievance procedure

The Employer's contention that the only recourse for an alleged violation of the memorandum of agreement is the formal grievance procedure is also incorrect. The existence and importance of informal resolution of complaints and grievances concerning the interpretation of the memorandum of agreement, work practices or conditions of employment without having to resort to the formal grievance procedure have been discussed above.

Given the comparatively slight interference with the Employer's rights and the employee and employee organization rights involved, the Employer's conduct must be found inherently destructive or discriminatory. The Employer's business justifications for the disciplinary action do not outweigh the potential adverse affect upon employee rights. The Employer in this case must be held to have intended the very consequences which foreseeably and escapably flowed from his actions. Erie Resister, supra at 228. The employer's statement in the memo accompanying the written reprimand that "(i)n the future, any interference with management rights . . . will not be tolerated and will be subject to further disciplinary action" foreseeably impacts upon K.S.A. 75-4324 rights by discouraging participation by Mr. Pipkin in future efforts to represent employees relative to grievances and disputes concerning work practices and conditions of employment, and from seeking office in the employee organization that obligates the representative to so represent employees. Seeing this action against Mr. Pipkin would also have a chilling effect upon other

employees to become involved in, or seek office in the employee organization. The Employer must be held to have intended such consequences. The issuance of a reprimand to Mike Pipkin constitutes a violation of K.S.A. 75-4333(b)(1) and (3).

Comparatively Slight Test

Assuming, arguendo, the conduct of the Employer was not "inherently destructive" of important employee rights, the evidence is still sufficient to establish a violation of K.S.A. 75-4333(b)(1) and (3). As noted previously, if the public employer's conduct is not sufficient to constitute behavior "inherently destructive" of K.S.A. 75-4324 employee rights, the impact must be considered "comparatively slight." When the resulting harm to public employee rights is "comparatively slight," and a substantial and legitimate business end is served, the public employer's conduct is lawful and an affirmative showing of improper motive must be shown.

Giving the Employer the benefit of the doubt that the three business justifications set forth above serve a substantial and legitimate business end, the burden is upon the employee or employee organization to come forward with evidence that the employee would not have been disciplined "but for" his employee organization affiliation or activities. Anti-union and discriminatory motivation may be inferred from either direct or circumstantial evidence.

The factors from which anti-union or discriminatory conduct can be inferred in the instant case include:

1. **Knowledge of employee's employee organization activities.** While the Employer expresses an apparent lack of knowledge of Mike Pipkin's status as an employee organization officer and steward, the evidence is clear Mr. Pipkin has been the Chairman of the Union for four years; the size of the Service Department operation is comparatively small such that it is hard to believe the status of Mr. Pipkin could have gone unrecognized for four years; Mr. Pipkin signed the 1988-90 memorandum of agreement and 1989 addendum as Chairman of the Union and Mr. Wellbrock also signed those documents as Public Works Director; Mr. Wellbrock testified that he assumed from Mr. Pipkin's actions that he was Chairman of the Union; Mr. Pipkin had filed grievances on behalf of employees, his name appears on the grievance, and he represented them at the grievance hearings; and the statement of Ralph Smith to Mr. Pipkin at the February 7, 1990 meeting with Mr. Lyddane that the subject was not a union problem indicates a recognition of Mr. Pipkin's status.

2. **Proximity between the employee's employee organization activities and the disciplinary action.** Approximately one month elapsed between the first incident upon which Mr. Pipkin's disciplinary action was based and the issuance of the written reprimand. Only one day passed between the Lyddane incident on the 7th of February and the reprimand of Mr. Pipkin on the 8th of February, 1990.

3. **Disparate treatment of employees.** Other employees were involved in the January 3, 1990 and the February 7, 1990 incidents. Their actions constituted no less of an interference with the alleged management prerogatives than did Mr. Pipkin's, but these employees were not reprimanded nor is there any evidence in the record that they were advised that they were interfering with management prerogatives such that any future similar action would result in disciplinary action. The only employee against whom disciplinary action was taken was Mr. Pipkin, Union officer and steward.

   Looking at the January 5, 1990 radio incident with Mr. Hammerschmidt, it is unreasonable to believe the only way an employee can seek an explanation for a work practice, policy or procedure, or employer interpretation of the memorandum of agreement is through the formal grievance process, or that the employer refuses to entertain questions and no other employee has ever sought an answer or clarification prior to the January 5, 1990 incident with Mr. Hammerschmidt. In fact, Mr. Smith testified that employees can come and ask questions anytime. It should be noted that the evidence indicates Mr.

Pipkin never told Mr. Hammerschmidt to stay off the radio, only that Mr. Hammerschmidt took it that way.

4. **Absence of warnings for alleged misconduct.** There is nothing in the record to prove Mr. Pipkin was ever advised his participation in employee organization activities would or could result in disciplinary action. Likewise, there is nothing in the record to indicate this activity on the part of Mr. Pipkin was new or different from his past activities as Union Chairman. Given Mr. Pipkin's tenure as the Union Chairman and the lack of any evidence to the contrary, it can bee inferred that he has addressed other employee problems or concerns about work practices or conditions of employment in a similar fashion in the past. Again, there is nothing in the record that such activity resulted in warnings or disciplinary action.

5. **Other factors.** Of importance here is the relatively slight interference with employer managerial prerogatives that did or could have resulted from Mr. Pipkin's activities when weighted against the harm to protected employee rights from the Employer's conduct.

   Additional attention must be given to the fact that as to the statement attributed to Mr. Pipkin on or about January 19, 1990 that he should have been involved in the Herman-Seitz meetings, Mr. Smith did not know, in fact, that Mr. Pipkin made the statement, and made no effort to discuss the statement with Mr. Pipkin or investigate its authenticity, and yet this same unconfirmed statement was used as a basis for disciplinary action. It would be hard to argue that the Employer, as normal course of business, used unsubstantiated third person hearsay as evidence to support disciplinary action without offering the employee the opportunity to verify its accuracy or respond. Also, if the statement did so interfer with management prerogatives, one would assume the Employer would have so advised Mr. Pipkin or at the very least made an effort to ascertain the correctness of the statement.

It is reasonable to infer from these factors a union animus or discriminatory motivation for the Employer's conduct, and that the disciplinary action would not have been taken "but for" Mike Pipkin's employee organization affiliation or activities. Therefore, the Employer's reprimand of Mike Pipkin is a violation of K.S.A. 75-4333(b)(1) and (3) under the "comparatively slight" test as well as the "inherently destructive" test.

ORDER

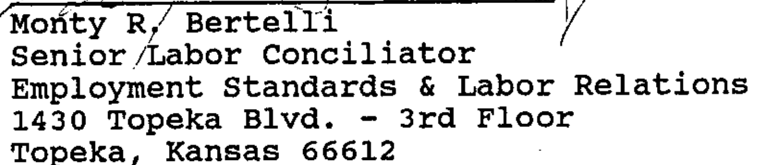
IT IS THEREFORE ORDERED that the City of Hays, Kansas expunge from the personnel records of Mike Pipkin the written reprimand issued February 8, 1990.

IT IS FURTHER ORDERED that the City of Hays, Kansas shall cease and desist interfering with employee rights guaranteed by K.S.A. 75-4324 and protected by K.S.A. 75-4333(b)(1), and discriminating against employees, as prohibited by K.S.A. 75-4333(b)(3), because of their affiliation with or participation in an employee organization.

IT IS FURTHER ORDERED that the City of Hays, Kansas shall conspicuously post a copy of this order at all locations where employees in the bargaining unit represented by the Service Employees Union report to work.

IT IS FURTHER ORDERED that since the prohibited practice has been established pursuant to K.S.A. 75-4333(b)(1) and (3), and the relief granted will not change, it is unnecessary at this time to consider the alleged violation of K.S.A. 75-4333(b)(6).

IT IS SO ORDERED this 14th day of April, 1991.



Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
1430 Topeka Blvd. - 3rd Floor
Topeka, Kansas 66612

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Public Employees Relations Board, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of April, 1991, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

Petitioner: Art J. Veach, Business Agency,
Service Employees Union Local 513,
417 East English,
Wichita, Kansas 67202

Respondent: John T. Bird, City Attorney
c/o GLASSMAN, BIRD & BRAUN,
113 West 13th Street,
Hays, Kansas 67601.

Members of the PERB Board