BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC EMPLOYEES (KAPE), Petitioner,	)	
vs.	)	Case No. 75-CAE-9-1990
STATE OF KANSAS, ADJUTANT GENERAL'S OFFICE, Respondent.	)	

INITIAL ORDER

On the 16th day of August, 1990, the above-captioned prohibited practice complaint came on for formal hearing pursuant to K.S.A. 75-4334 and K.S.A. 77-517 before presiding officer, Monty R. Bertelli.

APPEARANCES

Petitioner: Appears by counsel Brad Avery, Kansas Association of Public Employees, 400 S.W. 8th Street, Suite 103, Topeka, Kansas 66603.

Respondent: Appears by counsel Mark S. Braun, Assistant Attorney General, Kansas Judicial Center, 2nd floor, Topeka, Kansas 66612.

ISSUE PRESENTED FOR REVIEW

WHETHER THE REFUSAL OF A PUBLIC EMPLOYER TO PROVIDE WRITTEN COUNTER-PROPOSALS ON NOTICED, MANDATORILY NEGOTIABLE CONDITIONS OF EMPLOYMENT WHEN THE SAME ARE REQUESTED BY THE RECOGNIZED EMPLOYEE ORGANIZATION CONSTITUTES REFUSAL TO MEET AND CONFER IN GOOD FAITH IN VIOLATION OF K.S.A. 75-4327 AND THEREFORE A PROHIBITED PRACTICE IN ACCORDANCE WITH K.S.A. 75-4333(B)(5).

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SYLLABUS

1. PROHIBITED PRACTICES - Burden of Proof. The burden of proving a charge lies with the party alleging an unfair practice, and must be proven by a preponderance of all the evidence. The filing of a prohibited practice complaint creates no presumption of violation.

2. PROHIBITED PRACTICES - Per Se Violations - Refusal to provide written counter-proposals. The basis for a per se violation involves an absence of bargaining, frequently selective as to subjects, such that it is the failure to negotiate, rather than the absence of good faith. The failure to provide written counter-proposals cannot be viewed as a type of conduct amounting to a per se refusal to bargain.

3. PROHIBITED PRACTICES - Burden of Proof - Totality of conduct standard. The "totality of conduct" is the standard through which the quality of meet and confer negotiations is to be tested. Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright or per se refusal to bargain, all the relevant facts must be studied in determining whether a party is bargaining in good or bad faith. The Board should not rely upon one factor alone conclusive evidence that the party did not genuinely try to reach agreement.

4. PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT - Nature of the Act - Obligation of the parties. The Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 et seq., imposes mandatory obligations upon the public employer and representatives of public employee organizations not only to meet and confer, but to enter into discussions in good faith with an affirmative willingness to resolve grievances and disputes.

5. PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT - Nature of the Act. The Kansas Public Employer-Employee Relations Act is not a strict "meet and confer" act nor is it a "collective negotiations" act but is a "hybrid" containing some characteristics of each.

6. DUTY TO BARGAIN - Good Faith - Making concessions. The "good faith" concept imposes no requirement that the parties reach agreement, agree to a proposal, or make a concession.

7. PROHIBITED PRACTICES - Good Faith Bargaining - Failure to reach agreement. If honest and sincere bargaining efforts fail to produce an understanding on terms, nothing in the Public Employer-Employee Relations Act ("PEERA") makes illegal the public employer's refusal to grant a particular demand or provide a counter-proposal on an issue does not necessarily constitute bad-faith bargaining.

8. PROHIBITED PRACTICES - Burden of Proof - Willful. The Kansas legislature intended that proof of a prohibited practice be more difficult under PEERA than under federal law. Proof of anti-union animus or specific intent to violate an employee's or recognized employee organization's rights is essential to establish a prohibited practice.

9. DUTY TO BARGAIN - Good Faith - Subject - Existing statutes or regulations covering topic. Under PEERA the representative of the public agency and the recognized employee organization must negotiate upon and are free to agree to proposals governing any term and condition of employment regardless of existing statute or regulation covering the topic, subject only to certain, limited exceptions.

10. DUTY TO BARGAIN - Scope of Negotiations - Negotiable subjects test. Use of a three-prong test provides a meaningful standard by which to determine claims of negotiability.

11. DUTY TO BARGAIN - Scope of Negotiations - Balancing of interests. To determine whether a subject is negotiable, the Board must balance the competing interests of public employers and the requirements of democratic decision making. Where the employer's management prerogative is dominant, there is no obligation to negotiate, even though the subject may ultimately affect or impact upon public employee terms and conditions of employment.

12. DUTY TO BARGAIN- Good Faith - Making concessions. Although the Public Employer-Employee Relations Act does not require the making of concessions during negotiations, the factual basis for a party's refusal to make a particular concession is a factor in determining whether or not that party is negotiating in good faith.

13. DUTY TO BARGAIN - Good Faith - Failure to make proposal - Excuse. A public employer cannot use financial uncertainty as an excuse for failing to make a wage proposal.

14. DUTY TO BARGAIN - Good Faith - Failure to provide requested information. The failure to provide requested information constitutes evidence of a refusal to bargain in good faith both on the part of the public employer and the employee organization.

FINDINGS OF FACT

1. The Kansas Association of Public Employees, ("KAPE"), is the recognized employee organization for the fire fighters unit in the Adjutant General's Office as provided in Public Employee Relations Board, order 75-UDC-4-1988 (Pet. Ex. 4).

2. The Adjutant General's Office is a public agency of the state of Kansas as defined by K.S.A. 75-4322(f), and therefore a public employer subject to the jurisdiction of the Public Employer-Employee Relations Act, (the "Act").

3. On or about April 10, 1989 KAPE and the Adjutant General's Office, ("Employer"), commenced the meet and confer process by meeting to establish the ground rules for future substantive discussions (Tr. p. 103).

4. KAPE was initially represented by Don Kuehn at meetings concerning noticed terms and conditions of employment held on 6-9-89, 6-16-89, 6-30-89, 7-11-89, 8-9-89 and 8-17-89, and thereafter by Paul Dickhoff for approximately twelve more meetings up to and including April 6, 1990 (Tr. p. 17, 103, 105).

5. The Employer was represented by Gary Leitnaker of the Department of Administration, Al Nauman, Personnel Director for the Adjutant General's Office and Chief Master Sergeant Smith during the meetings. Mr. Nauman was the chief spokesperson for the Employer (Tr. p. 102).

6. On or about June 9, 1989, KAPE presented a package of proposals concerning topics to be included in a final memorandum of agreement (Tr. p. 105).

7. According to Mr. Dickhoff KAPE's package included 17 articles with approximately 75 total subsections (Tr. p. 72). Mr. Nauman testified the package included 17 articles with a total of 66 topics within those articles (Tr. p. 72).

8. The Employer did not present KAPE with a written package of proposals concerning topics to be included in the final memorandum of agreement.

9. As a result of approximately 18 meet and confer sessions over a period of 10 months, the parties reached tentative agreement on approximately 75% of the topics (Tr. p. 18).

10. Of the approximately 42 topics upon which tentative agreement had been reached, agreement came as the result of "a good deal of oral discussions at the table" with concessions being made by both sides (T. p. 74).

11. Mr. Dickhoff classified the topics upon which no agreement had been reached into three categories: (1) topics being at impasse, (2) topics for which no counter proposal had been received and (3) topics for which a response was received to a KAPE proposal but the response was not considered to be a true counter-proposal (Tr. p. 75). Mr. Nauman testified that of the topics where no agreement had been reached: 14 counter-proposals had been made; no counter-proposals were given on three but an oral explanation for why no proposal was forthcoming; and there were five topics about which the Employer was reluctant to discuss because of a pending lawsuit involving those topics (Tr, p. 105-6).

12. Employee Discipline: KAPE made a proposal concerning employee discipline in Article IV, Section 4 of its package (Hrg. Ex. 1). At one of the sessions in December, 1989 Mr. Nauman stated to Mr. Dickhoff that he would receive nothing on discipline based upon the belief that the topic was not mandatorily negotiable. At the next session Mr. Nauman acknowledged that discipline was a mandatory topic and the mistake of his previous statement (Tr. p. 134). On February 14, 1990 the employer made a written counter-proposal to Article IV, section 5 that it believed addressed the topic of employee discipline (Tr. p. 134-35, Hrg. Ex. 1). No agreement on the topic has been reached.

13. Longevity Pay: The topic of longevity pay was discussed at the December 21, 1989 session (Tr. p. 18, 20, 180). The Employer's initial response was that no counter-offer would be given and that KAPE should seek its longevity program from the legislature (Tr. p. 20, 180, 188). On March 28, 1990 Mr. Nauman informed Mr. Dickhoff there was a bill introduced in the legislature (H.B. 2718) that would fund longevity pay for unclassified employees (including the firemen in this unit) (Tr. p. 21, 119). The Employer's counter-proposal for longevity was H.B. 2718 (Tr. p. 131-32). At the time of making the counter-proposal the bill was in committee and the Employer did not know whether or not it would pass (Tr. p. 133). The bill ultimately did not pass (Tr. p. 188). No agreement was reached on the topic of longevity pay.

14. Wages: As Article VIII, Section 1 of its April 6, 1989 package of proposals, KAPE included a pay matrix and provisions for step increases (Tr. p. 21). Mr. Nauman made a request to Mr. Kuehn for information concerning the surveys and data upon which the pay matrix was based (Tr. p. 125, 147, 153, 169), and renewed the request when Mr. Dickhoff took over (Tr. p. 125, 169). That information was never given to the Employer (Tr. p. 169). On March 28, 1990 the Employer presented KAPE with a written statement that "Each employee shall receive a regular hourly wage as prescribed and approved by the Governor" (Tr. p. 22, Hrg. Ex. 1). At the time the proposal was made by the Employer the Employer did not know what the Governor's recommendation concerning wages would be (Tr. p. 187). No agreement was reached on the topic of wages.

15. Use of Facilities: KAPE included a proposal in its April 6, 1989 package regarding the use of facilities at Forbes Airfield by the employee organization for unit business. (Article V, Section 3). On December 8, 1989 and April 6, 1990 the issue was addressed by KAPE with the Employer indicating that no counter-proposal would be made on that topic (Tr. p. 25-26). No written counter-proposal was given to KAPE (Hrg. Ex. 1).

16 PEAC Deductions: In Article V, section 9 of KAPE's April 6, 1989 package there was a proposal for payroll deductions of employee contributions to the Public Employee Action Committee (PEAC). Mr. Dickhoff received no response to an inquiry at the December 8, 1989 session concerning this topic (Tr. p. 27). At the December 21, 1989 session he was told no response would be forthcoming from the Employer and that the topic was not a mandatory item for meet and confer (Tr. p. 28). On April 6, 1990 Mr. Nauman sought to get a better understanding of PEAC and its purpose, and Mr. Dickhoff tried to explain what PEAC did. Through the conversation KAPE stated, in response to a question from Mr. Nauman, that it had no management role in PEAC. When asked why then was it included in the proposal no answer was given (Tr. p. 121). Mr. Nauman expressed the concern that the deduction of contributions for PEAC could be considered a political contribution, and thereby a prohibited practice under the Act (Tr. p. 122). No agreement was reached on this topic.

17. Drug Testing: Finally, KAPE made a proposal concerning the procedures to be followed for implementation of a drug testing program (Article IV, Section 10 of Hrg. Ex. 1). The Employer provided no counter offer but explained that since the

employees in the unit were not included in the present state law requiring drug testing, there was no reason to have a procedure in the memorandum of agreement (Tr. p. 32, 123). No agreement was reached on this topic.

18. At different times during the meet and confer process KAPE suggested the parties make a joint request of the Board for an opinion as to the negotiability of certain topics. The Employer refused KAPE's request on the belief such action was premature and that the parties should continue to meet and confer in an endeavor to reach agreement (Tr. p. 33, 111-12).

19. Request for Written Counter-Proposals: On March 9, 1990 Mr. Dickhoff wrote to Mr. Nauman expressing a need to better understand the position of the Employer relative to those topics upon which agreement had not been reached. To assist in understanding those positions Mr. Dickhoff requested a written counter-proposal, a statement that such topic constituted terms and conditions of employment, or a statement of position on each of the open items (Pet. Ex. 1).

20. On March 15, 1990 Mr. Nauman wrote to Mr. Dickhoff stating the Employer's position that PEERA did not require the submission of written responses or counter-proposals to each item under discussion. He stated counter-proposals or explanations had been provided on most topics, and the Employer had not been convinced of the necessity to include certain other topics in the memorandum of understanding (Pet. Ex. 2).

21. KAPE did not begin requesting written proposals until the last third of meetings. There was no demand early on in the meet and confer proceedings (Tr. p. 204). One reason given by KAPE for the need for written proposals was the vacillation of the Employer on topics (Tr. p. 40) Additionally, KAPE claimed that the meet and confer sessions could not be productive unless KAPE Knew the Employer's position or that it intended not to state a position (Tr. p. 69).

22. Throughout the meet and confer process the Employer's representatives did attend all scheduled meetings (Tr. p. 107). The employer also maintained a willingness to return to the bargaining table and the belief agreement was possible.

CONCLUSION OF LAW AND OPINION

The primary issue before the Public Employee Relations Board ("Board") is whether the Adjutant General's Office ("Employer") committed a prohibited practice in violation of K.S.A. 75-4333(b)(5) and/or K.S.A. 75-4333(b)(6) by refusing to provide written counter-proposals when requested by the Kansas Association of Public Employees ("KAPE"), the recognized employee organization.

It is the position of KAPE "*that good faith bargaining toward a mutual agreement... contemplates written proposals and counter-proposals at some point in order to comply with the statutory requirement to 'exchange freely information, opinions and proposals' (Pet. Ex. 1)*". KAPE contends the Employer's refusal to make written counter-proposals was a clear indication it had no intention of reaching an agreement on wages, hours and other terms and conditions of employment.

The Adjutant General's Office maintains "*nothing in PEERA ("Act") requires written counter-proposals during the meet and confer process*"; how agreement is reached not being mandated by the Act. The Employer counters it is only required to come to the negotiation table with the "*willingness*" to resolve matters and reach agreement. The Employer, having satisfied this requirement, therefore did meet and confer in good faith.

BURDEN OF PROOF

Although Kansas courts have not addressed the standard of proof necessary to establish a prohibited labor practice, federal courts have made it clear that the burden of proving a charge lies on the party alleging an unfair practice. *"[T]he 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 423, 433(10th Cir. 1044). Findings of unfair labor practices must be supported by substantial evidence. Coppus Engineering Corp. v. National Labor Rel. Bd., 240 F.2d 564, 570 (1st Cir 1957).

The "Good Faith" Requirement

K.S.A. 75-4327(b) provides:

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

The term *"meet and confer in good faith"* is further defined in K.S.A. 75-4322(m) as:

> *"a process whereby representatives 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."*

In determining whether a prohibited practice has occurred, the Board usually looks to the conduct of the parties for evidence of the presence or absence of subjective *"good faith."* However, certain types of conduct have been viewed as independent or per se refusals to bargain, without regard to any considerations of good or bad faith. Such conduct generally involves an absence of bargaining, frequently selective as to subjects, such that it is the failure to negotiate, rather than the absence of good faith, which forms the basis for the per se violation.

EXCHANGE OF PROPOSALS

While K.S.A. 75-4322(m) defines *"meet and confer in good faith"* to include the ***duty to "exchange of proposals"***, neither the Act nor any judicial interpretation requires the exchange of proposals be in written form. As is evident from the testimony in this case, negotiations may occur without proposals being exchanged in writing. In fact, the record showed that the tentative agreement on approximately

75% of the topics in KAPE's original proposal was the *"result of a good deal of oral discussions at the table"* (Tr. p. 74). Accordingly, the failure to provide *"written"* counter-proposals cannot be viewed as a type of conduct amounting to a per se refusal to bargain.

When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the meet and confer process must be considered. Duval County School Bd. v. Florida Public Employee Relations Commission, 353 SO.2d 1244 (Fla 1978). Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright or per se refusal to bargain, all the relevant facts of a case are studied in determining whether the public employer or recognized employee organization is bargaining in good or bad faith. The *"totality of conduct"* is the standard through which the *"quality"* of negotiations is tested. NLRB v. Virginia Elec. & Power Co., 314 U.S. 169 (1941).

In applying this standard the Board examines a party's conduct as a whole for a clear indication as to whether that party has refused to meet and confer in good faith, and the Board usually does not rely upon any one factor as conclusive evidence that the party did not genuinely try to reach agreement. NLRB v. Truitt

Manf. Co., 351 U.S. 149, 157 (J. Frankfurter, concurring 1956). ("Truitt").

In deciding whether a party has acted in good faith it is necessary to understand what rights and responsibilities have been bestowed on the public employer and recognized employee organization by the Act. However, here a conflict arises as to the nature of the PEERA law. Employee organizations characteristically refer to it as a "*collective bargaining*" act. Public employers maintain it is but a "*meet and confer*" act.

The Supreme Court of Kansas addressed a similar conflict concerning the nature of the Professional Negotiations Act, K.S.A. 72-5413 et seq. in the case of National Education Association v. Board of Education, 212 Kan. 741 (1973), ("Shawnee Mission"), In that case the court cited the definition of the terms as established by the Advisory Commission on Labor Management Policies for State and Local Government by the 1969 Advisory Commission on Intergovernmental Relations:

> *"Collective Bargaining or Negotiations. A method of determining conditions of employment through bilateral negotiations between representatives of the employer and employee organizations. These parties are required by law to reach a settlement which is set forth in writing and which is mutually binding. The National Labor Relations Act defines the process as "the performance of mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions*

> *arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession ..."*
>
> *"Meet and Confer. A method of determining conditions of public employment through discussions between representative of the employer and employee organizations. These parties are required by law to endeavor to reach an agreement on matters within the scope of representation. If agreement is reached, it is reduced to a memorandum or understanding and presented to a jurisdiction's governing body or its statutory representative for final determination.*
>
> *"Memorandum of Understanding, Meet and Confer. A written, non-binding, record of recommendations mutually agreed upon by an employer and employee organization concerning the conditions of employment (wages, hours vacations, holidays, overtime, etc., and the procedures to be followed in settling disputes or handling issues that arise during the terms of the memorandum. Such memoranda are prepared for submission to the executive or legislative body and shall become effective when such executive or legislature takes the necessary implementary action."*

In Shawnee Mission, the court rejected the pure "meet and confer" approach wherein the public employer reserves the right of unilateral decision-making and is required only to listen to the proposals of the employee organization while the recognized employee organization functions essentially as an information gatherer and supplicant. However, it did not embrace the "*collective bargaining*" approach of the private sector either. Unfortunately, the court did not specifically outline the nature of public sector negotiations.

Professor Raymond Goetz, in his law review article, The Kansas Public Employer-Employee Relations Law, 28 Kan. L. Rev. 243, notes *"the Act uses the euphemisms 'meet and confer proceedings' to describe the process that takes place when an employee organization attempts to represent employees in dealing with a public employer. Terms like 'bargain collectively,' customarily in the private sector, have been studiously avoided."* He concludes *"Despite its consistent use of 'meet and confer' nomenclature, the Act in substance provides a 'hybrid' combining some characteristics of meet and confer with other characteristics of collective bargaining."* Id. at 283.

The Kansas Supreme Court agreed with Professor Goetz's characterisation of PEERA in the case of Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 804 (1983) ("Pittsburg State") stating:

> *"'Meet and confer' acts basically give the public employee organizations the right to make unilateral recommendations to the employer, but give the employer a free hand in making the ultimate decision recommending such proposals. The Kansas Public Employer-Employee Relations Act, on the other hand, imposes mandatory obligations upon the public employer and representatives of public employee organizations not only to meet and confer, but to enter into discussions in good faith with an affirmative willingness to resolve grievances and disputes and to promote the improvements of employer-employee relations. . . .*
>
> *"We conclude that the Act is not a strict "meet and confer" act nor is it a "collective negotiations" act, but as Professor Goetz has stated, it is a hybrid containing some characteristics of each. However, it be designated, the important thing is that the Act imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith with*

affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations." Id. *at 804-05.*

Subjects covered By Existing Statutes

What then, under the *"hybrid"* Act, is the duty of the public employer relative to the meet and confer process, especially where the subject is covered by a statute or regulation? KAPE argues the Board should look to its decision in Local 1357, Service and Maintenance Unit vs. Emporia State University, Department of Administration, State of Kansas, 75-CA3-6-1979, ("Emporia State") for guidance.

Administrative bodies are not ordinarily bound by their prior determinations or the principles of policies on which they are based. The doctrine of res judicata does not ordinarily apply to decisions of administrative tribunals. Pearson v. Williams, 202 U.S. 281 (1906). It is intrinsically a judicial doctrine not to be applied unwittingly to legislative or executive activities which administrative bodies are sometimes empowered to exercise in addition to the judicial one. There is present in administrative law an aspect of discretion which is absent in the strict application of res judicata in the judicial system, and it is this difference which permits agencies to do again what courts may not, and which therefore requires examination of particular cases. Warburton v. Warkentin, 185 Kan. 468, 476 (1959).

State decisis is not, like the rule of res judicata, a universal, inexorable command. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it should be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided. Burnet v. Coronado Oil & Gas Co., 285 U.S. 343, 406 (Brandeis, J. dissenting 1931).

The doctrine of state decisis is a strong factor in building up internal administrative law, and in influencing the judiciary in its reviews of the administrative agency may refuse to follow its prior ruling when its action is not oppressive or does not act arbitrarily, unreasonable, or capriciously. Warburton, supra at 476-77. Thus it has been said, the doctrine of stare decisis is not generally applicable to decisions of administrative tribunals. Id. As the Kansas Supreme Court noted in Warburton:

> *"Certainly an administrative agency, charged with the protection of the public interest, is not precluded from taking appropriate action to that end because of mistaken action on its part in the past."*

According to Professor Goetz, Emporia State establishes that under the PEERA the public employer and the recognized employee organization meet and confer *"as equals for something more than an exchange of views followed by unilateral action, even though the topic of discussion may at the moment*

be governed by a statute or statewide regulation." Goetz at 283. Further if the guarantee of the right of public employees to *"form, join or participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employer... with respect to grievances and conditions of employment"* found in K.S.A. 75-4324 would be a mere delusion if it is not accompanied by the correlative duty on the part of the public employer to recognize such employee representative and to meet and confer with them in a bona fide effort to arrive at an agreement on conditions of employment.

Furthermore, the procedure set forth in K.S.A. 75-4327 for holding Board-supervised elections to determine the choice of employee representative and the procedure provided by K.S.A. 75-4328 which requires recognition by the public represent the employees in meet and confer proceedings and settlement of grievances becomes of little worth if after the election negotiations on all subjects can be ignored by a claim of statutory or regulatory pre-emption.

"Meet and confer" as contemplated by the Act is something more than the mere meeting of public employer with the recognized employee representative. The essential element is rather the intent to adjust differences and to reach an acceptable common ground. *"Meet and Confer"* is not simply an occasion for purely formal

meetings between management and labor, while each maintains an attitude of *"take it or leave it"*; it presupposes a desire to reach ultimate agreement and thereby enter into a memorandum of agreement.

As Justice Frankfurter stated in his concurring opinion to Truitt:

> *"These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with to what an outsider may seem unreasonableness. A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relationship of the parties, antecedent events explaining behavior at the table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes the finding of absence of good faith one for the judgment of the Labor Board . . . Id. at 154-55*

The *"good faith"* concept established in K.S.A. 54-4327(b) imposes absolutely no requirement that the parties reach agreement. However, it does impose a duty to negotiate with a fair and open mind and with a sincere purpose to find a basis for agreement. Specifically, good faith requires more than the proposal of a particular provision and absolute refusal to even consider modifications, General Elec. Co. & Int'l Union of Elec., Radio &

Mach. Workers, N.L.R.B. 192 (1964). It demands instead a certain amount of exchange of relevant information to insure intelligent negotiation, N.L.R.B. v. Frontier Homes Corp., 371 F.2d 974, 978 (8th Cir. 1967). As the U.S. Supreme Court observed in NLRB v. Insurance Agents' Int'l Union, 366 U.S. 477 (1960):

> *"Discussions conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take." 361 U.S. at 489.*

It is this type of *"give and take negotiations"* over terms and conditions of employment that the Board has found to be required of the public employer under the Act. Emporia State at 3.

PEERA does not compel either party to agree to a proposal or make a concession. If honest and sincere bargaining efforts fail to produce an understanding on terms, nothing in the Act makes illegal the public employer's refusal to accept the particular terms submitted to it, and the public employer's refusal to grant a particular demand or make a counter-proposal on an issue does not necessarily constitute bad-faith bargaining. One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in negotiations, their frequency, progress toward agreement, and the persistence with which the employer offers opportunity for

agreement. N.L.R.B. v. Sands Mfg. Co., 91 F.2d 721, 725 (1938) ("Sands").

In enforcing the duty to *"meet and confer in good faith"* the Board must find as the ultimate fact whether, in the case before it and in the context of all its circumstances, the accused party has engaged in bargaining without the sincere desire to reach agreement which PEERA commands. 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 word "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 forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.*
>
> *"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 to cause an injury to another."*

A comparison of K.S.A. 75-4333(b) as presently written to a similar provision without the word *"willfully"* indicates a legislative intent to impose a requirement of some blameworthiness. This interpretation finds support in the fact that K.S.A. 75-4333(b) is patterned after section 158(a) of the federal Labor Management Relations Act that 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). Accordingly, it would appear the Kansas legislature added the word "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 an employee's or recognized employee organization's rights as essential to establish a prohibited practice.

Preemption of Statutes and Regulations

The Kansas legislature in passing PEERA has recognized that, like private employees, public employees have a legitimate interest in engaging in collective negotiations about issues that affect

terms and conditions of employment. However, the scope of negotiations in the public sector is more limited than in the private sector.

As the New Jersey Supreme Court explained in Re IFPTE Local 195 v. State, 44 A.2d 187, 191 (N.J. 1982) ("IFPTE Local 195"):

> *"This is because the employer in the public sector is government, which has special responsibilities to the public not shared by private employers. What distinguishes the State from private employers is the unique responsibility to make and implement public policy. . .*
>
> *"Matters of public policy are properly decided, not by negotiation and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration."*

During the negotiation of a memorandum of agreement certified employee organizations must be recognized as having equal bargaining rights with the public employer as to *"conditions of employment,"* except as certain subjects are declared by law to be outside the mandatory scope of negotiations. Such declarations may be found in K.S.A. 75-4330(a) and within the definition of *"conditions of employment"* in K.S.A. 75-4322(t) which provides:

> *"Conditions of employment" means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such*

> *matters which have been fixed by statute or by the constitution of this state".* *(emphasis added).*

If one were to look solely at the portion of K.S.A. 75-4322(t) setting forth the laundry list of mandatory subjects of negotiations, it would appear a public employer would be obligated to meet and confer in good faith on only a few subjects. However difficulties of interpretation arise when one attempts to reconcile the laundry list of K.S.A. 75-4322(t) with the *"no adjustment or change" language* contained later in that section, and with the employer rights set forth in K.S.A. 75-4330(a) as the mandatory subjects of meeting and conferring listed in K.S.A. 75-4322(t) appears to be further narrowed by K.S.A. 75-4330(a):

> *"The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to (1) any subject preempted by federal or state law or by a municipal ordinance passed under the provisions of section 5 or article 12 of the Kansas Constitution; (2) public employee rights defined in K.S.A. 75-4324 and amendments thereto; (3) public employer rights defined in K,S,A, 75-4326 and amendments thereto; or (4) the authority and power of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence, from which appointments or promotions may by made to positions in the competitive division of the classified service of public employer served by such civil service commission of personnel board."*

The public employee rights alluded to in K.S.A. 75-4330(a)(3) are set forth in K.S.A. 75-4326 as follows:

> *"Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:*
> *(a) Direct the work of its employees;*
> *(b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency.*
> *(c) Suspend or discharge employees for proper cause;*
> *(d) Maintain the efficiency of governmental operation;*
> *(e) Relieve employees from duties because of lack of work or for other legitimate reasons;*
> *(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and*
> *(g) Determine the methods, means and personnel by which operations are to be carried on."*

The Kansas Supreme Court rejected a narrow interpretation of K.S.A. 75-4330(a) in Pittsburg State case:

> *"The primary purpose of the Public Employee Relations Board is obviously to effectuate the purposes and provisions of the Act. K.S.A. 1982 Supp. 75-4323. The scope of any memorandum of agreement reached by any public employer and any public employee organization may extend to all matters relating to conditions of employment except proposals relating to employer and employee rights as defined by the Act. K.S.A. 75-4330(a). Viewing the entire Act, with its broad statement of purposes, we concede that the legislature did not intend that the landry list of conditions of employment as set forth in K.S.A. 75-4322(t) be viewed narrowly with the object of limiting and restricting the subjects for discussion between employer and employee. To the contrary, the legislature targets all subjects relating to conditions of employment. (emphasis supplied by the court).*
>
> *PERB, as the arbiter between employer and employee, has fashioned the "significantly related" test in an effort to steer a middle course between minimal negotiability, with nearly absolute management prerogative, and complete negotiability, with hew management prerogatives. In so doing it has devised a*

commonsense approach to the problem of sorting out matters which cannot be easily defined or neatly categorized, in order to determine their negotiability." 233 Kan. at 819

Unresolved is the issue of the extent to which pre-existing statutes and regulations take precedence over the duties and responsibilities placed upon the public employer by the meet and confer provisions of the PEERA. The uncertainty results from the apparent conflict between that portion of K.S.A. 75-4322(t) stating "*nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state*" with K.S.A. 75-4330(c) and K.S.A. 75-4331.

K.S.A. 75-4330(c) provides:

> "*(c) Notwithstanding the other provisions of this section and the act of which this section is a part, when a memorandum or agreement applies to the state or to any state agency, the memorandum or agreement shall not be effective as to any matter requiring passage of legislation or state finance council approval, until approved as provided in this subsection. When executed, each memorandum of agreement shall be submitted to the state finance council. Any part or parts of a memorandum of agreement which relate to a matter which can be implemented by amendment of rules and regulations of the secretary of administration or by amendment of the pay plan and pay schedules of the state may be approved or rejected by the state finance council, and if approved shall thereupon be implemented by it to become effective at such time or times as it specifies. Any part or parts of a memorandum of agreement which require passage of legislation for implementation thereof shall be submitted to the legislature at its next regular session, and if approved by the legislature shall become effective on a date specified by the legislature.*"

The pertinent part of K.S.A. 75-4331 states:

> *"...If a settlement is reached with an employee organization and the governing body or authority, the governing body or authority shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum, the matter shall be returned to the parties for further deliberation."*

Other than the above-referenced statutes, the Public Employer-Employee Relations Act contains no specific provisions governing conflict between the Act and existing laws or regulations. Two distinct theories have developed from court decision in jurisdictions faced with this issue.

In Michigan, for example, the Michigan Supreme Court in the case Civil Service Commission v. Wayne County Board of Supervisors, 184 N.W. 2d 201 (Mich. 1971), noted the absence of any evidence of legislative intent, *and "guessed"* at what the legislature would have done had the conflict problem come to its attention. The court held that other provisions of law covering mandatory subjects of bargaining were superceded pro tanto by the Michigan PERA.

In contrast, the New Jersey Supreme Court, in State of New Jersey v. State Supervisory Employees Assoc., 393 A.2d 233 (N.J. 1978), held that specific statutes or regulations which expressly set particular terms and conditions of employment may not be contravened by a negotiated agreement. For that reason,

negotiation over matters set by statute or regulations is not permissible.

Adoption of the Michigan approach would give wide sway to collective negotiations and more nearly approximate collective bargaining in the private sector. The most significant problem with this approach however is that it would permit wide diversity in the terms and conditions of employment for the various public employee units in the State. Matters governed by specific statute or regulation would be regulated only by the negotiated agreement of the public employer and the recognized employee representative. Areas where statewide uniformity had been deemed necessary could break down into a mass of confusion.

As the Delaware Supreme Court concluded in Laborers' Int. U. Local. 1029 v. State, 310 A.2d 664,667 (Del. 1973):

> *"The sections listed in section 5938(c) are those in which uniformity of treatment would seem most essential if the system is to have meaning, particularly those which attempt to deal with classification based on ability, equal compensation for commensurate ability and responsibility, promotions and time off from work with pay. If each agency is to bargain with the bargaining representative of its employees on such things as the amount of pay for holidays and double shifts worked, the amount of authorized leave with pay, the use of accumulated sick leave as additional vacation with pay, etc., then the obvious result will be to have employees of the same classifications receiving different compensation and different leave arrangements for different purposes based solely upon the agency they work for and the success of their collective bargaining representatives."*

In comparison, the New Jersey approach has the advantage of simplicity; a subject addressed by statute or regulation is not appropriate for negotiation. If the subject matter is covered by statute or regulation and the public employees are dissatisfied, their recourse is to seek modification through the regulatory or legislative process, and not through collective negotiations.

However, it seems unthinkable that the Kansas legislature would have gone to the trouble establishing the Public Employer-Employee Relations Act, with its detailed procedures for recognition of employee representatives, meet and confer, impasse, and resolving prohibited practices, and would then have provided that the existence of a statute or regulation would automatically preclude the negotiability of all items, even mandatorily negotiable subjects, within the scope of PEERA. If that were the case, carried to its logical extreme, most terms and conditions of public employment could ultimately be rendered non-negotiable. Attributing such an intent to the legislature is at best unrealistic.

It is clear the Kansas legislature made a disctinction in PEERA between subjects upon which the public employer is bound to meet and confer and subjects which are binding upon the public employer when included within a memorandum of agreement. Two

provisions of the Act distinguish PEERA from both the Michigan and New Jersey statutes.

There is no question that a memorandum of agreement reached under PEERA between a recognized employee representative and the representative of the public agency which applies to the state or any of its agencies is not binding upon the governing body as K.S.A. 75-4330(c) authorizes the legislature or state finance council to approve or reject any part or parts of a memorandum of agreement. A thorough discussion of the difference between a "*representative of a public agency*" and a "*governing body*", and between a "*memorandum of understanding*" and a "*memorandum of agreement*" is set forth in the Emporia State order and need not be repeated here. If the memorandum is rejected, it is returned to the representative of the public agency and the recognized employee representative for further negotiations, see K.S.A. 75-4331.

It would follow then that any such rejection could not constitute a K.S.A. 75-4333(b)(5) prohibited practice as a refusal to meet and confer in good faith. This is obviously a departure from private sector law.

Additionally, K.S.A. 75-4330(c) provides that even if a memorandum of agreement is accepted by the "governing body," any subject contained therein requiring an amendment to a rule or

regulation or the passage of legislation is not effective until such action is completed.

As a general proposition, the representative of the public agency and of the recognized employee organization must negotiate upon, and are free to agree to, proposals governing any term and condition of employment regardless of existing statute or regulation covering the topic, subject only to certain, limited exceptions set forth in K.S.A. 75-4330(a). As the Board correctly pointed out in Emporia State:

> *"It would appear then that the legislature was very much aware that many of the subjects enumerated at K.S.A. 75-4322(t) would require passage of legislation or changes in existing administrative rules and regulations for implementation, therefore they provided an orderly means to do so. The legislature set out a procedure whereby recognized employee organizations could be assured of a forum, via meet and confer process, to present their ideas, recommendations, or proposals to the governing body without violating the provisions of K.S.A. 75-4333(d)"* Id. *at 8.*

The Board concluded that while parties have an obligation to meet and confer and to engage in good faith, give-and-take negotiation over all subjects defined in K.S.A. 75-4322(t), they must recognize they have no authority to change statutes, and the Board reasoned that the representative of the public agency and the recognized employee organization *"through this process, is not altering matters set by statute but rather recommending changes. . . upon mutual recognition of the need for such changes arrived at during the meet and confer process.*

A subject contained in a memorandum or agreement which applies to the state or its agencies does not become effective until approved by the governing body and any necessary amendments to regulations, pay plans, pay schedules or legislation are adopted. Until such time as the subject becomes effective, there is no conflict with, or adjustment or change to, matters fixed by statute or regulation, therefore no violation of K.S.A. 75-4322(t) or 75-4330(i). Once the amendment or legislation necessary to effectuate the memorandum of agreement is adopted, the potential for conflict has been removed.

One restriction on the negotiability of all terms and conditions of employment is found where the subject has been pre-empted by a specific statute or regulation which sets or controls a particular term or condition of employment. Such exception is extremely limited, and the subjects fall into two categories: 1) where the governing body has no authority to adopt amendments or legislation necessary to implement the terms of a memorandum of agreement because the controlling statute or regulation is the product of action by a higher level or government, e.g., state established certification requirements for city police and fire employees, or federal anti-discrimination or affirmative action requirements applicable to the state; and 2) where legislation grants authority to act to a specific position or agency, or grants rights to employees, e.g. who establishes the state pay plan, or

the employee rights set forth in K.S.A. 75-4324. Included within this exception is the limited authority of the civil service commission to conduct and grade merit examinations and rate candidates in the order of their relative excellence.

Negotiation is preempted only if the statutory or regulatory provisions speak in the imperative and leave nothing to the discretion of the public employer. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection the inclusion of that subject in a negotiated agreement is negotiable. And where a statue sets both a maximum and minimum level of employee rights or benefits, negotiation is required concerning any proposal for a level of protection fitting between and including such a maximum and minimum.

A second exception looks to subjects the control of which is reserved to the public employer. These rights are enumerated in general terms in K.S.A. 75-4330(a)(3) as set forth above. However, as the New Jersey court observed in Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 410 A.2d 1131 (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 the 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."*

Determination of Negotiability

The state is different from a private employer inasmuch as it has the unique responsibility to make and implement public policy. Accordingly, the scope of negotiations in the public sector is more limited than in the private sector. The role of the Board in a scope of negotiations case is to determine, in light of the competing interests of the state and its public employees, whether an issue is appropriately decided by the political process or by collective negotiations. In IFPTE Local 195 the New Jersey Supreme Court stated:

> *"Matters of public policy are properly decided, not by negotiations and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration. We have stated that the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiations. . . Our democratic system demands that governmental bodies retain their accountability to the citizens." 443 A.2d at 191.*

The central issue in a scope of negotiations determination is whether or not a particular subject matter is negotiable. To determine whether a subject is negotiable, the Board must balance

the competing interests by considering the extent to which the meet and confer process will impair the determination of governmental policy. Use of a three-prong test provides a meaningful standard by which to determine claims of negotiability.

First, a subject is negotiable only if it intimately and directly affects the work and welfare of public employees. Examples of subjects which are included here are rates of pay and working hours. Any subject which does not satisfy this part of the test is not negotiable.

Second, an item is not negotiable if it has been preempted by statute or regulation. This requirement was discussed above.

Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. 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 interest of public employees and the requirements of democratic decision making. A weighing or balancing must be made. Where the employer's management prerogative is dominant, there is no obligation to negotiate even though the subject may ultimately affect or impact upon public employee terms and conditions of employment.

The basic inquiry therefore, must be whether the dominant concern involves an employer's managerial prerogative or the work and welfare of the public employee. The dominant concern must prevail. Since the line which divides these competing positions are often indistinct, it must be drawn on a case by case basis.

To the extent that subjects do not involve substantive governmental discretion and responsibility, but merely the procedural aspects of reaching and effectuating such determinations, they concern terms and conditions of employment ordinarily subject to negotiation N.J. State College Locals v. State Bd. 449 A.2d 1244, 1251 (N.J. 1982).

Written Counter Proposals

As noted above, the duty to meet and confer in good faith includes an endeavor to reach agreement on conditions of

employment. As thus defined, the duty may be violated without a general failure of subjective good faith. A refusal to negotiate in fact as to any subject which is a proper subject of negotiation and about which a recognized employee organization seeks to negotiate, violates the duty, even though the public employer has every desire to reach agreement with the recognized employee organization upon an overall memorandum of agreement, and earnestly and in good faith bargains to that end. Pasco City School Bd. v. Fla PERC, 353 S.2d 108 (Fla 1977).

Although the PEERA does not require the making of concessions during negotiations, the factual basis for a party's refusal to make a particular concession is a factor in determining whether or not that party is negotiating in good faith, see Edgeley Ed. Ass'n v. Edgely Public School Dist. No. 3, 256 NW2d 348 (N.D. 1977).

KAPE, through its evidence cites six topics upon which it sought to negotiate and which the Employer allegedly refused to meet and confer in good faith by refusing to provide counter-proposals in written form. These topics include employee discipline, longevity pay, wages, use of facilities, payroll deduction for contributions to PEAC and procedures for implementation of a drug testing program

The initial inquiry is whether these topics are proper subjects for negotiation, i.e. whether negotiation is mandatorily required. While Mr. Nauman testified the Employer's negotiating

team did not designate subjects as mandatory or permissive subjects for negotiation but was willing to discuss any topic of concern to KAPE, a violation of the duty to meet and confer can be found upon only if there is a failure to meet and confer on mandatorily negotiable topics.

It is clear upon application of the three-prong test for negotiability set forth above that the subjects of discipline, longevity pay, wages and use of facilities are proper subjects for negotiations. Each subject intimately and directly affects the work and welfare of public employees, is not pre-empted by a specific statute or regulation, and does not significantly interfere with the exercise of employer managerial prerogatives.

While the record is not complete as to the status or purpose for the contribution to PEAC, it is clear PEAC is a political action committee, and KAPE has no management role in it. From the evidence in the record it cannot be said the deductibility of contributions to PEAC *"intimately and directly affects the work and welfare of public employees."* Having failed to satisfy the first prong of the three prong test the subject is not mandatorily negotiable. Accordingly the Employer does not have a duty to negotiate concerning deductions for contributions to PEAC, and therefore not required to provide counter-proposals, written or oral.

On the subject of procedures to be followed for implementation of a drug testing program, the controlling factor is the lack of any such program at the time of meet and confer, and the lack of evidence that such a program will or may be adopted during the term of the program. The record indicates the public employees in the unit are not included in the present state law mandating drug screening for certain classes of public employees, and there is no intention by Employer to include them in the foreseeable future. The prospect for inclusion of these employees in the drug screening program at some unspecified future date is speculative at best and therefore cannot at this time be said to *"directly"* affect public employee work or welfare. Again KAPE has failed to satisfy the first prong of the three-prong test. The subject was not mandatorily negotiable and the Employer was not required to provide a counter-proposal in any form.

This should not be understood to mean the topic of drug screening procedures is never mandatorily negotiable. As stated above, there is a distinction between the public employer's substantive decision to adopt a drug testing program and the procedural process to implement the decision. Thus, while the determination to adopt a drug screening program is a substantive decision and therefore a managerial prerogative not subject to mandatory negotiation, the procedures for implementing that

substantive decision are subject to mandatory negotiation because as a general rule procedural matters pose no significant threat of interference with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy. The dispositive factor in the instant case is the timing of the request to negotiate, not the subject matter of the request.

On the subject of wages, KAPE's original package of proposals submitted to the Employer on April 6, 1989 included a pay matrix and provisions for step increases. There is no question but that the Employer provided, on March 28, 1990 a written statement that *"Each employee shall receive a regular hourly wage as prescribed and approved by the Governor."* The issue is whether such written statement truly constitutes a written counter-proposal satisfying the public employer's duty to make a good faith endeavor to reach agreement on conditions of employment.

The form of the Employer's response to KAPE's wage proposal apparently was based upon the grant of authority to the director of the budget and the secretary of administration to prepare a pay plan and salary schedule for approval by the governor. Such authority is found in K.S.A. 75-2938 which states:

> *"After consultation with the director of the budget and the secretary of administration, the director of personnel services shall prepare a pay plan which shall contain a schedule of salary and wage ranges and steps, and from time to time changes therein. When such pay plan or any change therein is approved or*

> *modified and approved as modified by the governor, the same shall become effective on a date or dates specified by the governor and any such modification (or) change of date shall be in accordance with any enactments of the legislature."*

Additional justification for the form the Employer's response apparently was the lack of knowledge as to what that pay plan would include. A characterization of the Employer's position would be *"You are going to receive whatever the Governor decides to give you but we have no idea what that will be."*

It should be clear from the language of Emporia State as reaffirmed above that the public employer has a duty to meet and confer without regard to existing statutes and regulations, with certain exceptions, and therefore such meet and confer posture of Employer, if considered alone, would be unacceptable.

The Employer incorrectly places the Governor's approval of a pay plan as the focal point of the meet and confer process with that decision then determining the Employer's obligation concerning negotiation of wages. To the contrary the governor's approval of a pay plan is the last step in the negotiation process, not the first, and should have no effect on the meet and confer process until and unless the wage proposal contained in the memorandum of agreement submitted by the representative of the public agency and the recognized employee representative is rejected and returned for further negotiations pursuant to K.S.A. 75-4331.

Rhyne and Drummer, in The Law of Municipal Labor Relations, 1979, at 87, cites Pasco Co. Sch. Bd. v. Fla PERC, 353 So.2d 108 (Fla 1977) for the proposition that a public employer cannot use financial uncertainty as an excuse for failing to make a wage proposal. In that case the Florida District Court of Appeal affirmed a Florida PERB finding that a school board had refused to bargain in good faith where the board refused to make any counter-offer to union wage proposals.

As a defense, however, the Employer appears to raise the issue of KAPE's failure to provide information upon which it established its proposed pay matrix and step increases as a mitigating factor in its failure to provide a specific wage counter-proposal. The record establishes Mr. Nauman requested of Mr. Kuehn additional information concerning surveys and data upon which the pay matrix was based as means to evaluate the proposal. The request was renewed when Mr. Dickhoff replaced Mr. Kuehn. In both instances KAPE indicated the information would be forthcoming, but it was never provided to the Employer.

K.S.A. 75-4322(m) places a mutual obligation on both parties to "exchange freely information". The failure to provide requested information has been found to constitute evidence of a refusal to bargain in good faith both on the part of the employer, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), and the employee organization, Detroit Newspaper Printing and Graphic Communications

Local 13, 598 F.2d 267 (LA DC, 1979). This requirement is based upon the principle that the parties need sufficient information to enable them to understand and intelligently discuss the issue raised during negotiations and as to employer requests it is reasoned such information is essential for the employer in structuring its economic proposals.

Good faith negotiations necessarily require that proposals presented or claims made by either party should be honest. If such proposal or claim is important enough to present in the give and take negotiations required by the meet and confer process, it is important enough to require some sort of proof of its accuracy. Truitt, 351 U.S. at 151-52.

It is also important to note that the Employer's written statement on March 28, 1990 was its first response to KAPE's wage proposal. Generally, negotiations, especially on monetary subjects, are expected to be a somewhat drawn-out process in which neither party offers at the outset that which it is willing to finally settle. Generally a public employer's best offer will not be included in its initial response to a recognized employee representative's proposals. Gilroy and Sinicropt, Collective Negotiations and Public Administration, at 38-39.

In the instant case the Employer's written statement on wages was exchanged on what was to be the last day of negotiations due to the subsequent filing of the prohibited practice complaint by

KAPE. No opportunity was provided for movement by the Employer from its initial position on wages. While it cannot be stated that the Employer's statement on March 28, 1990 was not its final and best offer on wages, the testimony of Mr. Nauman at the hearing would indicate agreement might still be possible.

> *". . . it's management's opinion that we are most willing to get back to the table and meet and confer in good faith and endeavor to reach agreements . . . And I think with some good exchange of information, perhaps we could continue to make progress. That's our goal, to make progress and endeavor to come up with an agreement." (Tr. p. 130)*

This possibility of latitude in future negotiations on wages was confirmed by Gary Leitnaker. (Tr. p. 199).

Turning to the subject of longevity pay, there is some question whether H.B. 2718 was intended to be the Employer's counter-proposal to KAPE's proposal. Mr. Nauman testified that it was, Mr. Leitnaker testified he did not consider it to be a counter-proposal. However, since Mr. Nauman was the chief representative of the public agency we will defer to his understanding.

It must be assumed, and the record is very sketchy on this point, that by reference to H.B. 2718 the Employer was indicating a willingness to include the terms and conditions contained in that Bill within a memorandum of agreement, and was not linking the fate

of that issue in negotiations to the fate of the Bill in the legislature.

We are again faced with some of the same problems discussed above concerning wages; namely a counter-proposal made on the last day of negotiations, no opportunity for movement from the initial proposal, and apparent willingness to continue negotiations and honest belief agreement could be reached.

As to the subject of discipline the Employer provided a written counter-proposal to Article IV, Section 5 that it believed also addresses the issue of grievance. Finally, no counter-proposal was given by the Employer on the issue of use of facilities.

CONCLUSION

When a party has been charged with failing to meet and confer in good faith, the overall conduct of the parties must be considered, as must the factual basis for a party's proposal or refusal to provide a proposal.

In this case the parties met and conferred at least 18 times from June 9, 1989 to April 6, 1990. During that time, as a result of a good deal of oral discussion and concessions by both sides, agreement was reached on approximately 75% of the topics contained in KAPE's June 9, 1989 package of proposals. On all but one subject - use of facilities - the Employer offered at least some

opportunity for agreement, and indicated a willingness to continue to meet and confer and potential latitude in present positions making agreement possible.

Of the six enumerated subjects that presently represent the stumbling-block to agreement, two are not mandatorily negotiable; procedures to implement a drug testing program and payroll deductions for PEAC contribution. A written counter-proposals was offered on the subject of grievances, and no counter-proposal was forthcoming on use of facilities. The remaining two, wages and longevity pay, represent subjects on which some response was received from the Employer, albeit not in the form or specificity KAPE found acceptable.

Examining the record of this case it appears KAPE's true complaint is not so much with the fact that they did not receive written counter-proposals or responses as requested but with the actual position taken by the Employer on those subjects. It is difficult to perceive how written communications would have truly facilitated the meet and confer process or conversely how refusing to provide same, at that particular point in negotiations, thwarted agreement.

The reason agreement could not be reached on the subject of wages stems from neither party knowing what the governor was going to recommend, thereby KAPE could not evaluate the sufficiency of the offer and the Employer could not compare it to KAPE's offer.

Further, because of KAPE's failure to provide the information used to develop its pay matrix, the Employer was unable to ascertain its reasonableness. The conduct of the parties relative to providing information needed by the other to negotiate this subject, not the form of the communications, hampered negotiations. That conduct, however, is not an issue before the Board.

The Employer provided what is characterized as an oral counter-offer to KAPE's proposal on longevity pay at the last meeting on March 28, 1989. Given the confusion among members of the Employer's negotiating team as to whether H.B.2718 was in fact a counter-offer, a written response might have been helpful to the process. It is obvious from lack of knowledge of the parties concerning the terms of H.B. 2718 that little negotiation or discussion occurred on this subject after March 28, 1989. Presumably either party could have obtained a copy of H.B. 2718 as a basis for evaluation and discussion, so that the Employer's lack of providing a written counter-proposal would not have frustrated the meet and confer process. However, further discussions ceased with the filing of the complaint on April 10, 1989.

KAPE did provide evidence that would prove the Employer vacillated in its position concerning the negotiability of grievance procedures, and that if written counter-proposals or responses had been received the confusion concerning the Employer's

position on a subject could have been eliminated. However, this vacillation occurred on only one occasion and involved only one subject. The error was corrected at the next negotiation session. No other evidence of vacillation occurs in the record. It can be inferred thereby that Employer vacillation on subjects was not a problem nor was vacillation employed by the Employer as a means to avoid agreement.

It cannot be found that in this case, in the context of all its circumstances, that KAPE has met its burden of proving the Employer engaged in the meet and confer process without the sincere desire to reach agreement, or that the Employer's refusal to provide written counter-proposals was intended to thwart negotiations and agreement. The Employer's witness, Mr. Leitnaker, testified it was not the intent of the Employer to refuse to meet and confer in good faith or deny any rights guaranteed to unit employees by the Act. (Tr. p. 95). Even Mr. Dickhoff, KAPE's witness, testified he would not characterize the Employer's actions as an intent to frustrate the bargaining process (Tr. p. 79) nor would he say that the Employer sat down and plotted to frustrate the process. (Tr. P. 95).

This order should not be taken for the proposition that a party involved in the meet and confer process is not required by the Act to provide written counter-proposals, or that the conduct of the parties, the stage of the negotiations and the progress

toward agreement, or the refusal to provide written counter-proposals could be found to evidence bad faith and an unwillingness to reach agreement. In this particular case, but for certain mitigating factors, a finding of bad faith in the Employer's refusal to provide written counter-proposals or responses would not have been unreasonable. However, the added failure to provide written counter-proposals when requested by KAPE was not significant enough when viewed in the context of all the circumstances in this case to establish a sincere desire not to reach an agreement.

Whenever either party to the meet and confer process requests that counter-proposals or responses to proposals, or positions on proposals be presented in written form, such request should be honored when it will facilitate the negotiation process and when there is no legitimate reason not to comply. It should be noted Mr. Leitnaker in his testimony did not know of any legitimate reason why the Employer in this case would not put its proposals in writing (Tr. p. 208-209).

A formal counter-proposal is not indispensable to the meet and confer process, when from the discussions and negotiations it is apparent that what one party would offer is wholly unacceptable to the other party. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

Hopefully, when meet and confer sessions commence again between KAPE and the Adjutant General's Office this order will

provide some guidance relative to the duties and responsibilities of the parties during the meet and confer process which was previously.

ORDER

IT IS THEREFORE ORDERED that Petitioner's Kansas Association of Public Employees, prohibited practice complaint be denied.

Dated this 11th day of March, 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 order 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 11th day of March, 1991, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

Brad Avery
Kansas Association of Public Employees
400 S.W. 8th Street, Suite 103
Topeka, Kansas 66603.

Mark S. Braun
Assistant Attorney General
Kansas Judicial Center, 2nd floor
Topeka, Kansas 66612.

Members of the PERB Board

Sharon D. Iverstall