STATE OF KANSAS

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

IN THE MATTER OF Pittsburg State University, Complainant, vs. Kansas-National Education Association Respondent.	*	CASE NO: 75-CAEO-1-1982

ORDER

Comes now this 25 day of January, 1982, the above captioned matter for consideration by the Public Employee Relations Board.

APPEARANCES

Complainant appears by and through its counsel, Mr. Robert N. Partridge, Attorney at Law and Ms. Kathleen Babcock, Attorney at Law.

Respondent appears by and through Mr. Robert E. Medford, Director, Uni-Serv Southeast.

PROCEEDINGS BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

1. Complaint filed by employer with the Department of Human Resources on December 8, 1981.

2. Complaint submitted to employee organization for answer on December 9, 1981.

3. Respondent employee organization's answer received by Department of Human Resources on December 18, 1981.

4. Paul K. Dickhoff, Jr. appointed hearing examiner on December 28, 1981.

5. Parties contacted by telephone on December 28, 1981 to outline issues to be addressed by examiner. Issues agreed to and briefing schedule established orally on December 28, 1981 followed by letter of understanding on December 29, 1981.

6. Petitioner's brief received January 11, 1982.

7. Respondent's brief received January 6, 1982.

FINDINGS OF FACT, DISCUSSIONS AND CONCLUSIONS OF LAW

This case comes before the Board for the determination of the status, that is the mandatorily vs. non-mandatorily negotiable nature, of nine (9) issues. Those issues are:

1) Salary Funds Generation

2) Salary Allocation

3) Out of State Travel

4) Promotions

5) Summer Employment

6) Tenure

7) Retrenchment

8) Access to Personnel Files

9) Academic Freedom

As one reviews the statute in order to determine questions of negotiability of subject matters, several provisions of the law provide direction. In its declaration of policy and objectives, at K.S.A. 75-4321 (a) (2), the legislature recognizes that,

> "the refusal by some to accept the principle and procedure of full communication between public employers and public employee organizations can lead to various forms of strife and unrest;" (Emphasis added)

Later, within K.S.A. 75-4321 (b) it states that,

> "it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law." (Emphasis added)

K.S.A. 75-4322 (t) then defines conditions of employment as:

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

The application of the law is then conditioned by K.S.A. 75-4326 which states:

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

In the opinion of this Board, the message of the legislature is clear and may be restated in the following manner relative to the question of negotiability; public employers and public employees are required to enter into full communciation on all subject matters which relate to conditions of employment to the extent that those proceedings do not infringe upon the existing rights of public employers. There are at least two (2) possible highly polarized interpretations at which one could arrive in administering the Act. The first interpretation could find

that every subject proposed for negotiations carries with it an economic cost and therefore has a direct effect on a individual's salary or wages and as such is a mandatorily negotiable subject within the purview of the statute. The second interpretation could find that all subjects proposed for negotiations infringe upon one or more of management's rights as outlined at K.S.A. 75-4326 and as such do not constitute subjects over which the public employer is obligated to bargain. In this Board's opinion both of the aforementioned interpretations are incorrect. The third interpretation, the one embraced by this Board recognizes both employers' and employees' rights under the law. By way of example, take the subject of an employer's right to transfer employees. This subject is clearly enumerated within K.S.A. 75-4326 as an existing right of public employers and it is not difficult to understand that the employer must retain the right to determine that transfers are necessary from time to time in order that the employer may fulfill his/her obligation of orderly, efficient, effective and uninterrupted operation of the agency. In that regard the employer must retain the authority to make decisions. It is also easily understood that a transfer could have a direct significant relation to the salary, wages or hours of work of the unit members transferred and therefore directly relate to one or more conditions of employment. The portion of a transfer policy which would be subject to mandatory negotiation would properly be the criteria, procedures or methods to be utilized in determining candidates for transfer and not the decision to transfer itself. A similar example can be outlined in the area of employee discharge. That right is outlined as the employers at K.S.A. 75-4326 (c) but the action has a significant relation to an employee's salary, wages and hours of work. As such, the procedures, criteria, or methods by which an employee may be discharged, and that action reviewed, would be mandatorily negotiable but the decision to initiate such an action would be retained by the employer. In support of this interpretation the Board directs the parties attention to language from K.S.A. 75-4326 (c) and (e), specifically the words "for proper cause" and "or for other legitimate reasons". In the opinion of this Board, proposals which contain language seeking to define those "causes" or "reasons" and the steps to be followed in implementing the decision to suspend, discharge or relieve employees are mandatorily negotiable. Once again, the employer's right to make such decisions would remain intact but the validity of the employer's actions would be subject to review to the extent provided in the agreement.

A provision of this type could serve to inform the employees of the "scope of crimes" considered by the employer to constitute discharge offenses, advise the employee when his conduct had transcended those bounds, and give the employee an avenue of recourse in instances of actions initiated without "cause" or "legitimate reason". If this Board were to assume that the legislative intent of the retained management's rights clause was to eliminate such matters entirely from mandatory negotiations there would be no purpose served by the enactment of the statute. That is, such a narrow interpretation could preclude any subject from being mandatorily negotiable. One could certainly argue that discussions and/or agreements in regard to: "salaries and wages" would interfere with the employer's right to "maintain efficiency of governmental operations", "hours of work" would interfere with the right to "direct the work of its employees" or "to assign", "vacation allowance" would interfere with the right to "determine the methods, means and personnel by which operations are to be carried on"; and the list goes on. Referring again to K.S.A. 75-4321 (a) (2) wherein the legislature recognizes the harmful effect of a lack of <u>full communication</u>, the Board finds it impossible to believe that the purpose of K.S.A. 75-4326 is to so totally emasculate the meet and confer process. The Board is of the opinion, rather, that the legislature was attempting to recognize the fact that the extent to which an employer should be required to participate in the process should by all means stop short of an abdication of the authority necessary to accomplish their obligation "to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government".

While it is extremely important to recognize that a management's rights clause does not preclude <u>all</u> negotiations in regard to those subjects it is equally important to note that a subject does not become mandatorily negotiable by flimsily tying it to an enumerated subject term and condition. For example, in a university setting, an employee organization might insist that they be allowed to negotiate the subject of curriculum based upon the argument that the addition or deletion of a class would have a significant relation to a unit member's salary or hours of work. Clearly, the employer must retain control and decision making authority in regard to curriculum: (1) under the statutory clause granting the employer the right to determine the methods, means and personnel by which operations are to be carried on, (2) in fulfillment of his obligations to meet the needs of taxpayers, and (3) in consideration of other matters such as accreditation requirements. For the sake of clarity, let us assume in this example that the university had determined it necessary to add an additional section to a class formerly offered at only one time and to amend the course offerings from five (5) hour lectures to three (3)

hour lectures and a two (2) hour evening laboratory format. These decisions would have a significant relation on conditions of employment such as hours of work. Nonetheless, the decisions are management's to make and would be other than mandatory subjects. The organizations would however have standing to discuss the impact, on the terms and conditions of employment of unit members, that those decisions would have. If the university intended to require the unit members to teach the newly proposed evening lab, thus amending their hours of work, they could not do so prior to negotiating that change with the organization in a timely fashion. Furthermore, the employer could not unilaterally implement any decision, be it a management right or otherwise, that would impact on mandatorily negotiable terms and conditions of employment of unit members subsequent to the certification of the representative and prior to full participation in the meet and confer process. It must be remembered that the memorandum of agreement, once ratified, carries with it a certain sanctity. Its conditions may not unilaterally be amended during its life by either party without the consent of the other. Conditions of employment may similarly not be altered or amended subsequent to the certification of an employee representative and prior to participation in the meet and confer process. And finally even subsequent to the expiration of a memorandum of agreement, so long as the employee representative retains certification, a term and condition of employment may only be changed after full participation in meet and confer. To find otherwise totally ignores basic principles of justice and fair play and would allow an unscrupulous employer to circumvent the intent of the Act through numerous means.

SALARY GENERATION

The first subject before the Board is "Salary Generation". The language contained in this proposal clearly seeks to allow the employees input into the salary portions of the budget preparation process. The Board is guided in his determination of the negotiability of this subject by language contained at K.S.A. 75-4327 (g) which states:

> "(g) It is the intent of this act that employer-employee relations affecting the finances of a public employer shall be conducted at such times as will permit any resultant memorandum of agreement to be duly implemented in the budget preparation and adoption process."

This provision, coupled with the specific inclusion of "salaries" as a mandatory term and condition of employment, leaves the Board with no alternative but to find the subject of "Salary Generation" to be mandatorily negotiable. There is nothing sacred in the term "Salary Generation". This Board is of the opinion that the proposal placed on the table, and more especially section (A) (1) embodies exactly the process contemplated by the legislature when they listed "salaries" as a mandatory subject of negotiations. The Board offers the following as a representative set of steps which the employer and employee organization might follow in fulfillment of their requirement to meet and confer relative to the salaries of unit members. This example should <u>not</u>, by any means, be interpreted to embody the <u>only</u> acceptable set of steps to be followed. First, at some point in time, in accordance with K.S.A. 75-4327 (g) and prior to the budget submission date the organization should notify the employer of their desire to meet and confer relative to salaries of unit members. The parties could enter into an agreement relative to the percentage increase which an outstanding employee should receive. For sake of this exercise let us assume that percentage to be ten (10). Pursuant to K.S.A. 75-4331 the parties would prepare a memorandum of understanding and present it to the governing body for approval or rejection pursuant to K.S.A. 75-4327 (g). If approved by the governing body, the agreement would be implemented pursuant to K.S.A. 75-4330 (c). If the parties are of the opinion that all salary incremental dollars should be given across the board, the allocations could be easily calculated. If the parties believe increments should be based on merit, logic would dictate that they also negotiate a merit evaluation system, the results of which could be translated into dollars. Logic would further dictate that an employee be allowed some recourse, perhaps through a grievance procedure, if he felt he had been unfairly rated. Assume that the evaluation system resulted in an employee receiving points on a scale from "0" to "20". Any employee earning from fifteen (15) to twenty (20) points might receive the 10% increase previously agreed upon. Those earning from ten (10) to fifteen (15)

points might receive 8%, and anyone receiving less than ten (10) points might receive only 5%. If the budget provided for a 10% hike for all employees, and not all employees earned between fifteen (15) and twenty (20) points and thus a 10% increase, the resultant remaining money might be reapplied to unit members salaries across the board. Naturally, the Board understands that some individuals will not be renewed and others will quit. Negotiations, however, must be conducted relative to some base. The Board is of the opinion that the base which should be used should assume identical conditions to those in existence during negotiations.

SALARY ALLOCATION

The second subject to be considered by the board is that of "Salary Allocation". As, was the case in the previous subject, "salaries" is listed as a mandatorily negotiable term and condition of employment. The language contained within the proposal on salary allocation again seeks to allow the organization input into the distribution of university salary monies to be received by bargaining unit members and others. The function of determining allocations to schools, departments and individuals would be mathematical based upon the formulas negotiated in the example in this order relative to "Salary Generation". The Board does find discussions or proposals which seek to establish salaries of non-unit members to be other than mandatorily negotiable. The salaries of non-unit members are managements prerogative and when the budget is submitted, those amounts would simply be added to the amount negotiated for unit members. Salary allocation for members of bargaining unit is mandatory.

OUT OF STATE TRAVEL

Out of state travel and thecosts thereof have a definite significant relation to employee's ultimate compensation. Further, frequently out of state travel is necessary in the field of education in order for a teacher-employee to enhance his standing in the academic world which significantly relates to his salary. Out of state travel is mandatory.

PROMOTIONS

The fourth subject deals with "Promotions". As stated at K.S.A. 75-4326, the right to determine that a promotion is in order is undeniably a managements' right. If and when management decides to promote, the action will have a significant relation to the terms and conditions of employment of the affected unit member(s), generally in regard to their salary and/or hours of work. As in our earlier examples regarding transfer and discharge, the portions of a promotion policy which would be subject to mandatory negotiations would include the criteria, procedures, or methods by which candidates for promotion are identified and the action is completed. Certain provisions of this proposed promotion procedure, if implemented, would require the employer to abdicate portions of his management rights. That abdication would occur both in regard to his decision to promote and within the process of identification of candidates for promotion. For example, portions of the proposal on promotions seek to establish maximum time frames within which promotions must be made. In the opinion of this board, such provisions in a memorandum of agreement would be permissive at best but in no case would they be mandatory subjects of bargaining. As stated before, however, certain provisions of the proposal are determined to be mandatorily negotiable.

SUMMER EMPLOYMENT

The employer must first decide if summer school classes are to be offered. Whether directed by the legislature, the statutes, or by his own whim, the employee organization certainly has no guaranteed right to participate in that decision. If and when the decision is made to conduct summer school classes, the employer must decide which classes will be offered. Curriculum is a matter reserved to management's decision. Complainant would have the Board find that a proposal defining the criteria, procedures, or methods for the screening of candidates for summer employment would in some way diminish management's right to establish curriculum. The Board submits that the cart is before the horse in that line of reasoning. As previously stated, the Board believes the employer has the undeniable right to establish curriculum to be offered. However, intrinsic to summer employment are all of the facets of conditions of employment. Therefore, it is a mandatory item.

TENURE

The sixth subject, "Tenure", like many of the other issues at hand, is not defined as a term and condition of employment within the statute. While tenure carries with it some sort of mystique on a university campus, the proposal before this Board seems to do nothing more than to establish a procedure whereby one can earn his way out of probation and into permanent status. The first line of the tenure proposal provides something of a definition of tenure. It states, "Tenure is a guarantee of academic freedom and due process protection as well as the right to continued employment following completion of the probationary period". The proposal seeks to establish a time frame for the earning of tenure i.e., the term one must serve on probation, and the rights one acquires with the attainment of tenure i.e., no termination without adequate cause. Tenure does not, however, quarantee or extend to the employee any academic freedom as it purports. By the language within section "D" of the proposal, even probationary employees would enjoy the same academic freedom possessed by those with tenure. It does not appear from the language of the proposal that the granting or denial of tenure would have any effect on a faculty member's salary, wages, hours of work, or any other enumerated condition of employment. It does appear that the singular substantive benefit derived by the attainment of tenure would be the right of the employee to have the actions of management reviewed for "adequate cause" in the event of a termination or non-renewal of his/her employment. The Board directs the parties attention to K.S.A. 75-4326 (c) and (e) and specifically to the words "for proper cause" and "legitimate reasons". The Board is convinced that those words were included by the legislature with the intent that a public employer be prevented from terminating employees at his whim. Logically, if the legislature recognizes the employer's right to terminate for proper cause, they would further expect someone other than the employer to review his own actions for validity. To find otherwise would render the terms "proper cause" and "legitimate reasons" of no value and useless for inclusion. The Board is of the further opinion that the legislature in no way intended that a discharged employee be required to file actions in the courts for determinations regarding proper cause. The reasonable assumption would be that the legislature intended for the employer and the employee organization to attempt to collectively formulate and agree on a method for the review of complaints arising from terminations. That avenue is, in the opinion of this Board , the grievance procedure, listed as a mandatorily negotiable subject at K.S.A. 75-4322 (t). Inasmuch as a termination alters every condition of employment previously enjoyed by the employee, a person's ability or standing to request a review of the action becomes of paramount importance. If the individual attains that right at the moment in time when they acquire tenure, then negotiations over the earning of tenure are mandatory. The duration of a

probationary period understandably could vary depending on the nature of the employment but most contracts of employment and/or civil service systems provide for a probationary period ranging from six (6) months to one year. Traditionally, the period allows the employer a fixed amount of time in which to "evaluate" the employee and, if necessary, to discharge the employee without outside scrutiny. Successful completion of the period carries with it the expectation of continued employment if accomplished in accordance with the rules of the employer. The period of time one must serve in this state of "limbo" until he is afforded the protections of the contract is undeniably mandatorily negotiable.

RETRENCHMENT

Under K.S.A. 75-4326 the employer has the undeniable right to relieve employees from duties because of lack of work or for other legitimate reasons.

An examination of the definition of "conditions of employment", is provided at K.S.A. 75-4322 (t) reveals that "salaries, wages and hours of work" are included. The issue of retrenchment currently before the Board is mandatorily negotiable in that any procedure for obtaining a reduction in the work force would significantly relate to salaries, wages or hours of work and other "conditions of employment" as described by the definition.

Perhaps the questions of the negotiability of retrenchment can most easily be understood and resolved by looking at the various procedure by which a reduction in work force may be achieved. One procedure that may be utilized by employers is to lay off employees one day per week. Certainly, this technique would fall under the definition for conditions of employment as it directly affects the number of hours worked. Another procedure for achieving a reduction in work force is to simply terminate a certain number of employees. This technique would also fall under the definition of "conditions of employment" as it directly affects the salaries of those employees. Still another procedure for effectuating retrenchment may involve a combination of lay off and demotions. This technique would also remain within the definition as it would, once again, involve the salaries of employees regardless of whether they are terminated or demoted.

It should be noted that the Board is referring only to the procedures by which a reduction in work force is achieved as being mandatorily negotiable. The decision as to whether retrenchment is necessary is reserved for managerial discretion. The Board has reached this conclusion through an analysis of the management's rights provisions of K.S.A. 75-4326. These provisions allow for the maintenance of the work force through hiring, promoting, demoting, transfer, and so forth. In addition, an employer retains the right to assign work to employees. These rights only extend, in the opinion of the Board, to the actual decision as to whether retrenchment, promotion, transfer, etc., are necessary. The Board bases this conslusion on the portion of the declaration of policy at K.S.A. 75-4321 (3) which states:

> "the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."

The Board is of the opinion that the designation of management rights, as set forth at K.S.A. 75-4326, is the avenue through which the state may fulfill its obligation to provide certain services. However, the Board believes that the

legislature intended to limit the procedures by which these duties are fulfilled by the requirement of both public employers and public employees to meet and confer over conditions of employment.

An examination of the language of the management's rights provisions at K.S.A. 75-4326 reveals that although the employer retains the right to decide whether lay off, promotion, etc., are necessary to fulfill governmental duties, the statute is silent concerning who may make the decisions on the procedures for promotion or reducing the work force. To determine who under the Act can set procedure, the Board has considered the mandatory nature of issues involving conditions of employment. The Board has shown that the procedures by which a reduction in work force is achieved has a direct impact on salaries and hours of work. In light of the fact that the legislature did not specifically grant the employer the right to set procedures for reducing the work force and in consideration of the direct impact of this procedure on the conditions of employment, the Board can only conclude that the procedure for achieving a reduction in work force is mandatorily negotiable.

PERSONNEL FILES

The eighth subject is that of "Personnel Files". It is not difficult to understand the reasons why an employer might choose to keep files on his employees. Personnel files might contain letters of commendation, evaluations, records of disciplinary actions, payroll data, original applications, individual achievements, etc. Maintenance of a personnel file would be of no value or use unless it were maintained for some purpose. Personnel files are normally maintained by the employer and utilized in making various employment decisions relative to salary increases, promotions, terminations, awards, lay offs, vacation entitlement, retirement eligibility, and many more. Since the material within the files serves to provide guidance in the determination of various conditions of employment, an employee's right to knowledge of the information in the file, and an avenue to refute erroneous entries is of monumental importance. The Board is therefore of the opinion that the subject of "Personnel Files" is mandatorily negotiable.

ACADEMIC FREEDOM

The final subject to be considered is that of "Academic Freedom". The Board is asked to rule that academic freedom is a mandatory subject for meet and confer based upon the Pittsburg State University/KHEA proposal contained within the topic grievance procedure. After analyzing the proposal the Board believes the question of law has been misstated. Perhaps a better statement of the question would be; is academic freedom grievable? The Board bases his analysis on the following; Paragraph A of the proposal is meaningless. That is, there is no reference to the incorporation within the contract of the academic freedom guidelines contained in the faculty handbook. Rather there is a simple statement finding such guidelines adequate. Paragraph B states that a faculty member has the right to make a request. It would seem that each faculty member would have a constitutional guarantee to make such a request. Therefore, this paragraph is similarly meaningless. Paragraph C then proposes to make any complaint regarding academic freedom, subject to the grievance procedure.

Grievance procedure is most definitely a mandatory subject for meet and confer. Grievance is defined at K.S.A. 75-4322 (u) as;

> "(u) 'Grievance' means a statement of dissatifaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice." (Emphasis added)

The faculty handbook guidelines on academic freedom no doubt relate in some manner to the amount of freedom given to the individual faculty member to teach. These guidelines would qualify as a traditional work practice, thus any "punishment" given by management to a faculty member for a alleged violation of the guidelines would be subject to review via the grievance procedure. Such review would, of course, be tempered by the agreed upon grievability clause contained within the memorandum of agreement. That is, most labor contracts contain a grievability clause under the heading of grievance procedure. This clause specifies what is and what is not grievable.

The Board must rule that academic freedom as evidenced by the Pittsburg State University/KHEA proposal is other then a mandatory subject for negotiations. Paragraph C, however, as it relates to grievability is a proper and mandatory subject for meet and confer under the "topic" grievance procedure.

In summary, the Board has found much of the language included within the various proposals to be misplaced, misleading, and other than mandatorily negotiable. The rulings in this case, however, were based upon the entire language of the proposal. If portions of the individual proposals were found to be mandatorily negotiable, the rulings were so issued. The Board admonishes Pittsburg State University/KHEA to henceforth present proposals at the table which are clearly stated and properly labeled. Based upon the record as a whole the Board finds the following:

1) Salary Generation - Mandatory
2) Salary Allocation - Mandatory
3) Out of State Travel - Mandatory
4) Promotions - Mandatory
5) Summer Employment - Mandatory
6) Tenure - Mandatory
7) Retrenchment - Mandatory
8) Personnel Files - Mandatory
9) Academic Freedom - Other than Mandatorily Negotiable/except subject to grievance

There ~~was~~ no question but that there is a good faith dispute as to whether said nine (9) items ~~was~~ were mandatorily negotiable. We cannot, therefore, find Respondent guilty of a prohibited practice in this matter.

The complaint is herewith dismissed.

IT IS SO ORDERED THIS 28 DAY OF JANUARY, 1982, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.

James J. Mangan

James J. Mangan, Chairman, PERB

Louisa A. Fletcher

Louisa A. Fletcher, Member, PERB

I hereby Dissent. See my attached dissenting opinion.

Lee Ruggles

Lee Ruggles, Member, PERB

Art Veach, Member, PERB

Donald Allegrucci, Member, PERB

DISSENTING OPINION-PERB CASE
No. 75-CAEO-1-1932

Lee Ruggles, PERB Member, dissenting:

I

I respectfully dissent. When the legislature passed K.S.A. 75-4321, et seq. in 1971, the legislature deliberately patterned the Kansas Act after the comprehensive model "Meet and Confer" Act drafted by the national Advisory Commission on Intergovernment Relations. The Kansas Supreme Court noted a parallel between the Commission's definition of meet and confer and the language of the Public Employer-Employee Relations Act. [National Education Association v. Board of Education of Shawnee Mission, 212 Kan. at 749, 512 P.2d at 432.] It was a significant and deliberate act when the Kansas Legislature deviated from the model law to provide in the K.S.A. 75-4322(t) definition of "Conditions of employment" which enumerated a specific list of items as mandatory subjects. Since this laundry-list aspect of the definition of "Conditions of employment" does not appear in the model "meet and confer" act, I must interpret this to be a purposeful choice of the Kansas Legislature. In the Respondent's Brief it was stated, "Where such a list is included in legislation, the Courts have strictly interpreted these lists." I concur and think such position should be taken by this Board.

In PERB Case 75-CAE-21-1980 the Hearing Examiner provided an "impact" theory as a rationale greatly expanding the lists of mandatory subjects provided by the legislature in K.S.A. 75-4322(t). In this case a different Hearing Examiner provided an "effects" rationale which is essentially the same as the "impact" theory. The majority of the Board rejected both the "impact" and "effects" rationales and came up with their own equally unsound theory of "significantly relate" as an excuse to expand the number of mandatory subjects.

I observed that the decisions reached by the majority on whether a subject was mandatory by their use of the

"significantly relate" theory had as much predictability as a flip of a coin. In fact they flipped the allegorical coin several times during their deliberations on several of the subjects they eventually found to be mandatory subjects. For example, the Hearing Examiner found the subjects of Summer Employment and Out of State Travel to be other than mandatorily negotiable. I feel this was a correct result, albeit for the wrong reason, by the Hearing Examiner. Yet the majority by application of their "significantly relate" theory improperly reversed this and made both subjects mandatorily negotiable. If an experienced PERB majority had this much difficulty in applying their "significantly relate" theory, I am concerned at the widespread confusion and uncertainty the application of this theory will create for public employers across Kansas.

The majority adoption of the "significantly relate" test goes far beyond what the legislature intended. The "impact" and "effects" theories by the two Hearing Examiners in these cases were bad enough. However, the majority repudiated both of these theories and went further without any logical basis.

Today's opinion will require all parties in the meet and confer process across the state of Kansas to guess at what future topics will come up "heads" and thereby be includable as a term and condition of employment. Such a condition improperly impedes both state and local governments in their exercise of functions specifically designated as management rights. This result was never intended by the legislature. I am shocked and dismayed by my colleagues' attempts to make the PEER Act something it was never intended to be.

Based on the listing by the legislature in K.S.A. 75-4322(t), of specific mandatory subjects, I hereby find that none of these nine (9) subjects at issue in this case are mandatorily negotiable subjects.

The Respondent's Briefs to the Hearing Examiner and the Respondent's Exceptions and Briefs filed with the Board have convinced me of the merits of its position. These documents set forth the errors, both in findings of fact and conclusions

of law with such precision that I hereby adopt these arguments as my response to the majority's Order on these cases.

In summary, the conclusions as set forth in this Order by the majority were not supported by substantial evidence, by statute, or by appropriate court decisions as cited in the Respondent's Briefs. I predict they would be set aside on appeal.

For the foregoing reasons, I respectfully dissent.

Lee Ruggles

Lee Ruggles, Member PERB
Dissenting on Case No. 75-CAEO-1-1982