

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fraternal Order of Police)	
Lodge No. 4,)	
Petitioner,)	
v.)	Case No. 75-CAE-24-1993
)	
City of Kansas City, Kansas)	
Police Department,)	
<u> Respondent.</u>)	

INITIAL ORDER

This prohibited practice complaint was heard by Monty Bertelli in 1993. There were several days of hearings. Due to reassignment, Bernard J. Dunn has been appointed as a substitute presiding officer in this matter.

The Petitioner, the Fraternal Order of Police, Lodge No. 4 (hereinafter referred to as the "FOP"), appeared by and through counsel, Steve A. J. Bukaty. Witnesses on behalf of the Petitioner were Peter J. Fogarty, Bill Howard Sr., Samuel Reid, Michael D. Lewis, Dennis K. Roberts, Bill Edward Dillon, Charles Dickinson, Jeff Alan Ring, Zane Schuberger, and Carl Hornbeak. The Respondent, City of Kansas City, Kansas (Police Department) (hereinafter referred to as the "City") appeared by and through counsel, Daniel Denk. Witnesses on behalf of the Respondent were Thomas Dailey, Raymond Thebo, Gary Twitchel, Wayne Richards, Robert Wilkinson, Richard Hartzfeld, Frank Clair, Charles Koonse, Harold Brown, and Sam Breshears.

The Respondent, simultaneously with their answer, filed a Motion to Dismiss based upon:

1. Lack of jurisdiction in the Public Employees Relations Board; and
2. Waiver, Estoppel, and Res Judicata

A grievance was filed January 23, 1993. (City Exhibit No. 1) (Tr. Vol. I p. 6, Mr. Denk,

75-CAE-24-1993

Attorney for City.)

Respondent contends, in support of this Motion, that Petitioner exercised an irreversible and exclusive election to use the grievance procedure under the terms of the bargaining agreement, thus precluding subsequent filing of a prohibited practice claim under the provisions of the Kansas Public Employer-Employee Relations Act (hereinafter referred to as "PEERA") K.S.A. 75-4321 et seq.

ISSUES PRESENTED

1. Is this Board without jurisdiction because the Petitioner elected, as an exclusive remedy under the terms of the bargaining agreement, the grievance procedure, under the terms of the Bargaining Agreement Memorandum of Understanding between the parties, thus waiving their right under the agreement to proceed under PEERA?
2. Did the City violate PEERA, K.S.A. 75-4333(b)(1), (2), (3), and (5), by committing a prohibited practice, when removing the take-home car from Officer Howard?

FINDINGS OF FACT

1. The City is a municipality and city of the first class of the state of Kansas and has made the election to come under the provisions of the Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321, et seq., as amended. (Judicial Notice)

2. The FOP is the exclusive collective bargaining representative for all sworn employees of the Police Department below the rank of Lieutenant, except for confidential and supervisory employees who are excluded. (Joint Exhibit No. 1 - Article 1; Hearing Transcript, Vol. I, p. 61.)

3. The City and the FOP have entered into a series of two and three year Memoranda

of Understanding wherein the parties have set forth "terms and conditions" of employment of the employees covered by the collective bargaining agreements. (Opening statements and Judicial Notice.)

4. The relevant Memorandum of Understanding for this cause is the 1990 through 1992 Memorandum of Understanding. (Joint Exhibit No. 1; Hearing Transcript, Vol. I, p. 61.)

5. In the past, the FOP has repeatedly taken a strong position that any untimely action during the grievance proceeding by the City resulted in the grievance being resolved in favor of the FOP and its member(s). (Hearing Transcript, Vol. VIII, p. 1807-1810.)

6. Since the early 1980s, a take-home car has been assigned to the Identification (ID) Unit in the Department. (Hearing Transcript, Vol. II, p. 328). The officer with the take-home car would be responsible for responding to homicides and other major cases when there was a manpower shortage. (Hearing Transcript Vol. II, p. 329.)

7. In the past, the ID unit also had a camera car. This second car was funded by a federal grant. (Hearing Transcript, Vol. II, p. 330-331.)

8. The authority to assign take-home cars rests solely with the Chief of Police. (Hearing Transcript, Vol. V, p. 1023.) This is established through the general order 93-17 of the Department. (Hearing Transcript, Vol. VII, p. 1407-1408; City Exhibit No. 17.) This Department Order describes the on-call vehicle guidelines. The guidelines establish that assignments of on-call vehicles shall be at the discretion of the Chief of Police or his designee. (Hearing Transcript, Vol. VII, p. 1408.)

9. The Department was constantly scrutinized about the take-home cars. It was part of Captain Breshears' duties to monitor the number of take-home cars and to trim down the number of

cars used. Take-home cars were removed from various units after Breshears became the administrative assistant. (Hearing Transcript, Vol. VIII, p. 1800-1803; City Exhibit 20.) The Department has cut back from sixty-three cars to forty-two take-home cars in the department since January 1, 1994. In December 1992 and January 1993, the Department removed several cars out of the vice and narcotics unit, the support unit, a community relations unit, and other units. (Volume VII, p. 1409-1410.) The Police Department has to take into account financial problems faced by the City of Kansas City, Kansas, while providing municipal services. The department is constantly requested by the administration to cut costs. (Hearing Transcript, Vol. VII, p. 1406-1407.) The Administration and City Council are always very concerned regarding the issue of take-home cars because it is a high-cost factor. (Hearing Transcript, Vol. VII, p. 1408-1409.)

10. Major Harold Brown was commander of the Bureau of Services, which included the ID unit, from 1989 until March 1, 1993. (Hearing Transcript, Vol. V, p. 1021-1022, 1024.)

11. The ID unit's take-home car was assigned to Don Graham from approximately 1982 until approximately 1990. Shortly before Graham retired, he gave up all rights to the take-home car and Bill Howard was offered the take-home car. (Hearing Transcript, Vol. I, p. 109; Vol. II, p. 343-344.)

12. During the time period from 1982 to 1990, the take-home car would be assigned to Bill Howard if Graham was on vacation or sick leave. (Hearing Transcript, Vol. II, p. 384; Vol. III, p. 523; Vol. V, p. 872.) Howard also had the take-home car prior to Graham's surrender of the same during Graham's vacations or in-service training. (Hearing Transcript, Vol. III, p. 615.)

13. Bill Howard had possession of the take-home car until the time his son, Officer Scott

Howard, was terminated by the Department in approximately February 1992. At this time, Howard surrendered the take-home car. (Hearing Transcript, Vol. I, p. 109-110; Vol. II, p. 341-342.)

14. When Howard surrendered the car, the car was assigned to Officer Thebo. (Hearing Transcript, Vol. II, p. 355; 398; Vol. III, p. 527.) Thebo had worked in the unit since approximately December 1983. Thebo has been a union member since joining the police department and had acted as the ID unit's union steward since approximately 1990. (Hearing Transcript, Vol. VI, p. 1142-1144.)

15. This was the first time the ID unit had to decide how to assign the take-home car between officers which were not both the senior departmental and senior ID unit officer. (Hearing Transcript, Vol. V, p. 1182; 1191-1192.)

16. The Chief has the authority to determine how many take-home cars are utilized, and what departments receive them. (E.g., Reid, Tr. p. 593; Breshears, Tr. p. 1799.)

17. Within units, lieutenants assign the take-home cars to officers. (E.g., Dailey, Tr. p. 1554, 1715, 1716, 1721.)

18. Officers are not expected or required to discuss take-home car assignments with the Chief. (Dailey, Tr. p. 1555-56.)

19. As a general matter, Chief Dailey does not concern himself with the practical details of which officers receive take-home cars. (Dailey, Tr. p. 1541-42.)

20. The Identification unit has only seven patrolmen, three of whom work days. (Howard, Tr. p.329.)

21. With each employee having two days off per week, there are numerous evening and

night shifts in which only one ID unit officer is on duty. The purpose of the take-home car is to provide backup for major calls during such shifts. (Id.)

22. From the early 1980s until February of 1992, the single ID unit take-home car utilized by bargaining unit employees was assigned to officers who had the most departmental and unit seniority and who worked days. (E.g., Brown, Tr. p. 1037.)

23. The senior officer had the right-of-first refusal on the take-home vehicle. (e.g., Brown, Tr. p. 1036-39, 1056, 1075-76.)

24. When the senior officer wanted to give up the car, which happened on occasion, it would go to the next senior officer. The most senior officer could then ask for it back when he wanted. (e.g., Reid, Tr. p. 528; Thebo, Tr. p. 1171-73.)

25. As with overtime, the senior officer's declining the extra duty on any given occasion did not constitute a permanent and irrevocable waiver of such duty in the future. (JX1, Article 13; see also Brown, Tr. p. 1040-41.)

26. Due to the number of major-case calls and the frequency with which only one officer is on duty in the ID unit, having the take-home car entails a significant amount of overtime and interruption of one's personal life. (e.g., Reid, Tr. p. 526-27; Thebo, Tr. p. 1168-71.)

27. In February of 1992, Officer Bill Howard's mother-in-law was suffering from a terminal illness and he was helping his wife take care of her when he was off duty. He was exhausted from the combination of this responsibility and the numerous call-outs during his days off, evenings and nights. (Howard, Tr. p. 345; Reid, Tr. p. 526-27.)

28. Fearing that the Chief would use a failure to respond to a call-out as an excuse to

retaliate against him for his union activities, and needing the time and energy to deal with the illness in his family, Officer Howard told Lieutenant Reid that he wanted to give up the take-home car "for a while." (Howard, Tr. p. 345-51, 384-87, 390-93; Reid, Tr. p. 526; Thebo, Tr. pp. 1147-48.)

29. Lieutenant Reid told Major Brown (Bureau Director in Services, of which the ID unit was a part) about Officer Howard's request, and Major Brown informed the Chief that Bill Howard wanted to give up his take-home car because he thought the Chief was out to get him and would fire him if he missed a call. (Howard, Tr. p. 384-87; Reid, Tr. p. 529-30; Dailey, Tr. p. 1428-31.)

30. Bill Howard did not request the take-home car at any time during the remainder of 1992. Howard was asked on several occasions to assume temporary take-home duties while Thebo was on vacation or leave and Howard refused. (Hearing Transcript, Vol. II, p. 354-355; 398-399.)

31. The ID unit is the department's crime lab. Officers in the unit collect fingerprints, take and process photographs and videotape, analyze physical and trace evidence, attend autopsies, take statements, etc. (e.g., Howard, Tr. p. 323.)

32. There was a need in the ID unit to have the back-up/call-out duties be with someone who had experience in the ID unit so that person would have the necessary skills to function alone when called out. (Howard Tr. Vol. II p. 323, 326, 329, 337, 379, 383, Vol. III p. 459, 515.)

33. In late 1992, Lieutenant Reid suggested to Major Brown that a second take-home car was justified for the ID unit. Major Brown checked with the Chief and then advised Reid that his request for a second car would be rejected. (Hearing Transcript, Vol. V, p. 1043-1046.)

34. In January 1993, a vehicle became available after the City closed its municipal jail. (Hearing Transcript, Vol. II, p. 355-356.) This car was newer, had less mileage on it, and had more

space for equipment. (Hearing Transcript, Vol. II, p. 400.)

35. The garage superintendent advised the ID unit commander (Reid) of the second vehicle and that the garage "wanted the better of the two vehicles." The ID unit members inspected the second vehicle and, determined of the two, the newer, bigger vehicle was preferred. (Hearing Transcript, Vol. III, p. 535-536; 576.) Howard and Thebo inspected the car with the understanding that there would be a switch of vehicles. (Hearing Transcript, Vol. V, p. 1157.)

36. Howard suggested to Lieutenant Reid that the ID unit requested that they keep both cars rather than exchanging them. Lieutenant Reid agreed. (Hearing Transcript, Vol. V, p. 1151.)

37. Lieutenant Reid then contacted Major Brown about exchanging the ID unit vehicle with the newer vehicle the garage possessed. Major Brown approved the exchange of vehicles after receiving approval from the Chief. (Hearing Transcript, Vol. V. P. 1029-1030.) Major Brown assumed that the older car would be turned into the garage. (Hearing Transcript, Vol. V, p. 1031.)

38. Initially, that car was to be used to replace the older ID unit car.

39. Lt. Reid decided it would be best to keep both cars and divide major case and camera duties. Through Major Brown and the garage superintendent, Lieutenant Reid's request to keep the second car was approved. (Reid Tr. p. 35-37.)

40. In accordance with past practice, Lieutenant Reid offered the new take-home car to Officer Howard due to his seniority. (Reid, Tr. p. 538.)

41. Lieutenant Reid of the ID unit had requested the additional car for the ID unit and did not turn in the older vehicle. Howard was asked if he wished to resume the take-home duties with the second car; he agreed. (Hearing Transcript, Vol. II, p. 357-358; 360; Vol. III, p. 537-538.)

42. Officer Howard's family crisis was past, he was rested, and his son was back at work, so when Lieutenant Reid offered him the second car, he accepted. (Howard, Tr. pp. 355-60, 39-402; Reid, Tr. p. 538)

43. Officer Howard took the newer car and Officer Thebo kept the car he had been driving. (Thebo, Tr. p. 1164.)

44. Both of these cars were in the budget and authorized for departmental use in 1993. (Dailey, Tr. p. 1537-38; Brown, Tr. p. 1130, Breshears, Tr. p. 1880-81.)

45. Officer Howard began driving the second car on January 16, 1993. (Howard, Tr. p. 507.)

46. On January 1993 Lieutenant Reid received a call from Major Brown, who told him the Chief said he was to take the car away from Officer Howard. (Brown, Tr. p. 1073; Reid, Tr. p. 539-542; Howard, Tr. p. 362-63, 507.)

47. The second car was assigned to Howard for three to four days. The second take-home car was then removed from Howard's control. (Hearing Transcript, Vol. II, p. 360; Vol. III, p. 616.)

48. Captain Breshears learned of the second vehicle in the ID unit and made inquiry to the Chief whether such a vehicle was authorized. (Hearing Transcript, Vol. VIII, p. 1803-1804.) The Chief had never authorized the second vehicle for that unit. Major Brown reported back to the Chief that, indeed, there was a second car and that Bill Howard was driving it. The Chief thereafter instructed Major Brown to return the second car. (Hearing Transcript, Vol. VIII, p. 1436-1437.)

49. Major Brown received a message from the Chief regarding the fact that the ID unit had kept both cars and that the car should be removed. Major Brown ordered Reid to see that the

second car got turned in to the garage. (Hearing Transcript, Vol. V, p. 1030-1031.)

50. The unit was told that they had no authority for two cars and they should elect which car they wanted to keep. (Hearing Transcript, Vol. III, p. 542.) The newer car was selected as the take-home car and the original car was removed to the motor pool and used as a spare. (Hearing Transcript, Vol. II, p. 406-407.)

51. Except for the grievance filed, Officer Howard never formally requested after February 11, 1992, that the take-home car be returned to him based upon past practice. (Hearing Transcript, Vol. II, p. 432-433; 435.) Howard never requested to Thebo that the take-home car be returned to Howard. (Hearing Transcript, Vol. V, p. 1173.)

52. The Howard case was the first time the issue arose in the ID unit about a senior officer surrendering a take-home car and later claiming the car back. (Hearing Transcript, Vol. V, p. 1191-1192.)

53. Howard told Officer Thebo that even if he (Howard) won the grievance, he did not want and would not take the take-home car. (Hearing Transcript, Vol. V, p. 1149-1150.)

54. The union, Officer Howard and other ID unit members conceded that it was totally within the discretion of the Chief of Police to determine whether take-home cars are to be permitted at all and, if so, to which bureaus, divisions or units such assignments are to be made. (Hearing Transcript, Vol. I, p. 158-159; Vol. II, p. 406; 409, Vol. VI, p. 1173-1174.)

55. Howard testified that he requested that the union file a prohibited practice charge in connection with the take-home car issue. D. K. Roberts, Chief Lodge Steward, did not file a charge but instead filed a grievance at Step 1 on behalf of Howard. (Hearing Transcript, Vol. II, p. 365;

Vol. IV, 742-743.)

56. At about the same time as Howard allegedly requested a prohibited practice charge be filed, Officer Frank Clair approached D. K. Roberts, Chief Lodge Steward, regarding a substantially similar grievance. D. K. Roberts investigated the situation and talked to current and former ID unit members about the past practices concerning the take-home car in the unit. Roberts concluded there were no clear-cut policies, no written policies existed, and the issue was not addressed in the union contract. He refused to the grievance on behalf of Officer Clair. (Hearing Transcript, Vol. IV, p. 707-710; Vol. V, p. 881-883; City Exhibit 3.) At this time, Roberts, on behalf of the union, requested that a Standard Operating Procedure (SOP) be issued to clarify this point. (Hearing Transcript, Vol. IV, p. 710.)

57. Officer Clair, who had served in the ID unit for approximately 11 years, testified that bidding within the ID unit for days off and shifts went by unit seniority. However, other matters, including the take-home car and schooling, was awarded based upon departmental seniority. (Hearing Transcript, Vol. V, p. 868-869.) This was confirmed by Officer Koonse, another member of the ID unit. (Hearing Transcript, Vol. V, p. 967-968.)

58. On January 19, 1993, Lieutenant Reid issued an SOP that the on-call vehicles would be assigned at the discretion of the unit commander. (Hearing Transcript, Vol. III, p. 488-491, 493, 582-584; City Exhibits 3 & 4.)

59. On or about January 23, 1993, (Step 1) and February 10, 1993, (Step 3) the union filed grievances on behalf of Bill Howard contending that the Memorandum of Understanding and past practice was violated when the City assigned the sole take-home car to Officer Thebo. (Hearing

Transcript, Vol. I, p. 181-182.)

60. After the second car was taken away from the unit, Officers Thebo and Stubler discussed the assignment of the remaining car. Bill Howard told Thebo that he would reclaim the take-home car if Stubler exercised his seniority to claim the car. (Hearing Transcript, Vol. V, p. 1166-1167.)

61. In Howard's circumstances, Step 1 of the grievance procedure required the issue to be brought up to Lieutenant Reid, Step 2 to Major Brown, and Step 3 would be to the Chief. (Hearing Transcript, Vol. III, p. 494-495.) Howard did not appeal to Major Brown but circumvented Step 2 and appealed his grievance to the Chief. (City Exhibit 1 & 2; Hearing Transcript, Vol. V, p. 1085-1086.)

62. Howard received denials from Lieutenant Reid at Step 1 and Major Brown at Step 2. D. K. Roberts never contended through the grievance procedure that the City had failed to make timely responses to the grievance at Step 1 or Step 2. In fact, he agreed that the City had responded. (Hearing Transcript, Vol. III, p. 509-510; 516; Vol. IV, p. 711-712, 749-750.) Reid gave Howard the memorandum denying his grievance when Reid wrote it and told Howard that he could not give the car back to Howard. (Hearing Transcript, Vol. III, p. 603.) Reid advised Major Brown that his written response to the grievance had been provided to Howard and D. K. Roberts. (Hearing Transcript, Vol. V, p. 1034.)

63. Bill Howard and the union pursued the grievance to Step 3, which was an appeal to the Chief. The next step (Step 4) would have been to request arbitration within 15 days. (Hearing Transcript, Vol. I, p. 181-182; Vol. II, p. 414-417; Joint Exhibit 1; City Exhibit 1.)

64. The Chief denied the grievance stating that the second vehicle in the ID unit was unauthorized and that the second vehicle had been returned to the garage. (Hearing Transcript, Vol. IV, p. 712-713; Vol. II, p. 1442-1446.)

65. The Executive Board of the union voted to file a prohibited practice charge against the City based upon the Department's removing the second take-home car from the unit or refusing to allow Bill Howard to reclaim either take-home car after initially surrendering it. The union expressly decided not to take the grievance process to the final stage: arbitration. The union's decision was made in consultation with Bill Howard and with legal counsel and after discussion of the possible consequences of abandoning the grievance. (Hearing Transcript, Vol. I, p. 112-113; 115-116; 174-177; 184-185; Vol. II, p. 418-420; 423; Vol. IV, p. 713.)

66. After abandoning the grievance on behalf of Bill Howard, Howard and the union filed a prohibited practice charge with PERB based upon the same allegations asserted in the prior grievance. (Hearing Transcript, Vol. I, p. 181-183; p. 182-184; City Exhibits 1 & 2.) This charge was filed on or about April 7, 1993, which was approximately 55 days following the Chief's response to the Step 3 grievance.

67. The relief requested under the Howard Prohibited Practice charge is mileage Howard incurred to and from work and lost overtime from approximately January 20, 1993, until May 12, 1993. Howard has been on vacation and disability leave since on or about May 12, 1993. He sustained a rotator cuff shoulder injury while on the job on January 20, 1993. He was away from and physically unable to work from May 12, 1993, to the date of these hearings. (Hearing Transcript, Vol. III, p. 443-445; Vol. VIII, p. 1789.) Howard did not know when he would be

physically capable of assuming the take-home car duties, even after he returns to work. (Hearing Transcript, Vol. III, p. 445-446.)

68. In 1989 the union pursued to arbitration an issue relating to payment of FOP members involved in the contract negotiation process. The City and the union agreed to proceed to arbitration through the grievance procedure and hold in abeyance any prohibited practice charges which might arise under the same dispute. (Hearing Transcript, Vol. I, p. 77-78.)

69. The Memorandum of Understanding, negotiated by both parties, in effect at the time of the Howard grievance provided:

[W]here a matter within the scope of this grievance procedure is alleged to be both a grievance and a prohibited practice, the officer involved may elect to take the matter through the grievance procedure or the PERB. The officer's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

70. The Union usually gets involved in grievances at Step 1 of the grievance procedure. (Hearing Transcript, Vol. IV, p. 744-745.)

71. Bill Howard was the chief negotiator for the Union at the time Joint Exhibit 1 was negotiated. Various provisions of the grievance procedure was discussed and changed in these negotiations. (Hearing Transcript, Vol. II, p. 412-413.)

72. The standard practice in the Union for making an election under the Memorandum of Understanding is that the Chief Lodge Steward or the President will discuss the grievance/prohibited practice with the officer, will get a recommendation from the Union attorney and then make the election. (Hearing Transcript, Vol. II, p. 297-298; 317; 321.) The City has never

required the individual officer to make the election decision alone. (Hearing Transcript, Vol. II, p. 300.) Past practice is that the Union gets involved in a grievance, at the latest, at Stage 1 or 2 of the grievance procedure. (Hearing Transcript, Vol. II, p. 316-317; 321.)

73. The Union has always taken the position that if the City fails to respond to a grievance in a timely manner, the grievance is automatically terminated in favor of the Union, which is consistent with the language of the negotiated agreement. (Hearing Transcript, Vol. I, p. 178-180; Vol. VII, p. 1400-1401.)

CONCLUSIONS OF LAW

1. The matter is before the Board on prohibited practice charges filed by the union filed pursuant to the Kansas Public Employer-Employee Relations Act (PEERA) K.S.A. 75-4321 et seq.

2. The burden is on the petitioner (the FOP) to establish that a prohibited practice charge was committed under K.S.A. 75-4333.

The statute further states that the standard is, the act must be willful. This term has well-established meaning under Kansas law. A "willful act" is defined as "an act performed with a designated purpose or intent on the part of a person to do wrong or to cause injury to another." Pattern Instructions for Kansas 2d 303. See also *Burdick v. Southwestern Bell Tel.* Col. 9 Kan. App. 182, 184-185, 675 p. 2d 922 (1984) (customer cannot evade tariff limitations of public utility unless willful conduct is proven). Other Kansas statutes requiring "willful" conduct have applied the definitions contained in PIK. See e.g. *Winzerl v. Wells Group, Inc.*, 234 Kan. 1016, 677 p.2d 1004, (1984) (absent evidence that employer "had a design, purpose or intent to willfully wrong or injure

the employee” penalties under the Wage Payment Act are not available); *Hanks v. Booth*, 11 Kan. App. 2d 149, 151, 716 p.2d 596, aff’d 240 Kan. 30, 726 p. 2d 1319 (1986) interpreting “willfully” requirement of K.S.A. 38-120).

3. In their various charges, the FOP alleged that the City violated K.S.A. 75-4333(b)(1), (2), (3), (4), and (5).

4. PEERA does not circumscribe or modify the existing right of a public employer to suspend or discharge employees for proper cause or to relieve employees from duties for legitimate reasons. K.S.A. 75-4326.

5. Unlike the National Labor Relations Act, PEERA only requires the parties to “meet and confer in good faith.”

K.S.A. 75-4335(b)(5). The Act imposes a duty on both the employer and employee to meet, confer and negotiate in good faith, with an affirmative willingness to resolve grievances and disputes. K.S.A. 75-4321(b); K.S.A. 75-4322(m).

6. Kansas law provides that the scope of the Memorandum of Agreement, with specified exceptions, “may extend to all matters relating to conditions of employment.” K.S.A. 75-4330(a). The Memorandum of Agreement “may contain a grievance procedure and may provide for the impartial arbitration of any disputes that arise in the interpretation of the memorandum agreement.” K.S.A. 75-4330(b).

7. In this case, the union’s prohibited practice charges allege violation of K.S.A. 75-4333(b)(1), (2), and (6). The applicable portions of PEERA state:

(b) It shall be a prohibited practice for a public employer or its

designated representative willfully to:

(1) Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;

(2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization;

(3) Encourage or discourage membership in any employee organization . . . by discrimination in hiring, tenure or other conditions of employment . . . ;

(4) Discharge or discriminate against an employee because he or she has filed any affidavit, petition or complaint or given any information or testimony under this act . . . ;

(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327;

(6) Deny the rights accompanying certification or formal recognition or formal recognition granted in K.S.A. 75-4328.

K.S.A. 75-4333 (emphasis added).

8. In applying and construing the prohibited practices law, the Board is required to recognize "the fundamental distinctions between private and public employment." K.S.A. 75-4333(e).

9. Under K.S.A. 75-4333, the burden is on the complainant to prove that a prohibited practice was committed.

10. To establish a prohibited practice, the union must prove that the action taken was "willful". Under Kansas law, a "willful" act is defined as "an act performed with a designed purpose or intent of the part of a person to do wrong or to cause an injury to another."

11. The City did not violate K.S.A. 75-4333(b)(1) in that it did not willfully interfere,

restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324.

12. The City did not violate K.S.A. 75-4333(b)(2) in that it did not willfully dominate or interfere with the formation or administration of an employee organization.

13. The City did not violate K.S.A. 75-4333(b)(3) in that it did not willfully encourage or discourage membership in any employee organization by discriminating in conditions of employment.

14. The City did not violate K.S.A. 75-4333(b)(4) in that it did not willfully discharge or discriminate against an employee because he or she has filed any complaint or testified under this Act.

15. The City did not violate K.S.A. 75-4333(b)(5) in that it did not willfully refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327.

16. The Charging party has not proven any anti-union animus on behalf of the employer and the employer had legitimate business reasons for proceeding as it did in this matter.

17. PEERA's fundamental purpose is to encourage governmental agencies to confer with its represented employees with the eye of reaching an agreement; to reduce such an agreement into writing; and to enforce such agreements in an effort to minimize strife between the employer and employee. K.S.A. 75-4321 et seq.

18. With respect to the City's motion to dismiss, the presiding officer has reviewed and considered the competent and substantial testimony and evidence presented at the hearing and the arguments and memoranda of counsel. It is the finding and conclusion of the presiding officer that

the issue presented, that being; whether the exclusive waiver under the terms of the bargaining agreement had been exercised by the union, is an issue arising under the laws relating to contract interpretation. Interpretation and construction of the terms of the contract itself is not a function of the Board and not within its jurisdiction. Therefore, the fact of waiver may not be determined in this forum. The motion may not be addressed and must, therefore, be deemed as overruled.

19. With respect to the merits of the claim, the union alleges the existence of a past practice whereby the unit senior officer would take the car home so the person with knowledge and experience in those skills of that unit would be reliably available after hours. If it were relinquished temporarily for a short time, it could be reclaimed.

After review and consideration of the competent and substantial testimony and evidence presented at hearing, and the arguments and memoranda of counsel, it is the finding and conclusion of the presiding officer, that such past practice may have existed, although there are some variations creating a basis for disagreement and uncertainty. However, if such a past practice did exist in the case at bar, Officer Howard himself effectively disrupted this past practice by relinquishing the car for a long period of time. This he did because of fear and mistrust of the Chief's motives and intent and an overwhelming set of personal and domestic circumstances and demands. This relinquishment was indefinite and possibly permanent. It also was accompanied by Officer Howard's statement to the Chief that Officer Howard considered the Chief's motives and intent to be in the nature of retaliation and deceit and that his feelings were that the Chief was not to be trusted, in Officer Howard's opinion. This statement, which was possibly taken as a personal insult by the Chief, provided a basis for retaliation, if indeed, there was actual retaliation, which was independent of any

anti-union animus.

It is the finding and conclusion of the presiding officer that the evidence does not show that the Chief, in causing the take-home car to be removed from Officer Howard, was acting out of any anti-union animus, or retaliation for union activity, or any other willful motivation violating any provision of law under the jurisdiction of this Board as presented in this claim. Further, it is not evident, under the facts in this case, that the Chief violated any established past practice in violation of the Memorandum of Understanding bargaining agreement.

20. For the above reasons, the Board finds that the union has failed to carry its burden of proof that a willful violation of K.S.A. 75-4333 has occurred. The Department's conduct in each instance was justified and not based upon impermissible reasons and did not violate K.S.A. 75-4333(b)(1), (2), (3), (4), or (5). Accordingly, this matter should be dismissed.

21. With respect to the request to award attorney fees to the Respondent, the presiding officer, after review and consideration of the competent and substantial testimony and evidence presented at hearing and the arguments and memoranda of counsel, finds that grounds do not exist under the law which would justify an award of attorney fees based upon the particular facts of this case.

ORDER

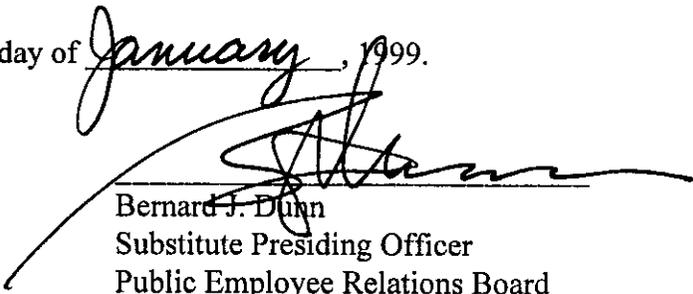
IT IS HEREBY ADJUDGED AND DECREED, BASED UPON FACTS PRESENTED IN THIS CASE, AS FOLLOWS:

1. The Respondent's Motion to Dismiss is overruled.
2. The Respondent has not violated the statute by committing a prohibited practice, and

therefore this complaint must be, and is hereby, dismissed.

3. Award of attorney fees is denied.

IT IS SO ORDERED this 28th day of January, 1999.


Bernard J. Dunn
Substitute Presiding Officer
Public Employee Relations Board
1430 S.W. Topeka Blvd.
Topeka, KS 66612

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the presiding officer's decision in this case. The Initial Order will become final pursuant to K.S.A. 77-530 unless reviewed by the Public Employee Relations Board, either on its own motion, or at the request of a party pursuant to K.S.A. 77-527. Any party seeking review of this Order must file a Petition for Review with the Public Employee Relations Board at 1430 S.W. Topeka Blvd., Topeka, Kansas, 66612, within fifteen (15) days from the date of service, plus three (3) days for mailing.

Certificate of Mailing

I, Kay Fordham, do hereby certify that on the 28th day of January 1999, a true and correct copy of the foregoing Initial Order was deposited in the United States Mail, first class, postage prepaid, properly addressed to:

Steve A. J. Bukaty
Attorney at Law
8826 Santa Fe Drive, Ste. 218A
Overland Park, KS 66212

Daniel B. Denk
McAnany Van Cleave and Phillips PA
707 Minnesota Ave., 4th Floor
P. O. Box 1300
Kansas City, KS 66117

and to the Public Employee Relations Board on 2nd day of February, 1999.


Kay Fordham