

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS**

Public Service Employees            )  
Union Local 1132,                    )  
    Petitioner,                        )  
  )  
  )  
vs.                                        )  
  )  
  )  
Unified Government of Wyandotte    )  
County/Kansas City, KS,            )  
    Respondent.                        )  
\_\_\_\_\_

Case No.: 75-CAE-7-2003

**INITIAL ORDER**

NOW on this 20th day of December, 2004, the above-captioned Prohibited Practice Charge comes on for decision pursuant to K.S.A. 75-4334 and K.S.A. 77-514(a) before presiding officer Douglas A. Hager, designee of the Public Employee Relations Board (hereinafter "PERB").

**APPEARANCES**

Petitioner Public Service Employees Union Local 1132 appeared through counsel, Thomas H. Marshall, Attorney at Law, Blake & Uhlig, P.A. Respondent, Unified Government of Wyandotte County/Kansas City, KS, appeared through counsel, Ryan B. Denk, Attorney at Law, McAnany, Van Cleave & Phillips.

75-CAE-7-2003

## PROCEEDINGS

On March 24, 2003, Petitioner Public Service Employees Union, Local 1132, (hereinafter "Petitioner" or "PSEU 1132"), filed a prohibited practice complaint with the Public Employee Relations Board against employer, Unified Government of Wyandotte County/Kansas City, Kansas (hereinafter "Employer" or "Respondent"). Petitioner's complaint, as amended by petition filed September 23, 2003, alleged that the employer engaged in prohibited practices in violation of K.S.A. 75-4333(b)(5) and (6) by refusing to meet and confer in good faith with Petitioner, as required by K.S.A. 75-4327. In support of its complaint, Petitioner alleges that Respondent failed and refused to meet and confer with Petitioner prior to reclassifying a position included in the employee unit, that of a Building and Grounds Specialist, to the position of Groundskeeper II, while simultaneously reassigning part of the tasks performed by the Building and Grounds Specialist position to a non-bargaining unit employee. Petitioner alleges that reassignment of bargaining unit work to a non-bargaining unit member is a mandatory subject of the meet and confer process under the Public Employer-Employee Relations Act and that the Employer's unilateral reallocation of the unit position and transfer of work to an employee outside the bargaining unit without first bargaining to impasse over same with Petitioner constitutes a violation of K.S.A. 75-4333(b)(5) and (6).

In its September 24, 2003 answer to Petitioner's Amended Complaint, Respondent denied generally that it had committed a prohibited practice. Respondent asserts that its conduct did not constitute a prohibited practice in violation of K.S.A. 75-4333(b)(5) and (6) because its actions were within rights granted it expressly by a memorandum of agreement with Petitioner

and by statutory rights reserved to a public employer by K.S.A. 75-4326. Respondent also contends that its actions relating to reallocation of an employee position and reassignment of work to an employee outside the bargaining unit do not constitute a mandatory subject of bargaining under state law. In addition, Respondent contends that Petitioner has, through past practice, waived any right to assert a claim of failure to meet and confer due to Employer's acts of reclassifying other positions. Finally, Respondent alleges that pursuant to a choice-of-remedies provision of a bargained-for agreement, Petitioner is precluded from pursuing this prohibited practice complaint as it previously filed a grievance concerning this matter, which such grievance process it did not pursue to conclusion. Respondent contends that even if it is found to have committed the prohibited practices with which it is charged, the only appropriate remedy is that of ordering it back to the table to bargain in good faith with Petitioner.

The parties have stipulated the facts of record and they are set forth below. The parties subsequently submitted legal arguments. The presiding officer considers this matter to be fully submitted and issues this initial order. *See* K.S.A. 77-526(b).

### FINDINGS OF FACT

1. PSEU Local 1132 is an "employee organization", as that term is defined at K.S.A. 75-4322(i).
2. The Unified Government is a public employer, who has elected, pursuant to K.S.A. 75-4321(c), to come under the provisions of the Kansas Public Employer-Employee Relations Act (PEERA).

3. Prior to 1997, the Unified Government consisted of two (2) separate governmental entities—the City of Kansas City, Kansas, and the County of Wyandotte, Kansas. In 1997, the City and the County combined to form the Unified Government.
4. At all times relevant herein, Mike Connor, has been the Director of the Parks and Recreation Department of the Unified Government. Prior to the consolidation, Mr. Connor was the Executive Manager of the Wyandotte County Park's Department.
5. At all times relevant herein, William B. Cavin has been Deputy Director of the Parks and Recreation Department of the Unified Government. Prior to the consolidation in 1997, Mr. Cavin was employed, in a similar capacity, by the City of Kansas City, Kansas.
6. At all times relevant hereto, Patrick Guilfoil has been employed as Maintenance Superintendent of the Parks and Recreation Department of the Unified Government. Prior to consolidation, Mr. Guilfoil held the same position with Wyandotte County, Kansas.
7. At all times relevant hereto, Scott Allen was a Park Maintenance Superintendent for the Unified Government.
8. At all times relevant hereto, Jeff Jennings has been employed by the Street Maintenance Department of the Unified Government and served as President of PSEU Local 1132.
9. At all times relevant hereto, Brian Yeager has been employed by the Street Maintenance Department of the Unified Government and served as Chief Steward for PSEU Local 1132.
10. At all times relevant hereto, Jeremy Hendrickson has been employed as a Groundskeeper III with the Parks Department of the UG and has served as a Steward for PSEU Local 1132.
11. Prior to the merger in 1997, PSEU Local 1132 represented a unit of hourly employees working for the City.

12. Prior to the merger in 1997, the American Federation of State, County and Municipal Employees (AFSCME) Local No. 1294, represented a unit of hourly employees working for the City of Kansas City, Kansas.

13. Prior to the consolidation of the City of Kansas City, Kansas and Wyandotte County in 1997, employees working for the County were not represented by any employee organization.

14. PSEU Local 1132 and the Unified Government are parties to a Memorandum of Agreement, effective from 2000 to 2003. A copy of the 2000-2003 Memorandum of Agreement is attached hereto as "Exhibit A."

15. Section 2.1 of Article 2 of the Memorandum of Agreement reads as follows:

"The Employer agrees to recognize the Public Service Employees Union, Local 1132, affiliated with the Laborers' International Union of North America, AFL-CIO (hereinafter "Union"), as the sole and exclusive bargaining representative for the hourly employees in the Street Maintenance and Traffic Regulations Division and the Park Maintenance Division for the Parks and Recreation Department."

16. Article 3 of the Memorandum of Agreement is entitled "Management Rights." Section 3.1 within the Management Rights Article of the Memorandum of Agreement states as follows:

"It is the intention of the parties hereto that the UG [Unified Government] retain each and every right and privilege it ever had except insofar as it has, by this Memorandum, agreed to specific limitations thereon.

The exclusive rights of the UG shall include, but are not limited to, its right to determine the qualifications of its employees; to establish continued policies, practices and procedures for the conduct of the UG and to change or abolish such policies, practices or procedures; to introduce new or improved methods, equipment of facilities; to discontinue processes or operations or to discontinue their performance by employees; to select, determine and schedule the number and type of employees required; to assign

work to such employees in accordance with the requirements determined by the UG; to establish and change work schedules; to determine the facts of lack of work; to direct the work of its employees; to hire, promote, demote, transfer, assign and retain employees and positions within the public agency; to subcontract work; to discipline, suspend or discharge employees for just cause; to maintain the efficiency of governmental operations; to layoff employees, to take actions as may be necessary to carry out the mission of the UG and emergencies; to determine the methods, means and personnel by which operations are to be carried on; to develop Standard Operating Procedures, Rules of Discipline and Rules and Regulations not in conflict with this Memorandum, to establish and maintain reasonable standards for wearing apparel and personal grooming and other and other prerogatives and responsibilities normally inherent in management of the UG which are not in conflict with the specific provisions of this Memorandum.

All management rights, power, authority and functions of other than those relinquished by the UG and this Memorandum shall remain vested exclusively in the UG.”

17. Section 3.2 of Article 3 of the Memorandum of Agreement relating to Management

Rights provides that,

“The number of employees to be employed is at the sole discretion of the Employer. The fact that certain job classifications, salaries and wage rates are established, does not mean that the Employer must employ persons for any or all such classifications, or to man any particular piece of equipment or vehicle that happens to be on the work, unless, in the sole opinion of the Employer, there is a need for such employee.”

18. Article 10 of the Memorandum of Agreement is entitled “Grievance Procedure.” Section

10.1 within Article 10 provides that,

“The term ‘grievance’ as used in this Memorandum shall be any dispute, disagreement, or difference between an employee and the UG as to the meaning of any terms or provisions of this Memorandum and as to the manner in which these provisions are applied.

Where a matter within the scope of this grievance procedure is alleged to be both a grievance and prohibited practice under the jurisdiction of the Public Employee Relations Board, the employee involved may elect to pursue the matter under either the grievance procedure herein provided or by action before the Public Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

Grievances are to be processed and/or settled in accordance with the following:

Step 1: The employee or the employee's Union representative, raising the grievance shall present it to the employee's immediate supervisor in writing, within three (3) working days from the time the grievance occurred or became known. Otherwise, it need not be considered.

Step 2: If the grievance is not resolved within six (6) working days from the time that the grievance occurred or became known, it shall be submitted in writing to the respective division head within three (3) working days of receipt of the Supervisor's response in Step 1.

Step 3: If the grievance is not resolved within three (3) working days of receipt of the division head's response in Step 2, the employee shall notify the Chief Union Steward of his dissatisfaction and shall request, in writing, a review of the grievance by the Director of Public Works or his designee. The Chief Union Steward shall make a formal request, in writing, of the Director of Public Works, for a Step 3 hearing on the grievance. The Director of Public Works, or his designee, and the Chief Union Steward shall agree on a mutually satisfactory date and time to hear the grievance, and shall render a decision on the matter within fifteen (15) working days of the Step 3 hearing.

Step 4: If the grievance is not resolved within three (3) working days from receipt of the Step 3 decision, the employee raising the grievance shall notify the Chief Union Steward, in writing of the his desire for arbitration in the grievance. The Employer and the Union shall agree on a disinterested third party to make a recommendation. The arbitration hearing shall be scheduled at a mutually agreeable date and time. The Employer and the Union agree to pay equal shares of any costs associated with the arbitration.”

Section 10.2 within Article 10 relating to the Grievance Procedure provides that,

“It shall be the responsibility of the employee to properly and promptly respond to the procedure herein itemized. Grievances not raised by employees within the time limitations stated shall not be considered. Furthermore, failure on the part of either party to promptly respond to the procedures outlined herein, shall result in the grievance being disposed of in favor of the non-defaulting party.”

19. Article 20 of the Memorandum of Agreement is entitled “Promotions and Bidding”.

Section 20.1 within Article 20 states:

“It is understood and agreed that it is the responsibility of the Employer to determine the size of the workforce, to declare job opportunities available and to determine relative qualifications, including ability, education, and experience of bidding employees for a vacant position.”

“When any permanent job vacancy exists in a bargaining unit position, the UG [Unified Government] may determine within a reasonable period of time from the declaration of the vacancy by the UG, whether such positions shall be filled. If it is determined that a position is to be filled, it shall be posted within a reasonable period of time from the determination to fill it. However, even if the Employer initially determines not to fill a position, the Employer expressly reserves the right, at any later time, to determine that such position should be permanently filled and may then post the same for bid.”

21. The Parks and Recreation employees represented by PSEU Local 1132 include a number of different job classifications, including four classifications of "Groundskeeper" — Groundskeeper I, II, III, IV. The unit represented by PSEU Local 1132 also includes the "Buildings and Grounds Specialist" classification. A list of the job duties of the various parks and recreation job classifications included in the bargaining unit represented by PSEU Local 1132 are set forth in Connor Exhibit #1, a true and correct copy of which is attached hereto.

22. Job duties and job descriptions as prescribed within Connor Exhibit #1 for all positions within PSEU 1132 are set and defined and periodically changed unilaterally by the Parks Department without meeting and conferring with PSEU 1132. On one occasion, PSEU 1132 did grieve the Parks Department's change of job duties as described within the job descriptions identified as Exhibit 1, however, such grievance was dropped by PSEU 1132.

23. As set forth in Connor Exhibit #1, a Groundskeeper performs both outside and inside work, which work includes, but is not limited to, snow removal, the planting, watering, fertilizing, mowing and trimming of grass and other plants, as well as the loading and unloading of stone, gravel, dirt, leaves, timber, trash, etc. Additional duties of the Groundskeeper classifications include any duties of a manual nature which a supervisor feel such Groundskeeper is able to perform. Groundskeeper duties also include assistance of employees of other job classifications in their duties and responsibilities as directed. The Buildings and Grounds Specialist does both outside and inside work. The Buildings and Grounds Specialist assists in snow removal and mows and trims the grass in areas around the buildings. Additionally, the Building and Grounds Specialist mow areas within the parks which include areas surrounding park shelters and structures as well as trails throughout the parks. The inside work includes

janitorial work relating to the cleaning of the community building, and park shelters, showing the community building to potential renters and setting up tables and chairs and per the renter's floor plan.

24. When Frank Magargel was in the position of Building and Grounds Specialist he performed work both inside the Meyn Center as well as outside the facility and throughout the Wyandotte County or Bonner Park. Mr. Magargel's duties outside of the Meyn Center included mowing and maintenance of the exterior of the Meyn Center. Throughout the Park Mr. Magargel mowed areas surrounding playgrounds and playground equipment, areas around shelter houses and shelter facilities, areas around other structures throughout the Park, and he mowed cross country trails for the high schools that ran throughout Wyandotte County Park. Additionally, Mr. Magargel did some trimming around trees throughout the Park.

25. Several employees within the Unified Government other than Frank Magargel, the Building and Grounds Specialist at the Meyn Center, also performed work at the Meyn center. Jeremy Hendrickson has personally performed work at the Meyn Center both before and after Mr. Magargel's retirement on several occasions. Furthermore, Mr. Hendrickson indicates that several employees within the Parks Department have performed work out at the Meyn Center both before and after Mr. Magargel's retirement. Such work has included setting up for events at the Center, cleaning and basic building maintenance. Additionally, after Mr. Magargel's retirement, Mr. Hendrickson and other employees within the Parks Department have continuously performed the exterior groundskeeping at the Meyn Center. Even when Mr. Magargel was in the position of Building and Grounds Specialist, he did not perform mechanical maintenance such as electrical, plumbing and more specialized maintenance at the Meyn Center

which work was performed by employees of the Unified Government who were not members of the bargaining unit represented by PSEU 1132.

26. The job classification of Building and Grounds Specialist did not exist, in the workforce of either the City of Kansas City, Kansas or Wyandotte County, prior to the consolidation of the two governments in 1997. Prior to 1997, Wyandotte County administered and maintained separate parks facilities. Among the parks facilities administered by Wyandotte County were three community-type buildings, known as the George Meyn Center, the James P. Davis Center, and the Pierson Community Center. In addition to these community centers, the Parks Department maintains five recreational centers and the Parks Department's administrative offices. All three of the community buildings are located within larger Parks with the George Meyn Center being located in Wyandotte County or Bonner Park, James P. Davis being located at Wyandotte County Lake Park and Pierson Community Center being located in Pierson Park. Prior to consolidation, work at these buildings was performed by County employees who performed janitorial duties inside of the building, set up for events, as well as performing exterior work, such as mowing grass, trimming, and picking up trash in the area surrounding the buildings. Additionally, these County employees performed outside general groundskeeping work within the larger parks within which each respective community center was located.

27. Prior to consolidation, the bargaining unit represented by PSEU Local 1132 at City of Kansas City, Kansas had no job classification which fit the description of the duties performed by the County employees who performed work at the George Meyn, James P. Davis, and Pierson Community Centers.

28. When the City and County consolidated in 1997, employees working in the County

Park's Department were accreted to the existing bargaining unit represented by PSEU Local 1132. Following consolidation, the Unified Government and PSEU Local 1132 met to discuss issues relating to the consolidation. Since there was no existing classification for the job duties of the former County employees who performed work at the George Meyn, James P. Davis, and Pierson Community Centers, the parties agreed to create the Building and Grounds Specialist position.

29. Under the 2000-2003 Memorandum of Agreement, as of July 2002, a Groundskeeper II is paid \$14.29 per hour and a Building and Grounds Specialist is paid \$15.14 per hour.

30. The job classifications in the bargaining unit represented by AFSCME includes a position known as "Caretaker." The main function of the Caretaker classification is to provide janitorial services. The Caretaker classification performs janitorial services in several of the Park and Recreation Department's buildings and physical facilities.

31. Following consolidation, the Building and Grounds Specialist position at the George Meyn Center was held by Frank Magargel. In 2002, Mr. Magargel advised the Unified Government that he intended to retire, effective at the end of 2002.

32. At some point in time prior to the Fall of 2002, the Unified Government had placed a freeze on filling various positions within the Parks and Recreation Department. One of these positions which had been frozen was a Caretaker position which had been assigned to do maintenance at the JFK Recreational Center. After this Caretaker position was frozen by the Unified Government, the Unified Government entered into an Agreement with the Boys and Girls Club pursuant to which the Boys and Girls Club assumed all maintenance responsibilities for the JFK Recreational Center. In late 2002 the Parks Department received notice that the

Unified Government was "unfreezing" this Caretaker position which had previously been assigned to the JFK Recreational Center.

33. Following Mr. Magargel's announcement that he would retire at the end of 2002 and after receiving notice that the previously frozen Caretaker position would now be "unfrozen", Mike Connor, Burt Cavin, Scott Allen, and Pat Guilfoil (hereafter "the Connor group") all met to discuss various matters relating to administration of the Unified Government's Parks and Recreation Department. At this meeting, the Connor group discussed the necessity of acquiring an additional Groundskeeper position because the Parks Department needed more mowers to keep up with mowing requirements within all of the Department's Parks. As a solution, it was suggested that the previously "frozen" Caretaker position which had been assigned to the JFK Recreational Center, which was now "unfrozen" and without any work assignment, be assigned to perform the inside custodial work at the George Meyn Center and other Parks Department facilities after Frank Magargel retired at the end of the year. It was further suggested that Mr. Magargel's position be reclassified to a Groundskeeper position to fill the Department's need for additional mowers. Additionally it was suggested that the Department change the methodology by which it mowed all of the Parks which are maintained by the Department. Specifically, it was suggested that mowing within the Parks be conducted as a "crew" approach - i.e. sending out 6 or 7 mowers to get the mowing done all at once - rather than assigning a single Groundskeeper to a single Park and have them mow at that Park at all times. These suggestions were ultimately adopted by the Connor group.

34. As a result of this decision by the Connor group, a memo was prepared, by Mr. Cavin, dated December 3, 2002, addressed to Sakeva Smith, of the Unified Government's Human

Resource Department, requesting that Mr. Magargel's former position be reclassified to a Groundskeeper II. Position. This Memorandum provides in pertinent part that, "The cleaning of the building does not leave very much time for mowing. The reclassification of this position will allow the individual in this position to spend all their time mowing. Reclassifying this position to Groundskeeper II will allow the Department to have a more efficient operation." A true and correct copy of Mr. Gavin's memo, labeled Connor Exhibit #2, is attached hereto and incorporated herein by reference. The reclassification was approved.

35. After the reclassification of the Building and Grounds Specialist position, all of the outside work related to the George Meyn Center was assigned to the Groundskeeper job classification, while all of the interior work was assigned to the recently unfrozen Caretaker position.

36. The Groundskeeper II position, which was created as a result of the reclassification of the Building and Grounds Specialist position was filled by Mr. Perry Stallings. When the Building and Grounds Specialist position was reclassified to a Groundskeeper II position, the open position was posted for bid and Mr. Stallings won the bid. This reclassification and assignment of Mr. Stallings is reflected within Connor Deposition Exhibit No. 4 which is incorporated herein by reference and attached hereto. Mr. Stallings assumed the position effective January 22, 2003. Prior to January 22, 2003, Mr. Stallings had been employed by the Unified Government as a Groundskeeper I. The Groundskeeper II position which Mr. Stallings filled is a position within the bargaining unit represented by PSEU 1132. Perry Stallings is a member of PSEU 1132.

37. No one from the Unified Government notified PSEU Local 1132 of the reclassification of

the Building and Grounds Specialist position, formerly held by Frank Magargel, to the Groundskeeper II position filled by Perry Stallings.

38. As a result, the Unified Government and PSEU Local 1132 did not meet and confer about the reclassification of the Building and Grounds Specialist position at the George Meyn Center.

39. In the past, the Unified Government has reclassified positions within the bargaining unit represented by PSEU Local 1132 without meeting and conferring with PSEU Local 1132. Conner Exhibits 5a through 5d and Conner Exhibit 10 represent several instances of such past reclassifications. Such exhibits are incorporated herein by reference. In all, these exhibits reflect that the Parks Department reclassified nine (9) positions. Five of these positions were reclassified to a higher job classification and pay scale, and four of these positions were reclassified to a lower job classification and pay scale. These reclassifications took place between October, 2000 and early November 2002. All of these job reclassifications took place before the reclassification which is the subject of this PERB complaint which occurred in January of 2003. The Parks Department did not meet and confer with PSEU 1132 regarding any of the reclassifications listed in Connor Exhibit 5a through 5d. Connor Exhibit 10 is another example of the reclassification of positions within the bargaining unit represented by PSEU 1132. PSEU 1132 and the UG met and conferred over the changes to the Park Maintenance II and Park Maintenance III job classifications. PSEU 1132 and the UG did not meet and confer over the changes to the Groundskeeper job classification. PSEU 1132 and the UG did not meet and confer over the actual conversion of the individual positions held by the five employees listed in the memo." PSEU 1132 did not grieve or file a PERB complaint with respect to any of these reclassifications. In addition to the reclassifications reflected by Exhibits 5a through 5d

and Exhibit 10, Burt Cavin testifies that there was one other reclassification which took place prior to October of 2000 which the Parks Department never met and conferred with PSEU 1132 about and which was never grieved or brought before PERB by PSEU 1132. PSEU Local 1132 and the Unified Government did confer regarding the conversion of a mechanic to a master mechanic. The Union has a record of the number of employees in each job classification within the bargaining unit. The Memorandum of Agreement requires the UG to notify PSEU 1132 whenever a bargaining unit member retires, is promoted, transfers or terminates his or her position in the bargaining unit. Vacancies which arise because of such retirements, promotions, transfers or terminations are posted for bid, pursuant to Section 20.3 of Article 20 of the Memorandum of Agreement. The Union has knowledge of these postings, but does not make it a regular practice to review postings to determine whether a posting relates to a vacancy in an existing position, the creation of a new position or a reclassification of an existing position.”

40. PSEU Local 1132 first learned of the reclassification of the Building and Grounds Specialist position at the George Meyn Center in January 2003. PSEU 1132 learned of the reclassification of the Building and Grounds specialist through Union Steward, Jeremy Hendrickson’s observance that the position was not posted for bid by the Unified Government following Frank Magargel’s retirement. Simultaneously, Hendrickson observed that the Unified Government did post the Caretaker position which ultimately was assigned to maintain the interior of the Meyn Center. During the course of performing his duties as a Groundskeeper, Jeremy Hendrickson, came into contact with another employee, Fred Thomas, who was performing duties at the Meyn Center. Mr. Hendrickson was familiar with Mr. Magargel and the duties which Mr. Magargel performed, as a Building and Grounds Specialist, at Meyn Center.

Mr. Hendrickson was aware that Mr. Magargel had retired. Upon seeing a new face working at the Meyn Center, Mr. Hendrickson spoke with Mr. Thomas and learned that Mr. Thomas was classified, not as a Building and Grounds Specialist, but as a Caretaker. This conversation with Mr. Thomas occurred on January 8, 2003.

41. On this same date, January 8, 2003, Mr. Hendrickson initially consulted with Mr. Jennings and Mr. Yeager. Following this discussion, Mr. Hendrickson attempted to resolve the Union's grievance by conferring orally with Hendrickson's supervisor pursuant to Step 1 of the Grievance Procedure. The grievance was denied at this stage. On January 9, 2003, Mr. Hendrickson filed a written grievance, attached hereto as Connor Exhibit 6c, alleging violations of Article 2, Article 3, and Article 20 of the Memorandum of Agreement between PSEU Local 1132 and the Unified Government. Under the title "Nature of the Grievance," Exhibit 6c indicates that the Unified Government has brought in a different union to do PSEU, Local 1132 work without negotiations. The Unified Government denied the January 9, 2003 grievance filed by Mr. Hendrickson. This written grievance reflects Step 2 within the Grievance Procedure under the Memorandum of Agreement. The grievance was denied at this stage. Following the denial of the grievance at this stage a meeting was held with Brian Yeager, Jeff Jennings, Mike Connor, and Scott Allen. This meeting represented Step 3 within the grievance procedure. Connor Exhibit 6a, attached hereto and incorporated herein, is the Parks Department's decision denying the Union's grievance at Step 3 and is dated February 12, 2003. Exhibit 6a specifically discusses the reclassification of the Building and Grounds specialist position to the Groundskeeper II position. Specifically, this Memorandum indicates that "We [Parks Department] were able to convert the Building and Grounds Specialist Position (PSEU) to a

Groundskeeper II position (PSEU).” PSEU 1132 did not request arbitration following this decision. Jeff Jennings, the Union President, indicates that arbitration was not requested because of the Union’s desire to pursue a PERB Complaint. Connor Exhibit 6-A through 6-C is a true and correct copy of the January 9<sup>th</sup> grievance, together with the Unified Government’s response thereto.

42. The Union subsequently decided to file a complaint with PERB, instead of pursuing the January 9<sup>th</sup> grievance to arbitration. On March 24, 2003, PSEU Local 1132 filed a Complaint with the Kansas Public Employee Relations Board, alleging that the Unified Government had violated K.S.A. 75-4333(b)(5).

43. At some point, Mr. Thomas, the person filling the position of Caretaker at the Meyn Center, left the Unified Government’s employment. At that point, PSEU Local 1132 ceased pursuing the January 9<sup>th</sup> grievance.

44. After Mr. Thomas left the position at the Meyn Center, work inside the Center was performed by members of the bargaining unit represented by PSEU Local 1132.

45. At some point, after Mr. Thomas left his position at the Meyn Center, the Unified Government hired Leigh Keller, to work as a Caretaker at the Meyn Center.

46. During the course of performing his duties as a Groundskeeper, Mr. Hendrickson became aware that Ms. Keller was working at the Meyn Center. Mr. Hendrickson spoke with Ms. Keller on April 2, 2003, and learned that Ms. Keller was classified as a Caretaker.

47. On the next day, April 3, 2003, Mr. Hendrickson filed a second grievance, alleging violations of Article 2, Article 3, and Article 20 of the Memorandum of Agreement between PSEU Local 1132 and the Unified Government. The Unified Government denied Mr.

Hendrickson's April 8, 2003 grievance. PSEU 1132 did not pursue this grievance to Step 3 in the grievance procedure or to arbitration. Jeff Jennings indicates that the subject matter of this grievance is "exactly the same" as the first grievance filed by PSEU 1132. Jennings also indicates that at the time of the filing of the second grievance, PSEU 1132 already knew that some of the duties which Frank Magargel had previously performed as a Building and Grounds Specialist were being assigned outside of the bargaining unit as is reflected by the first grievance. Connor Exhibit 7-A through 7-B is a true and correct copy of the April 8, 2003 grievance and the Unified Government's response thereto.

48. On September 19, 2003, the Complaint was amended to further allege a violation of K.S.A. 75-4333(b)(6). Jeff Jennings indicates that the dispute or grievance reflected within PSEU 1132's amended complaint to PERB is the same dispute or grievance which was the subject matter of the two grievances filed by PSEU 1132 with the Parks Department.

### ISSUES

Simply stated, the issue presented for resolution in this matter is whether Respondent's actions of reclassifying a unit position, that of Building and Grounds Specialist, to the position of Groundskeeper II, and its attendant action of reassigning duties previously performed by that position to a position outside of the bargaining unit, without first meeting and conferring in good faith with the unit representative to impasse and to that procedure's conclusion if need be, constitutes a prohibited practice in violation of Kansas law? It must also be determined whether Petitioner's actions preclude it from pursuing this prohibited practice complaint in view of an election-of-remedies clause in the parties' bargained-for memorandum of agreement.

## CONCLUSIONS OF LAW/DISCUSSION

1. Petitioner alleges that Respondent has committed a prohibited practice in violation of the Kansas Public Employer-Employee Relations Act, (PEERA), at K.S.A. 75-4333(b)(5) and (b)(6). Although Kansas Courts have not addressed the standard of proof necessary to establish a prohibited practice,<sup>1</sup> the Kansas Public Employee Relations Board ("PERB") has adopted the federal standard under the National Labor Relations Act ("NLRA"). Under this standard, the burden of proving a prohibited practice lies with the party alleging the violation. *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)("Adjutant General"). The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under PEERA, and it is incumbent upon the party alleging the violation to prove the charges by a preponderance of the evidence. *See Boeing Airplane Co. v. National Labor Relations Board*, 140 F.2d 423, 433 (CA 10, 1944). Findings of unfair labor practices must be supported by substantial evidence. *Coppus Engineering Corp. v. National Labor Relations Board*, 240 F.2d 564, 570 (1st Cir. 1957)

2. Kansas law provides that public employees have the right to form, join and participate in

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<sup>1</sup> The Public Employer-Employee Relations Act does not set forth the standard of proof necessary to establish a prohibited practice. The Kansas Supreme Court has indicated that an examination of the federal Labor-Management Relations Act, 29 U.S.C. §141-197, can provide guidance in interpreting PEERA. *U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources*, 247 Kan. 519, 531-32 (1990). 29 U.S.C. §160(c) provides in pertinent part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

activities of employee organizations for meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The legislative parameters of the duty to meet and confer under the PEERA are found at K.S.A. 75-4327(b):

"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 of agreement with such recognized employee organization." (emphasis added)

"This provision is buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer to willfully 'refuse to meet and confer in good faith with representatives of recognized organizations as required in K.S.A. 75-4327.'" Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 268 (1980).

3. K.S.A. 75-4322(m) defines "Meet and confer in good faith" and affirms that the meet and confer process centers around bargaining over conditions of employment:

"[T]he process whereby the 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**." (emphasis added)

The Kansas Supreme Court has interpreted these statutes to mean:

"The Act [PEERA] imposes upon both employer and employee representative 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." *Kansas Bd. of Regents v. Pittsburgh State Univ. Chap. of K-NEA*, 233 Kan. 801, 805 (1983).

Only after the parties have met in good faith, conferred over the mandatory subjects noticed up for bargaining, and have either reached agreement or bargained in good faith, reached an impasse

in good faith, and participated in impasse-resolution procedures such as mediation and fact-finding, *see* K.S.A. 75-4332, can it be said that they have satisfied their statutory obligation under PEERA. *State Department of Administration v. Public Employees Relations Board*, 257 Kan. 275, 287 (1995); *I.A.F.F. v. City of Junction City*, Case No. 75-CAE-4-1994 (July 29, 1994); *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991, p. 29 (Feb. 10, 1992).

4. K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from refusing to meet and confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations, that is, over “conditions of employment”. The term “conditions of employment” is defined at K.S.A. 75-4322(t) to mean:

“[S]alaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, wearing apparel, premium pay of 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.”

5. PEERA seems to speak with two voices on the question whether a topic is subject to mandatory negotiability. 75-4327(b) grants public employees the right to meet and confer with respect to conditions of employment. K.S.A. 75-4326, however, says that this right does not extend to matters of inherent managerial policy. Further, K.S.A. 75-4330(a) and the statutory definition of conditions of employment, at 75-4322(t), make it clear that the mandatory meet and confer process does not reach matters fixed by the Kansas constitution or statute, nor those preempted by federal law.

Virtually any subject of negotiation that is advanced under an assertion that it is a condition of employment in some way alters or infringes upon managerial prerogative. *Kansas*

*Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 815 (1983). Further, many subjects are to a greater or lesser degree circumscribed by constitutional, state and federal law.

6. The resolution of this conflict requires a statutory interpretation which harmonizes K.S.A. 75-4327(b) and 75-4322(t), set out above, with K.S.A. 75-4326 of the Kansas PEERA. K.S.A. 75-4326 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 or 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 out.”

The problem, then, in cases presenting the issue of the proper scope of meet and confer is to balance the employees' interest in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and course of the enterprise.

7. The Pennsylvania PERB in addressing this same conflict in the Pennsylvania public employee relations act adopted the use of a balancing test:

“A determination of the interrelationship between sections 701 and 702 calls upon us to strike a balance wherein those matters relating directly to "wages, hours and other terms and conditions of employment" are made mandatory subjects of bargaining and reserving to management those areas that the public sector

necessarily requires to be managerial functions. In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question.”

In adopting the balancing test for determining the mandatory vs. permissive nature of subjects under the Pennsylvania act, the Pennsylvania Supreme Court cited the Kansas case of *National Education Ass'n of Shawnee Mission, Inc. v. Bd. of Ed. of Shawnee Mission, U.S.D. 512, 212 Kan. 741 (1973)* (“Shawnee Mission”), as the leading case on the balancing test. *Pennsylvania Labor Relations Board v. State College Area Sch. Dist.*, 90 LRRM 2081 (1975).

8. While the *Shawnee Mission* case was decided under the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, a balancing test for use under PEERA was similarly approved by the Kansas Supreme 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 few 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.”<sup>2</sup>

*Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 667 P.2d 306 (1983).

9. In *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991) (“*Adjutant General*”), the PERB utilized three criteria in applying the balancing test. By these criteria:

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<sup>2</sup> While the Court referred to the test as the “significantly related test,” a review of the test as described and applied by the PERB, and as applied by the Court in *Pittsburg State* reveals that it is a balancing test which the Court approved. See also, Note: *Labor Law—Mandatory Subjects of Bargaining Under the Kansas Public Employer-Employee Relations Act—Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association*, 32 KAN. L. REV. 697, 707 (1984)(stating that in majority’s opinion “significantly

- (1) A subject is mandatorily negotiable only if it intimately and directly affects the work and welfare of public employees.
- (2) A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
- (3) A subject that affects the work and welfare of public employees is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.<sup>3</sup> *Id.*, at p. 34.

This test was reaffirmed by PERB in *Service Employees Union Local 513 v. City of Hutchinson, Ks.*, Case No. 75-CAE-21-1993, p. 30 (Jan. 28, 1994).

10. K.S.A. 75-4333(b)(5) prohibits an employer from refusing to meet and confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations. Specifically, that section of the PEERA states:

“(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:

.....

(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4328. . . .”

11. The objective the Kansas legislature hoped to achieve by the meet and confer process can be equated to that sought by the Congress in adopting the National Labor Relations Act as

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related test” was a balancing test).

<sup>3</sup> PERB in its *Adjutant General* order explained the test as follows:

“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 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.” *Adjutant General*, 75-CAE-9-1990 at page 35.

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described by the U.S. Supreme Court in *H.K. Porter Co.*, 397 U.S. 99, 103 (1970),<sup>4</sup> and cited with approval in *City of Junction City, Kansas v. Junction City Police Officers Association*, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)(“Junction City”):

“The objective of this Act [NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”

11. The concept of refusal to bargain means more than simply refusing to discuss a subject.

An employer is also deemed to have violated PEERA when it fails to bargain in good faith, or

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<sup>4</sup> Where there is no Kansas case law interpreting or applying a specific section of the Kansas Public Employer-Employee Relations Act, the decisions of the National Labor Relations Board (“NLRB”) and of Federal courts interpreting similar provisions under the National Labor Relations Act (“NLRA”), 29 U.S.C. 151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PEERA. See *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case Nos. 75-CAE-12/13-1991.

Because the language of K.S.A. 75-4333 is almost identical to the corresponding section contained in the NLRA, we presume our legislature intended what Congress intended by the language employed. See *Stromberg Hatchery v. Iowa Employment Security Comm.*, 33 N.W.2d 498, 500 (Iowa 1948). “[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense.” *Hubbard v. State*, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. *Peasley v. Telecheck of Kansas, Inc.*, 6 Kan.App.2d 990, 994 (1981)(Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive); See also *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974).

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task.

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, 116, p. 370; 50 Am.Jur., Statutes, 323; 82 C.J.S., Statutes, 371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy. *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, 52.02, p. 329-31 (4th ed. 1973); *Benton v. Union Pacific Rwy. Co.*, 430 F.Supp. 1380 (D.C.Kan.1977)(A Kansas statute adopted from another state carries with it the construction placed on it by that state); *State v. Loudermilk*, 208 Kan. 893 (1972).

makes unilateral changes in terms and conditions of employment. It is a well established principle of labor law that a unilateral change, by a public employer, in terms and conditions of employment, is *prima facie* violative of its public employees' collective meet-and-confer rights. *I.A.F.F. v. City of Junction City, Kansas*, Case No. 75-CAE-4-1994 (July 29, 1994); See also *Service Employees Union v. City of Hutchinson, Kansas*, Case No. 75-CAE-21-1993 (January 28, 1994); *City of Junction City v. Junction City Police Officers Association*, 75-CAEO-2-1992 (July 31, 1992). Because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a "mandatory" bargaining item. *I.A.F.F. v. City of Junction City, Kansas*; See also *Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 159 (1971). The threshold issue, therefore, is whether an employer's actions of reclassifying a bargaining unit position to become a different position, while simultaneously reassigning some of the duties previously performed by that position to a position outside of the bargaining unit are mandatory subjects of meet and confer negotiations. This is to be determined by application of the three-prong test set forth in *Kansas Association of Public Employees v. State of Kansas, Adjutant General*, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991).

12. As PERB concluded in *Service Employees Union Local 513 v. City of Hutchinson, KS.*, Case No. 75-CAE-21-1993, p. 37 (Jan. 28, 1994), it is a general principle of labor law that a matter which affects the terms and conditions of employment will be presumed a subject of mandatory bargaining. See also *Chemical Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 178-79 (1971); *American Electric Power Co.*, 137 LRRM 1199, 1201 (1991); *GHR Energy*

*Corp.*, 133 LRRM 1069 (1989).<sup>5</sup> In addressing this issue under the NLRA and other state public employee relations acts, the NLRB and other state's PERB counterparts have in many instances found the transferring of bargaining unit work to non-unit employees, for example, to another labor bargaining unit or to independent contractors by subcontracting, to be a term and condition of employment and therefore mandatorily negotiable. See, e.g., *Health Care And Retirement Corporation of America D/B/A Hampton House*, 317 NLRB 1005, 1995 WL 389869 (N.L.R.B.) (holding that where an employer promotes employee to supervisory position and the new supervisor continues to perform former bargaining unit work, the work is thereby removed from bargaining unit, giving rise to a change in bargaining unit's terms and conditions of employment and the employer is obligated to bargain with union in good faith; employer may unilaterally change the bargaining unit's work *only* after a lawful impasse); *Van Buren Public School District v. Wayne County Circuit Judge*, 61 Mich.App. 6, 232 N.W.2d 278, 90 L.R.R.M. (BNA) 2615 (1975)(subcontracting of school bus driving services previously performed by bargaining unit members is covered by the phrase "terms and conditions of employment"; requiring the parties to bargain about the decision whether to subcontract "might reveal aspects of the problem previously ignored or inadequately studied" and would bring a problem of vital concern to both labor and management within the framework established by the legislature as most conducive to labor peace); *West Oakland Home, Inc. D/B/A Lincoln Child Center*, 307 NLRB 288, 1992 WL 91239 (N.L.R.B.)( "[I]t is well established that the integrity of a bargaining unit cannot be

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<sup>5</sup> This should be read to mean that once the employee organization has provided proof sufficient to satisfy the first two prongs of the three prong test as set forth in *Kansas Association of Public Employees v. State of Kansas, Adjutant General*, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991) and produced evidence establishing an impact upon employee interests by the failure to bargain the subject, it has established a *prima facie* case and the presumption of mandatory negotiability attaches.

unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement or by Board action”); *Decision and Order of Rhode Island State Labor Relations Board, In the Matter of University of Rhode Island*, Case No. ULP-5238 (August 25, 2000)(where, following retirement of unit member, some of the duties of her former position were unilaterally assigned to non-bargaining unit member, such unilateral assignment to non-unit member and failure to bargain with employee representative constituted an Unfair Labor Practice)(*reversed on other grounds* at 2001 WL 1558774(R.I.Super.)); *City of Boston v. Labor Relations Commission*, 58 Mass.App.Ct. 1102, 787 N.E.2d 1154 (Table), 2003 WL 21057227 (Mass.App.Ct. May 12, 2003)(in this unpublished opinion, the Appeals Court held that the city’s unilateral transfer of bargaining unit members’ duties to municipal police who were not part of bargaining unit was mandatory subject of bargaining and resulted in adverse impact on patrol officers as they could potentially lose opportunity to work overtime, transfer also resulted in adverse impact on bargaining unit as it lost opportunity to represent additional members and that the labor commission did not exceed its authority by ordering employer to restore *status quo ante*); *Clerical-Technical Union of Michigan State University v. Michigan State University*, 214 Mich.App. 42, 542 N.W.2d 303 (1995)(holding that employer committed unfair labor practice of failure to bargain in good faith where it unilaterally sent notices to employees of changes in job title, grade level and of transfer from one bargaining unit to different bargaining unit); *Taos Health Systems, Inc. D/B/A Holy Cross Hospital*, 319 NLRB 1361, 1995 WL 788566 (N.L.R.B)(admonishing Employer that “once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board”).

13. Petitioner alleges that Employer committed the prohibited labor practice of failure to bargain in good faith when it unilaterally changed the classification of retiring unit member Magargel's Building and Grounds Specialist position to that of Groundskeeper II and reassigned some of the position's duties to an employee in a different bargaining unit. Were it properly before the Board, the question whether Employer committed the prohibited practice alleged under the instant circumstances would be deserving of this tribunal's careful and studied consideration. However, as explained in more detail below, the Board is precluded from addressing the merits of this substantive issue by Petitioner's own failure to observe the election of remedies provision contained in the parties bargained-for Memorandum of Agreement.

14. The record of this matter demonstrates that on January 8, 2003, Union Steward Jeremy Hendrickson "initially consulted with Mr. Jennings and Mr. Yeager" after discovering that a new employee, Mr. Fred Thomas, a Caretaker belonging to a bargaining unit represented by the American Federation of State, County and Municipal Employees union, was performing duties at the Meyn Center, following former PSEU member Magargel's retirement. Finding of Fact Nos. 40-41. Aware that Magargel's position had not been posted for bid by the Unified Government, Union Steward Hendrickson conferred orally with his supervisor pursuant to Step 1 of the MOA's grievance procedure. Finding of Fact No. 41. Hendrickson's grievance was denied at this stage. *Id.* On January 9, 2003, Hendrickson filed a written grievance alleging the violation of Articles 2, 3 and 20 of the parties MOA. *Id.* Hendrickson's Step 2 written grievance alleges that the Unified Government had brought in a different union to perform bargaining unit work without negotiating the issue with PSEU, Local 1132. *Id.* The UG denied the grievance at this stage as well. *Id.*

Following the denial, Hendrickson proceeded to Step 3 with a meeting held between union leaders Brian Yeager and Jeff Jennings, and Management representatives Mike Connor and Scott Allen. *Id.* The Parks Department denied the grievance at Step 3 by letter dated February 12, 2003. *Id.* Petitioner PSEU 1132 did not request arbitration following this decision. *Id.*

On March 24, 2003, PSEU Local 1132 filed a Complaint with the Kansas Public Employee Relations Board, alleging that the Unified Government had violated K.S.A. 75-4333(b)(5). Finding of Fact No. 42. At some point, Mr. Thomas, the person filling the position of Caretaker at the Meyn Center, left the Unified Government's employment. At that point, PSEU Local 1132 ceased pursuing the January 9<sup>th</sup> grievance. Finding of Fact No. 43. After Mr. Thomas left the position at the Meyn Center, work inside the Center was performed by members of the bargaining unit represented by Petitioner. Finding of Fact No. 44.

At some point, after Mr. Thomas left his position at the Meyn Center, the Unified Government hired Leigh Keller as a Caretaker to perform work at the Meyn Center. Finding of Fact No. 45. During the course of performing his duties as a Groundskeeper, Mr. Hendrickson became aware that Ms. Keller was working at the Meyn Center. Finding of Fact No. 46. Mr. Hendrickson spoke with Ms. Keller on April 2, 2003, and learned that Ms. Keller was classified as a Caretaker. *Id.* On the next day, April 3, 2003, Mr. Hendrickson filed a second grievance, alleging violations of Article 2, Article 3, and Article 20 of the Memorandum of Agreement between PSEU Local 1132 and the Unified Government. Finding of Fact No. 47. The Unified Government denied Mr. Hendrickson's April 8, 2003 grievance. *Id.* PSEU 1132 did not pursue this grievance to Step 3 in the grievance procedure or on to arbitration. *Id.* Union President Jeff

Jennings indicates that the subject matter of this grievance is "exactly the same" as the first grievance filed by PSEU 1132. *Id.* Jennings also indicates that at the time of the filing of the second grievance, PSEU 1132 already knew that some of the duties which Frank Magargel had previously performed as a Building and Grounds Specialist were being assigned outside of the bargaining unit as is reflected by the first grievance. Connor Exhibit 7-A through 7-B is a true and correct copy of the April 8, 2003 grievance and the Unified Government's response thereto.

*Id.*

15. The parties' Memorandum of Agreement provides that:

Where a matter within the scope of this grievance procedure is alleged to be both a grievance and prohibited practice under the jurisdiction of the Public Employee Relations Board, the employee involved may elect to pursue the matter under either the grievance procedure herein provided or by action before the Public Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

In the instant matter, Respondent asserts that the Union filed two grievances pursuant to the grievance procedures contained in the parties' MOA. Brief and Argument of the Unified Government of Wyandotte County/Kansas City, Kansas, p. 18. According to Step 4 of the parties' MOA grievance procedure, Petitioner had three days following receipt of the February 12, 2003 denial of its January 9, 2003 written grievance in which to file its written notice of intent to arbitrate. *Id.*, pp. 18-19. These three days came and went and the Union never requested that the matter proceed to arbitration. *Id.*, p. 19. Subsequently, the Union filed a second grievance on the same issue, and this grievance was pursued only through Step 2 of the parties' grievance procedure. *Id.* Respondent urges that pursuant to the parties' bargained-for grievance procedure, the Union was required to elect between either filing a grievance through

the Grievance Procedure, or filing a prohibited practice before this Board. *Id.* Because Section 10.1 of the parties' Memorandum of Agreement mandates that the election of one procedure over the other "shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy", this matter should be dismissed due to Petitioner's binding election of remedies. *Id.*, p. 20.

16. In its Reply Brief, Petitioner asserts that the parties' Memorandum of Agreement does not bar it from seeking relief from PERB. Reply Brief of Public Service Employees Union Local 1132 in Support of Complaint in Case No. 75-CAE-7-2003, p. 12. According to Petitioner, the MOA's Grievance Procedure does not indicate *when* the election occurs. *Id.*, p. 13. That is, since the Union did not exhaust the MOA grievance procedure by submitting the matter to arbitration, it should not be deemed to have elected that procedure and therefore it has not waived its right to elect the alternative remedy through this tribunal. *Id.*

17. The question whether Petitioner is deemed to have made an election of remedies under the parties' Memorandum of Agreement implicates a related but distinct issue, that of jurisdiction of the Public Employee Relations Board over a prohibited practice complaint where the underlying factual dispute forming the basis of that complaint could also be resolved by the parties through a grievance procedure. Clearly the Board has jurisdiction to determine whether an employer's actions constitute a prohibited labor practice pursuant to K.S.A. 75-4333. Likewise an arbitrator has the power to rule on matters concerning the interpretation and application of a memorandum of agreement between a labor bargaining unit and employer. In construing their public employer-employee relations act counterparts, other state judicial appellate courts have concluded that:

“if a party seeks redress of conduct which arguably constitutes one of the unfair labor practices listed in [the Act], jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice is in the PLRB, and nowhere else.”

*Hollinger v. Pa. Dept. of Public Welfare*, 94 LRRM 2170, 2173 (1976). Later, in *Pennsylvania Labor Relations Bd. V. General Braddock Area School Dist.*, 380 A.2d 946 (Pa.1977), the court reaffirmed its position:

“[W]here a party seeks redress of an unfair labor practice, ‘jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice, is in the [Pennsylvania Labor Relations Board] and nowhere else.’ We cannot, therefore, conclude that the PLRB is powerless to investigate charges of unfair labor practices merely because a collective bargaining agreement exists under which grievance arbitration is available for the determination of issues similar to those upon which the charges are based.”

18. While these other-jurisdictional statements of law are doubtless correct, and applicable under the Kansas Act as well, they do not address the question at issue in the present matter. Rather, the question presented for resolution here is whether having initiated the grievance procedure called for in its own bargained agreement, Petitioner is free to abandon that process and submit its dispute to this tribunal for resolution as a prohibited labor practice when its agreement with the Employer provides that an election of one of the two remedies, private or statutory, constitutes a waiver of the other and an agreement to be bound by its choice.

19. The presiding officer is not aware of any Kansas case law dealing with this issue. However, other jurisdictions with similar statutory regimes have done so in similar contexts and an examination of those matters may assist here. In *Department of Environmental Management*, the bargaining unit’s representative filed an unfair labor practice charge, alleging that by posting a part-time position, the employer had violated the parties’ memorandum of agreement. On July

6, 1994, apparently aware that a job opening for a part-time "principal forester" was about to be posted by Department of Environmental Management, (hereinafter Employer or DEM) the Rhode Island Council 94 AFSCME, AFL-CIO, (hereinafter Council 94), the bargaining representative for DEM employees, filed a grievance with DEM. *State of Rhode Island, Department of Environmental Management v. State of Rhode Island, Labor Relations Board, et al.*, 799 A.2d 274 (June 14, 2002). The grievance asserted that by posting a part-time position, DEM had violated the parties' collective bargaining agreement. The union asked that the posting be removed and a full-time position be posted instead. Employer denied the grievance, stating a full-time position was not needed and that the parties' CBA didn't prohibit part-time positions. Pursuant to the CBA, Council 94 appealed this decision to the state Department of Administration's Office of Labor Relations, which likewise denied the grievance. The next step in the parties' CBA grievance process was to submit the matter to binding arbitration. Despite this contract provision and the fact that the union had elected to undertake grievance resolution, Council 94 failed to submit the matter to arbitration. Rather, the union asked the state's Labor Relations Board for the relief it sought, alleging that DEM had committed an unfair labor practice by posting the job without first negotiating terms with Council 94.

In an attempt to resolve the matter, the Labor Board conducted an informal hearing between the parties. This effort, however, was unsuccessful and two years later, in February 1997, the Labor Board issued a formal complaint specifically charging that DEM had committed unfair labor practices by refusing to bargain with the union and by interfering, restraining or coercing employees in the exercise of their statutory labor rights. A formal hearing was scheduled for April 17, 1997, but was continued for various reasons until September 1, 1998. In

the interim, DEM sought dismissal of the Labor Board's complaint, urging that the Board lacked jurisdiction to interpret a CBA, and that the union, having elected to pursue its remedy through the collective bargaining grievance procedure, should have proceeded to arbitration. At the conclusion of the hearing, the Board rejected DEM's arguments and found that DEM had engaged in both of the prohibited practices charged. DEM subsequently filed an appeal that was heard and denied on June 20, 2000 by a justice of the Superior Court. DEM then filed a petition for *certiorari* to the state's highest court.

In its June 14, 2002 decision, the Rhode Island Supreme Court held that the Employer's election of remedies argument was conclusive. Noting that it had only recently reaffirmed its adherence to the long-standing election of remedies doctrine, the Court reiterated "that when one party to a CBA attempts to take advantage of the grievance procedure and loses, the election of remedies doctrine prohibits that party from pursuing the same dispute" in court. *Department of Environmental Management*, 799 A.2d 274, at 278 (citation omitted). The Court expanded on its reasoning, explaining that Petitioner Council 94 had resorted to the grievance process only to abandon it after two unfavorable decisions but before it had fully exhausted its contract remedies through the arbitration process. *Id.* "Once [the union] entered the grievance procedure, [it] had elected the remedy to adjudicate [its] claim, and [the union] should have pursued that remedy to its conclusion." *Id.*, citing to *Cipolla v. Rhode Island College Board of Governors for Higher Education*, 742 A.2d 277, 282 (R.I.1999). The Court concluded that the doctrine of election of remedies was applicable to actions taken and heard by the state's Labor Board, thus the case was not appropriately before the state's Labor Board, nor therefore was the dispute ripe for judicial review. *Department of Environmental Management, supra* at 278-279.

20. A series of federal labor law decisions now known as the *Steelworkers Trilogy*<sup>6</sup> and their progeny establish a strong presumption in favor of using negotiated grievance procedures for resolving disputes over the interpretation or application of collective bargaining agreements. In the first of these cases, the United States Supreme Court stated that the policy favoring negotiated dispute resolution mechanisms "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." Five years later, the Court reinforced the principle that the contractual grievance procedure should be used. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), the Court opined that:

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contractual grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress".

Other cases have reached similar results. See, for example, *Cranston Teachers' Association v. Cranston School Committee*, 423 A.2d 69, 109 L.R.R.M. (BNA) 3366 (R.I.1980)(holding that where teachers, through representative, invoked CBA's grievance procedure, they were foreclosed from seeking redress in Superior Court by election of remedies provision); *American Federation of State, County and Municipal Employees, AFL-CIO, Michigan Council 25 and Local 1416 v. Board of Education of the School District of the City of Highland Park*, 457 Mich. 74, 577 N.W.2d 79 (Mich.1999)(holding that where collective bargaining agreement provides mandatory grievance procedure, union or employee is not required to file suit until after

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<sup>6</sup> *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

grievance procedure is exhausted even if procedure results in nonbinding arbitration); *University of Rhode Island v. University of Rhode Island Chapter of the American Association of University Professors and Rhode Island State Labor Relations Board*, 2001 WL 1558774, Nov. 26, 2001 (R.I.Super.)(held that “[i]n cases where the facts surrounding a unilateral employer action give rise to both a grievance under the CBA and an unfair labor practice charge, it is preferable for the Board to defer its jurisdiction to the grievance and arbitration procedure established in the CBA, upon the terms for which both parties have bargained and agreed.”)

21. In *City of Grand Rapids v. Grand Rapids Lodge No. 97 Fraternal Order of Police*, 415 Mich. 628, 330 N.W.2d 52 (Mich.1982), the Employer brought an action at law against a police officer, his union and the American Arbitration Association seeking to enjoin arbitration of a claim by the officer that the city assume costs of his defense in a civil action brought against him and to indemnify him against any judgment pursuant to the terms of a collective bargaining agreement. *City of Grand Rapids v. Grand Rapids Lodge No. 97 Fraternal Order of Police*, 330 N.W.2d 52 (Mich.1982). The officer filed a cross-claim on the same issues as the grievance. A Michigan circuit court judge granted the injunction on the basis of a variation of an election of remedies clause in the parties’ CBA. Michigan Court of Appeals reversed, setting aside the injunction. The City appealed. *Id.* In its ruling reversing the Court of Appeals decision, the Michigan Supreme Court enforced the election of remedies clause from the parties bargained-for agreement. This provision stated that if an action at law concerning the disputed matter was commenced, pending grievance proceedings would end. The Court noted that “if a collective-bargaining agreement contains a grievance resolution procedure, the courts generally require exhaustion of that procedure before the initiation of a lawsuit.” *Id.*, p. 54. “If the grievance

procedure includes arbitration, the courts normally defer to the arbitration decision. *Id.*, pp. 54-55. The Court went on to state that if arbitration is not the mandatory final step in a grievance procedure, an individual union member aggrieved by the alleged breach of the CBA may resort to an action at law, but “commencement of such an action might not relieve the employer of its obligation to negotiate concerning the grievance with the union.” *Id.*, p. 55. The Court went on to conclude that since the parties’ negotiated agreement provided that if an action at law was commenced, the grievance process ended, and because an action at law, by way of cross-claim, was filed by an individual bargaining unit member, it followed that the grievance procedure’s final step, arbitration, must end in accordance with the parties’ negotiated agreement:

“[In this case], the collective-bargaining agreement provides that if an action is commenced the grievance proceedings shall end.

The dissenting opinion would hold that a collective-bargaining agreement cannot validly provide that the obligation of the parties to negotiate regarding a grievance terminates when an employee has made the grievance the subject of a lawsuit.

Even if that is a correct view, and it is not, it would not follow that the grievance is to be decided, if the employer and union cannot agree, by arbitration. If they cannot agree, their only statutory duty is to continue to negotiate—that is the statutory right; there is no statutory right to binding arbitration.

But even the union’s right to resolve a grievance by negotiation may be relinquished, and it was relinquished here.”

*Grand Rapids Lodge No. 97 Fraternal Order of Police, supra*, 330 N.W.2d 52, 55. Kansas law also allows that parties to a collective bargaining agreement may agree to procedures for the resolution of grievances in a manner that relinquishes members’ rights, even including constitutionally guaranteed due process rights. *Gorham v. City of Kansas City*, 225 Kan. 369 (1979). This is consistent with the federal law counterpart to the PEERA, wherein federal courts

have construed union authority to bargain to include the right to waive many of the union's fundamental statutory rights. "[R]ights . . . conferred on employees collectively to foster the process of bargaining . . . properly may be . . . relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147 (1974). If employees' collective rights, including due process rights, can be waived by parties through negotiated bargaining agreements, a union should be no less capable of waiving, by means of an election of remedies provision in a duly negotiated CBA or MOA, the right to pursue, as a prohibited labor practice, a set of facts also asserted to be violative of the parties' MOA. Moreover, sound policy reasons in furtherance of the statutory purposes of PEERA provide additional support for this determination.

21. A common thread in the foregoing decisions, and others related to this topic, is that they each further a statutory goal, common to all employer-employee relations acts, of promoting stability in labor relations, encouraging parties to meet and confer regarding grievances and grievance procedures by giving effect to grievance procedures agreed to by the parties themselves. As summarized by order of a prior PERB Presiding Officer, "from a policy perspective it must be concluded that PEERA . . . vests PERB with discretion to determine, once a complaint has been filed, whether to defer to the memorandum of agreement grievance procedure or to adjudicate such dispute in furtherance of its statutory prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334". Initial Order, *International Association of Fire Fighters v. City of Junction City, Kansas*, 75-CAE-4-1994, p. 43. Thus, this tribunal has expressly recognized that in some instances, it is appropriate that the Board defer consideration of a prohibited practice complaint to the procedures agreed upon by

the parties for resolving their grievances. In this matter, the parties have agreed that a party's election of one or the other remedy, contractual arbitration or statutory prohibited practice proceeding, constitutes a waiver of the other procedure.

Policy considerations similar to those outlined above were expressed by the NLRB in *Consolidated Aircraft Corp.*, 12 LRRM 44 (1943):

"[I]t will not effectuate the statutory policy of encouraging the practice and procedure of collective bargaining for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which this dispute has arisen."

In the instant matter the parties' bargained-for grievance procedure provided that "[w]here a matter within the scope of this grievance procedure is alleged to be both a grievance and prohibited practice under the jurisdiction of the Public Employee Relations Board, the employee involved may elect to pursue the matter under either the grievance procedure herein provided or by action before the Public Employee Relations Board." The parties' agreement concluded by mandating that "[t]he employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy." It is clear that the "election" of a procedure, either contractual or statutory, is deemed by terms of the agreement itself to have been made by commencing or initiating it, thus the commencement or initiation of either procedure constitutes a binding election of the remedy chosen and a waiver of the alternative.

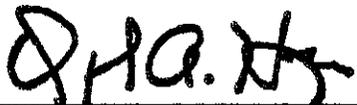
Otherwise, a party would be free to initiate one or the other procedure, abandon it, for example, inadvertently by lapse of a limitations period or deadline, or purposefully, as in response to an unfavorable decision, and then avail oneself of the alternative procedure. Such a practice would obviate and render meaningless the election of remedies provision itself. Such an interpretation is contrary to fundamental principles of contract and statutory analysis and cannot be sustained here.

In summary, where the parties to a bargaining agreement have negotiated an election of remedies provision, such as the one here, the PERB should uphold that agreement by declining jurisdiction over a prohibited practice complaint arising out of interpretation and application of terms of the parties' agreement where a party has elected a contractual grievance arbitration procedure, binding itself to that election and waiving the alternative, statutory, procedure before this Board.

**IT IS THEREFORE ORDERED**, that Petitioner Public Service Employees Union Local 1132 has, for the reasons set out above, made an election of remedies pursuant to the parties' memorandum of agreement, waiving its alternative before this Board. Petitioner's complaint is dismissed.

**IT IS SO ORDERED.**

**DATED**, this 20th day of December, 2004.

  
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Douglas A. Hager, Presiding Officer  
Office of Labor Relations  
427 SW Topeka Blvd.  
Topeka, KS 66603

### NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on January 18<sup>th</sup>, 2005, addressed to: Public Employee Relations Board & Labor Relations, 427 SW Topeka Blvd., Topeka, Kansas 66603.

### CERTIFICATE OF MAILING

I, Loyce McKnight, Office Administrator, Legal Services, Kansas Department of Labor, hereby certify that on the 28<sup>th</sup> day of December, 2004, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action through their attorneys of record in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Thomas H. Marshall, Attorney at Law  
Blake & Uhlig, P.A.  
753 State Avenue  
475 New Brotherhood Building  
Kansas City, KS 66101

Ryan B. Denk, Attorney at Law  
McAnany, Van Cleave & Phillips, P.A.  
707 Minnesota Ave., Fourth Floor  
P.O. Box 171300  
Kansas City, KS 66117-1300

  
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Loyce McKnight, Office Administrator