BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of Firefighters Local 179 Petitioner	)	
vs.	)	Case No.: 75-CAE-1-2011
City of Hutchinson, Kansas-Fire Department Respondent.	)	

INITIAL ORDER

NOW ON this 4th day of May, 2012, the above-captioned matter comes on for decision before presiding officer Douglas A. Hager, serving as designee of the Kansas Public Employer-Employee Relations Board. *See* K.S.A. 75-4323.

APPEARANCES

The Petitioner, International Association of Fire Fighters Local 179 appeared through counsel, Joni J. Franklin, Attorney at Law. Respondent, City of Hutchinson, Kansas Fire Department appeared through Hutchinson City Attorney Paul W. Brown.

BACKGROUND

Petitioner, International Association of Firefighters Local 179, (hereinafter "Petitioner" or "IAFF"), alleges Respondent, the City of Hutchinson, Kansas Fire Department, (hereinafter "Respondent" or "Employer"), has committed one or more prohibited practices under the Kansas Public Employer-Employee Relations Act, (hereinafter "PEERA" or the "Act"), K.S.A. 75-4321, *et seq*. *See* Complaint Against Employer, International Association of Firefighters Local 179 v. City of Hutchinson, Kansas Fire Department, Case No. 75-CAE-1-2011, filed July 2, 2010. In

its complaint, Petitioner alleges Respondent committed a prohibited practice in violation of K.S.A. 75-4333(b)(5) by refusal to negotiate in good faith before unilaterally implementing a change to applicable conditions of employment when it required a fitness for duty examination from unit member Firefighter Richard Unruh before being allowed to return to work after being on a medical leave for an injury. *Id.*, pp. 1-2.

IAFF specifically alleged that when bargaining unit member Captain Richard Unruh attempted to return to work from a non-occupational injury on or about February 22, 2010 with a written release from his treating physician to return to full duty, without physical restrictions, the Employer unilaterally changed the implementation of applicable policy without first negotiating such changes. Such a change, Petitioner asserts, alters mandatorily negotiable terms and conditions of employment and the failure to bargain such change is therefore a "refus[al] to meet and confer in good faith" in violation of K.S.A. 75-4333(b)(5). Petitioner also asserts that the City's refusal to meet and confer regarding implementation of the change in policy regarding fitness for duty certifications constitutes the prohibited practice of "interfere[ing], restrain[ing], or coerc[ing] public employees in the exercise of rights granted in K.S.A. 75-4324", a violation of K.S.A. 75-4333(b)(1). Petitioner asserts the Respondent's actions also constitute an attempt to "dominate, interfere . . . in the formation, existence or administration of [an] employee organization", in violation of K.S.A. 75-4333(b)(2). IAFF further alleges the City's refusal to meet and confer regarding the implementation of the change in the fitness for duty certification was a prohibited practice denying rights accompanying certification or formal recognition granted in K.S.A. 75-4328, in violation of K.S.A. 75-4333(b)(6). Petitioner also asserts that the City's unilateral imposition of the change in policy and its implementation caused its employees to be subject to potential discipline and discharge, in violation of K.S.A. 785-4333(b)(4).

Respondent denies that its actions constitute prohibited practices. *See* Employer's Answer, Case No. 75-CAE-1-2011. Specifically, with regard to the alleged prohibited practice of refusal to negotiate in good faith through a unilateral change to a mandatorily negotiable term or condition of employment, Respondent urges that its actions did not constitute a change of a mandatorily negotiable term or condition of employment. *See* Employer's Answer, Case No. 75-CAE-1-2011, pp. 1-7. The Employer's arguments and defenses[1] will be set forth in greater detail below. First, however, the presiding officer will set out his findings of fact, based upon his review and consideration of the entire record.

FINDINGS OF FACT

The parties have submitted suggested findings of fact and conclusions of law, and the presiding officer has considered the evidence presented at the hearing held on July 12, 2011. The presiding officer finds as follows:

1. Respondent is a public employer within the meaning of K.S.A. 75-4322(f), subject to the jurisdiction of the Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.* Respondent's Answer, Case No. 75-CAE-1-2011, p. 1.

2. Petitioner is a public employee organization, as defined by K.S.A. 75-4322(i), recognized by the Employer for the purposes of representing its members in relations with Employer as to grievances and conditions of employment under K.S.A. 75-4327(a). *Id.* The bargaining unit represented by Petitioner consists of approximately 85 of Respondent's employees. *Id.*

[1] Respondent asserted in its Answer that Petitioner did not file this Complaint within the statutory limitations period. *See* Employer's Answer, p. 7. This contention is without merit. The acts alleged to constitute prohibited practice violations herein occurred on March 5, 2010. Finding of Fact No. 29, *infra*. Petitioner filed this prohibited practice charge on July 2, 2010, well within the statutory limitations period. See K.S.A. 75-4334(a).

3. Firefighter and bargaining unit member Richard Unruh was employed with the City of Hutchinson Fire Department from February 4, 1980 through June 6, 2010. Transcript of July 12, 2011 Hearing, (hereinafter "Tr."), p. 7.

4. In 2009, Firefighter Unruh sustained a non-work related back injury, which required surgical intervention in November of 2009. *Id.*, pp. 7-8. Unruh's back surgery was performed on November 19, 2009. Tr., p. 8.

5. Unruh filled out Family and Medical Leave Act paperwork indicating that it was anticipated he would be off work from two to six months for this surgery. *Id.*, pp. 8-9.

6. The City has an employee handbook, last updated April 2010, which contains a "fitness for duty examination" policy under section 311. The "fitness for duty examination" policy under section 311, (hereinafter "section 311 policy"), indicates:

> "A medical and/or psychological examination may be required if a City employee has an injury or illness that appears to affect his/her ability to perform his/her essential job functions, or appears to threaten the safety of themselves, the public, or other employees."

Union Exhibit 1, p. 18.

7. The structure of the examination is defined in section 311 as follows:

> "This fitness for duty evaluation will be structured so that its requirements are job related and consistent with the City's interest in maintaining public and workplace safety."

Union Exhibit 1, p. 18.

8. The section 311 policy also defines additional circumstances where employees may have to undergo a fitness for duty medical examination, including "prior to returning to duty after a work-related accident, or following an extended medical leave of absence; following a work-related accident that results in measurable or reportable damage or harm to persons or property;

or when transferred and/or promoted into a safety-sensitive or physically demanding job." Union Exhibit 1, p. 19.

9. The section 311 policy provides no description of any types of fitness for duty examinations, or any type of medical test to be administered. Union Exhibit 1, pp. 18-19.

10. The section 311 policy also provides that "[a] failure to satisfactorily complete a required physical examination . . . is grounds for discipline, up to and including discharge." Union Exhibit 1, p. 19.

11. Prior to going on leave for the back surgery, Firefighter Unruh was not informed he would have to complete a Physical Capacity Test, (PCT), to return to duty. Tr., pp. 10, 13.

12. Prior to the incident giving rise to this prohibited practice complaint, the City has, on a long-term and consistent basis, accepted an employee's treating physician's work clearance as sufficient to meet the fitness for duty examination in section 311. Tr., pp. 137-138, 188-190.

13. Fire Chief Robert K. "Kim" Forbes testified of the long-standing practice that prior to the incident giving rise to this prohibited practice complaint, a return to work release from an employee's treating physician was "all we accepted" for a "fitness to return-to-duty" certification. Tr., pp. 188-189.

14. Following his surgery and recovery time, Firefighter Unruh contacted Respondent City of Hutchinson's Office of Human Resources' employee Margaret Spellman on February 16, 2010 and advised her that he anticipated a return-to-duty date of March 7, 2010. Tr., p. 10; Union's Exhibit 20, Bates stamped page 87. Spellman gave no indication to Unruh that he would have to take a Physical Capacity Test. Tr., p. 10.

15. In anticipation of his return to work, Firefighter Unruh submitted his full release to work from his physician at Abay Neuroscience Center to the City on or about February 22, 2010, with

the expectation that said release would allow him to return to duty without restrictions on March 7, 2010. *See* Union's Exhibit 20, Bates stamped page 89; Tr., pp. 10, 13-14.

16. On February 23, 2010, Tom Sanders, City of Hutchinson's Director of Human Resources sent a letter to Firefighter Unruh thanking him for the work release form from the Abay Neuroscience Center with an effective return to duty date of March 7, 2010 and advising him for the first time of the need for a "return to duty physical capacity test." Union Exhibit 20, Bates stamped page 92; Tr., p. 11.

17. Unruh contacted personnel at the City's Human Resources office to ask about the Physical Capacity Test. Tr., p. 11. Eventually, Firefighter Unruh had discussions with Tom Sanders to voice his concerns about the PCT. Tr., p. 12. These concerns included the fact that he had been given no information of the need for such a test prior to his request for leave, there was no written policy about the test, "the test was just new to [him], and that I was still under doctor's care while [Sanders] wanted this to be performed." *Id.*

18. Unruh inquired of Sanders what the PCT would involve and was advised it would include "upper and lower extremities", isometric testing, push-ups and sit-ups. Tr., p. 14. Unruh also asked him "why it was necessary to test [his] arms and legs when [he'd] had a back injury". Tr., pp. 14-15. Sanders advised that it "was to check for any other underlying injuries that [he] might have besides [his] back injury." Tr., p. 15.

19. Unruh asked what would happen if the testing revealed an underlying condition and was advised he "would probably need additional physical therapy." Tr., pp. 15-16. Unruh asked who would have to pay the cost of any additional physical therapy and was told that he [Unruh] would. Tr., p. 16.

20. Firefighter Unruh was informed that he could face discipline for refusing to perform the PCT, that if he failed the test[2] he would have a second chance to take it and that he would not be allowed to return to work until he passed the PCT. Tr., p. 17. He was also told that if he failed the test a second time, he could be terminated. *Id.*

21. Unruh also expressed concern to Sanders that at the time of his leave request he did not know about the requirement to take a physical capacity test, nor did he know that he could possibly lose his job if he didn't pass the testing. Tr., p. 22.

22. Firefighter Unruh was allowed to return to work prior to taking the PCT. Tr., pp. 18, 24. He was taken off injury leave and put on regular time for training. Tr., p. 18.

23. Unruh met with City of Hutchinson Fire Chief Robert K. Forbes the morning of March 5, 2010 regarding the City's demand for physical capacity testing. Tr., pp. 22-23. International Association of Firefighters Local 179 President Jesse Martin accompanied Unruh to that meeting. *Id.*

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[2]
Q. Did you inquire what would happen if you failed the Physical Capacity Test?
A. He told me I would probably have a second chance to re-do.

....

Q. If you failed the Physical Test, did he indicate whether you would be allowed to return to work?
A. Not if I failed.
Q. So if you failed it, he said you would not be allowed to return to work.
A. Correct.
Q. And then you said he said you'd have a second chance to take the test?
A. That's Right.
Q. Did you indicate what – or did you ask Mr. Sanders what would happen if you failed the test a second time?
Q. Yes, I did. I asked him if there was – if I could lose my job if I failed the second time. He says the possibility was there that I could.
Q. So he indicated that if you failed the test a second time, you could be terminated.
A. Right.

24. In that meeting the morning of March 5, 2010, Unruh expressed the same concerns to Chief Forbes that he had expressed to Sanders. Tr., p. 24. He also inquired of Chief Forbes why he was being required to complete the PCT after he had already been back to work. *Id.*

25. During the March 5 meeting, Forbes handed Unruh a letter advising that his PCT was scheduled for 11:30 a.m. on that same day. Tr., p. 23; Union Exhibit 7, Bates stamped page 15.

26. Fire Chief Forbes ordered Unruh to take the physical capacity testing. Tr., p. 26. Unruh filed a letter with Chief Forbes on that same date, March 5, 2010, indicating that although he believed being required to take the PCT as a condition for returning to work would be a violation of the Public Employer-Employee Relations Act and a change in his conditions of employment, he would comply with the Chief's written directive that he take the PCT "to keep from being charged with any insubordination brought on by the City of Hutchinson". Union's Exhibit 9, Bates stamped page 18.

27. Firefighter Unruh testified that he believed that if he had asked the City to honor its practice of accepting his doctor's release to return to duty, as they had always done in the past, and refused to take the PCT, he would not be allowed to return to work and would eventually be terminated. Tr., pp. 26-27

28. On that same date, March 5, 2010, Petitioner provided a letter to Chief Forbes, indicating:

> "IAFF Local 179 believes this test to be a violation of the collective bargaining agreement, [and] the State PEERA Statute . . . .
>
> . . . .
>
> This injury and subsequent surgery occurred off the job; Mr. Unruh's personal health insurance and sick time has covered this absence. After surgery and physical therapy, his physician has released him to return to work with no restrictions; this indicates that Mr. Unruh is fit to perform the duties and job functions with no additional testing.

> The IAFF also believes this to be a violation of the Kansas PEERA Statute as physical testing as a condition of employment is subject to collective bargaining as it constitutes a change in working conditions."

Union Exhibit 8, Bates stamped pages 16-17.

29. Firefighter Unruh took and passed the PCT on March 5, 2010 and returned to duty on March 7, 2010. Tr., pp. 25-26.

30. Firefighter and bargaining unit member Jason Hawks was employed by the City of Hutchinson, Kansas Fire Department beginning March 31, 2003 and was employed as a Fire Driver at the time of the hearing in this matter. Tr., p. 38.

31. Fire driver Hawks had a non-occupational hip injury that required surgery in June of 2010. Tr., pp. 38-39. He advised the City's Margaret Spellman on June 1, 2010 of the need for surgery and that he anticipated being off duty for from eight to twelve weeks. *Id.*; Union Exhibit 21, Bates stamped page 110.

32. Initially, it was anticipated that Fire Driver Hawks would return to work on or about September 7, 2010. Tr., p. 39. Hawks' physician released him to return to work with no restrictions on September 1, 2010. *Id.*; Union Exhibit 21, Bates stamped page 106.

33. Following his surgery, Firefighter Hawks was initially informed by the City's Margaret Spellman in a telephone conversation August 30, 2010 that he would have to pass a physical capacity test prior to returning to work. Tr., p. 39-41; Union Exhibit 21, Bates stamped page 107.

34. Prior to going on leave for the hip surgery, Firefighter Hawks was not informed he would have to complete a Physical Capacity Test, (PCT), to return to duty. Tr., pp. 41-42. Hawks understanding prior to going on leave for hip surgery was that a release from his doctor with no

restrictions was all he would need as a fitness for duty certification following his surgery. Tr., p. 41.

35. On August 30, 2010, Fire Driver Hawks was instructed by letter from Fire Chief Forbes to report for his PCT at 4:15 p.m. on September 1, 2010. Tr., p. 42.; Union Exhibit 21, Bates stamped page 105.

36. Hawks filed a letter with Chief Forbes on August 31, 2010, indicating that although he believed being required to take the PCT as a condition for returning to work would be a violation of the Public Employer-Employee Relations Act and a change in his conditions of employment, he would comply with the Chief's written directive that he take the PCT "to keep from being charged with any insubordination brought on by the City of Hutchinson". Union's Exhibit 21, Bates stamped page 104; Tr., pp. 57-58.

37. On that same day, August 31, 2010, Petitioner provided a letter to Chief Forbes, stating:

> "IAFF Local 179 believes this test to be a violation of the collective bargaining agreement, [and] the State PEERA Statute . . . .
>
> . . . .
>
> This injury and subsequent surgery occurred off the job; Mr. Hawk's personal health insurance and sick time has covered this absence. After surgery and physical therapy, his physician has released him to return to work with no restrictions; this indicates that Mr. Hawks is fit to perform the duties and job functions with no additional testing.
>
> The IAFF also believes this to be a violation of the Kansas PEERA Statute as physical testing as a condition of employment is subject to collective bargaining as it constitutes a change in working conditions."

Union Exhibit 8, Bates stamped pages 102-103.

38. Firefighter Hawks performed the PCT as scheduled, fearing disciplinary action for failure to comply. Tr., p. 57. In addition to concerns about discipline, Hawks was concerned that the City had not informed employees about any guidelines for the PCT. Tr., pp. 44-45.

39. Hawks was told when he arrived to take the test at the Hutchinson Clinic that the PCT would not be testing his injured hip. Tr., p. 44. Hawks passed the test and returned to work. Tr., p. 58.

40. Firefighter Jesse Martin has worked for the City of Hutchinson, Kansas Fire Department as a Fire Driver since January 12, 2004. Tr., p. 66. At the time of hearing in this matter, he had served as President of International Association of Firefighters Local 179 for two and one-half years. *Id.*

41. Martin, as President of Petitioner and bargaining representative I.A.F.F. Local 179, is familiar with the Employee Handbook section 311 regarding fitness for duty examinations as applied to members of the bargaining unit. Tr., p. 66.

42. Martin testified that the Union's understanding, based upon long-standing practice of the parties, is that a fitness for duty examination, as the term is used in section 311's fitness for duty examination policy "requires a doctor's note clearing [the employee] for full duty." *Id.*

43. Prior to the City requiring Firefighter Unruh to take a PCT to return to work following leave, no other firefighter had ever been required to take a PCT to return to full duty. Tr., p. 67.

44. Prior to its demand that Firefighter Unruh take a PCT, Respondent had never discussed any change, nor attempted to meet and confer with regard to its implementation of Respondent's fitness for duty examination policy under section 311. Tr., pp. 67-69, 72.

45. Prior to its demand that Firefighter Unruh take a PCT, the Union was given no notice of any change in implementation of the section 311 policy. Tr., pp. 67-69.

46. Petitioner President Jesse Martin expressed concern to the department management that the Union "had no understanding of the new test, and what was required of the test, [and that they] had been presented with no information from the City to describe what was required" to return to duty. Tr., pp. 68-69.

47. Martin expressed these concerns to Chief Forbes and Human Resources Director Sanders. Tr., p. 69. The response he received to his concerns was that the testing had been implemented by the City in 2007, but this [Unruh] was the first time it had been applied to the Fire Department and "you're going to have to have your members take the test or they risk being terminated." *Id.*

48. The City did not offer to meet and confer regarding this change of policy. Id. Nor did the City offer to meet and confer regarding any disciplinary procedures that might arise from a refusal to take a test. Tr., pp. 69-70.

49. The City did not inform Petitioner regarding any guidelines of how a PCT would be conducted, or what would happen to individual members during testing at any time prior to its unilateral change of requiring employees to engage in the testing. Tr., p. 71.

50. Petitioner's President Martin indicated that his understanding was that the requirement of a PCT would be triggered when a City employee missed three consecutive shifts of work. *Id.* Martin arrived at this understanding based on conversations with Chief Forbes and Human Resources Director Sanders after the City had already instituted its unilateral changes in the section 311 policy. Tr., pp. 71-72.

51. President Martin testified that he believes that city employee Breck Heller, who sustained a back injury and went on light duty for a week or two, was allowed to return to work without the PCT test and that city employee Harold Albright, was allowed to return to work without taking a PCT after a shoulder injury. Tr., p. 73. *See also* Union Exhibit 24, Bates stamped pages

169-173 (documenting Heller's September 17, 2010 back strain and his physician's September 20, 2010 release to return to work with light duty restrictions for ten days).

52. Fire Chief Forbes acknowledged that following his receipt of protests regarding the use of the PCT, there were no meet and confer sessions with the Union over this issue. Tr., p. 197.

DISCUSSION/CONCLUSIONS OF LAW

ISSUE ONE

WHETHER RESPONDENT COMMITTED THE PROHIBITED PRACTICE OF REFUSAL TO MEET AND CONFER IN GOOD FAITH IN VIOLATION OF K.S.A. 75-4333(B)(5) BY UNILATERALLY IMPLEMENTING A CHANGE TO ITS FITNESS FOR DUTY EXAMINATION SECTION 311 POLICY?

A. A GENERAL OVERVIEW OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT

Petitioner complains the City has engaged in prohibited practices in violation of the Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.* Complaint Against Employer, International Association of Firefighters Local 179 v. City of Hutchinson, Kansas Fire Department, Case No. 75-CAE-1-2011, p. 1 (hereinafter "Petitioner's Complaint"). The Kansas Public Employer-Employee Relations Act, (hereinafter "PEERA" or "the Act"), codified at K.S.A. 75-4321 *et seq.*, guarantees that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." K.S.A. 75-4324. In order to make "some provision for [the] enforcement" of the aforesaid employee rights, Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980), Kansas' PEERA provides that it is 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, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting;
(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, or because he or she has formed, joined or chosen to be represented by any employee organization;
(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327; or
(6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328;
(7) Deliberately and intentionally avoid mediation, fact-finding, and arbitration endeavors as provided in K.S.A. 4332; or
(8) Institute or attempt to institute a lockout."

K.S.A. 75-4333(b). Petitioner alleges that the actions by Respondent of which it complains were in violation of K.S.A. 75-4333, subsections (b)(1), (b)(2), (b)(4), (b)(5) and (b)(6). Petitioner's Complaint, p. 1.

K.S.A. 75-4333(b)(5) directs that it shall be a prohibited practice for a public employer willfully to refuse to meet and confer in good faith with representatives of the recognized employee organization as required in K.S.A. 75-4327. K.S.A. 75-4327 requires that "[p]ublic employers shall recognize employee organizations for the purpose of representing their members in relations with public agencies as to grievances and conditions of employment." K.S.A. 75-4327(a). The legislative parameters of the duty to meet and confer under the PEERA are found in 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)

K.S.A. 75-4327(b). "This provision is buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer willfully to '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).

K.S.A. 75-4322(m) defines "Meet and confer in good faith" and affirms that the meet and confer process centers around bargaining on 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 Act defines "conditions of employment" to mean "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state." *See* K.S.A. 75-4333(t). PEERA also directs that nothing in the act is intended to circumscribe or modify the existing right of a public employer to:

> (a) Direct the work of its employees;
> (b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency;
> (c) Suspend or discharge employees for proper cause;
> (d) Maintain the efficiency of governmental operation;
> (e) Relieve employees from duties because of lack of work or for other legitimate reasons;
> (f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and
> (g) Determine the methods, means and personnel by which operations are to be carried on.

K.S.A. 75-4326.

After the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. *See National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). If the parties are not able to agree on the terms of a mandatory subject of bargaining they are said to have reached "*impasse.*" *West Hartford Education Ass' n v. DeCourcy*, 295 A.2d526, 541-423 (Conn. 1972). Under PEERA, when good faith bargaining has reached impasse and the impasse procedures set forth in K.S.A.75-4332 have been completed in good faith, the employer may take unilateral action on the subjects upon which agreement could not be reached. K.S.A. 75-4332(f).

Certain types of conduct are viewed as *per se* violations of an employer's duty to meet and confer under labor relations laws. 1 Charles J. Morris, The Developing Labor Law, 562 (2d ed. 1983). Such conduct generally involves an absence of bargaining: unilateral changes by an employer during the course of a bargaining relationship concerning matters which are mandatory subjects of bargaining are normally regarded as *per se* refusals to bargain. *Id.*, at 563.

B. SCOPE OF NEGOTIATIONS

The Kansas Legislature has recognized that, like private employees, public employees have a legitimate interest in negotiations about matters affecting their terms and conditions of employment. K.S.A. 75-4321(b). The state is different, however, from a private employer due to its unique responsibility to make and implement public policy. *See* K.S.A. 75-4321(a)(4)("there neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique

fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions"); K.S.A. 75-4321(a)(5)("the difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion . . .). *See also, Local 195, IFPTE, AFL-CIO v. State*, 88 N.J. 393, 443 A.2d 187 (1982)("[w]hat distinguishes the State from private employers is the unique responsibility to make and implement public policy"). Accordingly, the scope of negotiations[3] in the public sector is more limited than in the private sector. *Id. See also, Rapid City Education Association v. Rapid City School District No. 51-4*, 376 N.W.2d 562 (1985)(scope of public sector negotiations more limited than private sector). The scope of negotiations in the public sector is more limited than in the private sector because the employer in the public sector is government, which has special responsibilities to the public not shared by private employers. *Local 195, IFPTE, supra,* 443 A.2d at 191. The role of the Board in a scope of negotiations dispute is to determine, in light of the competing interests of the state and its public employees, whether an issue is appropriately decided by the political process or by meet and confer.[4] In *IFPTE Local 195*, the New Jersey Supreme Court opined that:

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[3] In labor relations, "scope of negotiations" is a term of art implicating a dispute over whether a proposed bargaining subject is mandatorily negotiable. The PERB and Kansas Courts apply the *Borg-Warner* doctrine, *see N.L.R.B. v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 42 LRRM 2034, *remanded*, 260 F.2d 785, 43 LRRM 2116 (6thCt.App., 1958), which divides bargaining subjects into three categories: mandatory, permissive and illegal. *See Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991 (February 10, 1992); *State Department of Administration v. Public Employees Relations Bd.*, 257 Kan. 275, 894 P.2d 777 (1995).

[4] Ultimately under the PEERA, even with regard to those topics or proposals made mandatorily negotiable, the final decisions regarding public sector employees' terms and conditions of employment is reserved by law to the employer. *See* K.S.A. 75-4332; *State Department of Administration v. Public Employees Relations Board*, 257 Kan. 275, 894 P.2d 777 (1995)(noting that PEERA imposes no

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

Id.

K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from willfully 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." In interpreting this statue, both PERB and Kansas courts have consistently ruled[5] that the list contained at K.S.A. 75-4322(t) is not an exclusive list of the issues subject to mandatory negotiability:

> "Viewing the entire Act, with its broad statement of purpose, we conclude that the legislature did not intend that the laundry list of conditions of employment as set forth in K.S.A 75-4322(t) be viewed narrowly with the object of limiting and restricting the subjects for discussion between employer and employee. To the contrary, the legislature targets all subjects *relating to* conditions of employment."

Kansas Board of Regents and Pittsburg State University v. Pittsburgh State Univ. Chap. of K-NEA, 233 Kan. 801, 818-819 (1983)(emphasis in original)(hereinafter *"Pittsburg State"*).

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obligation on the public employer to agree to the employees' demands: governing body of public employer ultimately can dictate any mandatory subject of bargaining after negotiating in good faith, reaching impasse in good faith and participating in impasse-resolution procedures).

[5] Among the many PERB decisions ruling that the list contained at K.S.A. 75-4322(t) is not an exclusive list of issues subject to mandatory negotiability are: *Kansas Association of Public Employees v. State of Kansas, Adjutant General,* Case No. 75-CAE-9-1990 (March 11, 1991); *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991 (February 10, 1992). Kansas judicial decisions reaching the same conclusion include: *Kansas Board of Regents and Pittsburg State University v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801 (1983); *State Department of Administration v. Public Employees Relations Bd.*, 257 Kan. 275, 894 P.2d 777 (1995); *Pittsburg State University/Kansas National Education Association v. Kansas Board of Regents/Pittsburg State University*, 280 Kan. 408, 122 P.3d 336 (2005)

C. BALANCING TEST

In determining whether a subject not expressly set forth in the "laundry list" of conditions at K.S.A. 75-4322(t) is mandatorily negotiable, PERB has developed and Kansas courts have adopted a balancing test. Use of a balancing test is PERB's consistent, decades-old response to a dilemma of legislative creation. This dilemma derives from the fact that although K.S.A. 75-4327(b) grants public employees the right to meet and confer with respect to conditions of employment, K.S.A. 75-4326 stipulates that the right does not extend to matters of inherent managerial prerogative or policy.[6] In making the determination whether a proposed issue or bargaining proposal is the appropriate subject of mandatory bargaining, the interests of the parties must be balanced to decide whether negotiations will significantly impair the governmental unit's ability to make policy decisions.

For many years, PERB has used a balancing test to provide a meaningful standard for determining claims of mandatory negotiability. *See, e.g., Kansas Association of Public Employees v. State of Kansas, Adjutant General,* Case No. 75-CAE-9-1990 (March 11, 1991); *Service Employees Union Local 513 v. City of Hutchinson, Kansas*, Case No. 75-CAE-21-1993 (Jan. 28, 1994); *International Association of Fire Fighters, Local 3309 v. City of Junction City, Kansas*, Case No. 75-CAE-4-1994 (July 29, 1994). This same balancing test has been used by the Department of Labor's Office of Labor Relations for determining mandatory negotiability of topics under the Kansas Professional Negotiations Act, (PNA), K.S.A. 72-5413 *et seq*. *See Brewster-NEA v. U.S.D. 314*, Case No. 72-CAE-2-1991 (Jan. 29, 1991).

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[6] A term commonly used in the labor relations field, "inherent managerial prerogatives" encompasses those subjects the control of which is reserved by law to the public employer. *See* K.S.A. 75-4326.

Under the PEERA, these three criteria[7] are used in balancing the competing interests of employers and employees in the public sector when making a scope of negotiations determination:

> (1) A subject is mandatorily negotiable only if it is significantly related to express conditions of employment.
> (2) A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
> (3) A subject that is significantly related to an express condition of employment is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.

In applying the balancing test, it is important to recognize both employers' and employees' rights under the law. When there is a conflict between an employer's freedom to manage in areas involving the basic determination of public policy and the right of employees to meet and confer on subjects significantly related to their conditions of employment, a balance must be struck which will take into account the relative importance of the proposed actions to the two parties.

The first question to address is whether a proposed topic is significantly related to express conditions of employment. A subject which does not satisfy this part of the test is not mandatorily negotiable. Second, an item is not mandatorily negotiable if it has been preempted by state or federal law which sets or controls a particular term or condition of employment. Third, a topic that is significantly related to express conditions of employment is mandatorily negotiable only if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. Many decisions of the public employer will relate in varying degrees to express conditions of employment,

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[7] While characterized as having three prongs, the balancing test seeks to determine whether an item is significantly related to express conditions of employment versus whether negotiating the item would significantly interfere with the exercise of inherent managerial prerogatives, and it incorporates the statutory imperative regarding statutory and constitutional pre-emption. *See* K.S.A. 75-4330(a); K.S.A. 75-4322(t).

and negotiation will nearly always impinge to some extent on the determination of public policy. The two conflicting interests cannot be reconciled by focusing solely upon the one element or the other but instead the significance of the topic's relationship to express conditions of employment must be balanced against the extent of their negotiation's interference with management rights as set forth in K.S.A. 75-4326.

The requirement that the interference be "significant" is designed to effect a balance between the public employees' legitimate interest in meeting and conferring about matters affecting their conditions of employment and the government's unique responsibility to make and implement public policy. Where the employer's management prerogative is dominant, there is no obligation to negotiate even though the subject may be significantly related to express conditions of employment. Since the line which divides these competing interests are often indistinct, it must be drawn on a case by case basis.

D. APPLICATION OF BALANCING TEST

1) Is the Subject Significantly Related to Express Conditions of Employment?

In the instant matter, Petitioner concedes that the City "may have an inherent managerial right to impose a policy to require fitness for duty examinations or certifications prior to an employee returning to work from an injury or illness." Initial Brief of the Petitioner, p. 23 (hereinafter "Petitioner's Brief"). However, Petitioner "does contend that the implementation of the policy, and how it is carried out is a subject of mandatory negotiation." Petitioner's Brief, p. 23. In its brief, Respondent appears to concur that it has an inherent managerial right to impose such a policy, but urges that their "authority for fitness for duty exams is more than a managerial right." Reply Brief of the Respondent, p. 2 (hereinafter "Respondent's Brief"). "Fitness for duty

exams are governed by Federal law, subject to Federal regulations, and enforced by decisions of the Federal Courts." Respondent's Brief, p.2. Further, Respondent urges, Petitioner "has protested the use of the physical capacity test as a fitness for duty examination [and its] protest . . . is not procedural in nature, but is substantive . . . . [t]herefore, the subject matter is not mandatorily negotiable under the PERB statutes" *Id.* Respondent further urges that "implementation of the change in policy" is so intrinsically interwoven with the policy itself, that negotiation of same is not mandatory. Respondent's Brief, pp. 4-5. Respondent argues, in effect, that to require the public employer to negotiate its implementation would also force it to negotiate the underlying policy decision. Petitioner disagrees, citing *Law Enforcement Labor Services, Inc. v. City of Luverne*, 463 N.W.2d 546, 548 (1990) as persuasive support for its position. Petitioner's Brief, p. 23-25.

The presiding officer notes, first, that based upon the record and the arguments, Petitioner is not objecting to the specific testing used. As the unit members' exclusive bargaining representative, Petitioner objects to a change without negotiation from the parties' long-standing practice. Petitioner's Brief, p. 28. Because the long-standing past practices of Respondent and Petitioner are that a release to work without restrictions from an employee's treating physician have for many years consistently been accepted by the Employer as proof of fitness for duty under its section 311 policy, a change in this practice to require some other form of fitness for duty medical examination must first be negotiated, at least insofar as procedural and implementation aspects, as this change can potentially impinge on the ultimate condition of employment, employment itself.[8] In addition to the potential to lead to an employee's discipline

[8] *See, e.g., County of Cook v. Licensed Practical Nurse Ass'n of Illinois*, 284 Ill.App.3d 145, 671 N.E.2d 787 (Ill.App. 1 Dist.,1996)("[t]he undisputed evidence reveals that unless an employee returning to work

and even termination, this change in policy is significantly related to the following express conditions of employment: salaries, wages, hours of work, vacation allowances, sick and injury leave, retirement benefits and insurance benefits, all mandatory issues for PEERA's meet and confer process. *Id.*, pp. 25-26.

The presiding officer concurs with Petitioner's assertion. Requiring a return to duty fitness certification or examination when an employee, particularly one facing the rigors and dangers inherent in firefighting, returns to work from an extended medical leave, is an inherent managerial prerogative, and Respondent has long required a return to duty fitness certification in such circumstances, albeit in a different form, but the mechanics or procedures for implementing that decision are mandatorily negotiable. Courts in several jurisdictions interpreting similar state labor relations statutes under comparable or analogous facts have reached the same and analogous conclusions. *See, e.g., Law Enforcement Labor Services, Inc. v. City of Luverne*, 463 N.W.2d 546, 548 (Minn.App.1990)(while establishment of a physical examination policy is a matter of inherent managerial policy not subject to mandatory negotiability, said policy materially affected terms and conditions of employment justifying negotiation of policy's implementation); *Unified School Dist. No. 352, Goodland v. National Education Association-Goodland*, 246 Kan. 137, 785 P.2d 993 (1990)(teacher evaluation procedures mandatorily negotiable, while evaluation criteria are not); *University of Hawai'i Professional Assembly v. Tomasu*, 79 Hawai'i 154, 900 P.2d 161 (Hawai'i 1995)(because policy statement pursuant to Drug-Free Workplace Act merely complies with federal law, its initial promulgation is not bargainable; however, implementation of DFW Act would necessarily involve topics of

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from a leave of absence submits to a drug test, the employee may not return to work and could be subject to discipline or termination. It is difficult to imagine a more obvious condition of employment).

mandatory bargaining, such as what mandatory drug treatment program would entail, where employees would go for treatment, how treatment programs would be funded, and what disciplinary action would be imposed for violation of policy); *Webster Educ. Ass'n v. Webster School Dist.*, 631 N.W.2d 202, 144 Lab.Cas. P 59,408, 155 Ed. Law Rep. 1381, 2001 SD 94 (S.D. 2001)(school district was required to negotiate its reduction in force (RIF) and recall policy with education association; policy intimately and directly affected the work and welfare of the teachers to whom it might apply, education statutes did not provide a basis for preemption of the policy from negotiation, and because policy was procedural or mechanical in nature, it did not circumscribe the district's inherent governmental prerogative); *Law Enforcement Labor Services, Inc. v. Sherburne County*, 695 N.W.2d 630, 177 L.R.R.M. (BNA) 2242 (Minn.App.2005)(in cases in which public employer's inherent managerial policy overlaps with terms and conditions of employment, a two-step process is required to determine whether policy is subject to negotiation under Public Employment Labor Relations Act (PELRA): first, the court must determine whether the policy has an impact on terms and conditions of employment, and second, if it does, the court must ascertain whether the policy's establishment is separate and distinct from its implementation); *Township of Bridgewater v. P.B.A. Local 174,* 196 N.J.Super. 258, 482 A.2d 183 (1984)(while criteria for police officer physical fitness and agility test were not negotiable, township conceded that aspects of the test which related to procedural matters were mandatorily negotiable); *Unified School Dist. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968 (1984)(under "topic approach" balancing test, mandatorily negotiable topics under the statute include mechanics of staff reduction, and mechanics of selecting teachers to participate in student teacher program).

Establishing such a return to duty fitness examination policy, as Respondent had done, years ago, is not subject to mandatory negotiation under the Act. However, Respondent's unilateral change in the manner it has for many years consistently implemented the policy, by requiring a return to duty fitness examination as opposed to acceptance of a treating physician's release to return to work without restrictions, can cost an employee additional leave time, lost wages, costs for additional physical therapy, loss of other benefits and so forth. In addition, the employee could be subject to discipline, up to and including discharge, if he or she were unable to pass the certification. It is clear that Respondent's change in the manner by which it implements its section 311 policy is significantly related to express conditions of employment.

2) Is the Subject Completely Pre-empted by Federal or State Law?

The second consideration is an analysis of whether the subject in question is pre-empted by state or federal law. K.S.A. 75-4330(a); K.S.A. 75-4322(t). Respondent makes no argument that the subject in question is completely pre-empted by state statute or constitutional provision. *See* Respondent's Brief. Respondent does assert, however, that the type of fitness for duty examination it administers is governed by provision of the Family Medical Leave Act, 29 U.S.C. 2601 *et seq.*, and the Americans With Disability Act, 42 U.S.C. 12101 *et seq.* *Id.*, pp. 4, 5 and 9. The presiding officer notes that Respondent's assertion did not provide more specific detail regarding how these federal laws completely pre-empt negotiations regarding any procedural or implementation aspects of the return to duty fitness examination. Respondent's Brief, pp. 1-5.

In *Pittsburg State University/Kansas National Education Association v. Kansas Board of Regents/Pittsburg State University*, 280 Kan. 408, 122 P.3d 336 (2005), the Kansas Supreme Court set out the applicable analytical framework for determining whether a subject for

negotiation and inclusion in a memorandum of agreement under the PEERA is pre-empted by federal law. *Pittsburg State University/KNEA*, 280 Kan. at 417. Paraphrasing the Court's guidance, the appropriate inquiry in this matter is whether federal law prevents the parties from negotiating regarding certain aspects of implementation of a return to duty fitness examination and entering into a memorandum of agreement which includes the subject. *Id.* Respondent concedes that federal law does not provide procedural direction regarding fitness for duty examinations due to the infinite number of combinations which would be required for all types of jobs, all manner of medical diagnostic testing and all illnesses or injuries that could be involved. Respondent's Brief, pp. 4-5.[9] The presiding officer concludes therefore that state and federal law does not prevent the parties from negotiating regarding certain aspects of implementation of a return to duty fitness examination and entering into a memorandum of agreement which includes the subject.

3) Would a Negotiated Agreement Significantly Interfere with The Exercise of Inherent Managerial Prerogatives?

As previously noted, a topic significantly related to express conditions of employment is mandatorily negotiable only if it is a matter on which a negotiated agreement would not

[9] It bears noting that several procedural aspects or implementation concerns were suggested in Petitioner's briefing, among which were lack of notice of the PCT requirement prior to going on leave, the amount of time given between notice of the requirement of testing and the scheduled time for actually taking the PCT, lack of guidelines of the actual testing procedure, lack of preparatory materials or information regarding the PCT testing, lack of understanding and of uniformity in conditions triggering a PCT, disciplinary procedures that may arise as a result of failing a PCT, and use of the PCT as a baseline for members' physical fitness levels or physical ability to complete their jobs. *See* Petitioner's Brief, pp. 2-20. Respondent does not contend that requirements of the F.M.L.A. or the A.D.A. preclude negotiation of such procedural or implementation aspects, Respondent's Brief, p. 4, other than to argue, in effect, that implementation of the change in policy is intrinsically interwoven with the policy itself, that is, that to require the public employer to negotiate its implementation would also force it to negotiate the underlying policy decision. The presiding officer does not agree. Given Respondent's acknowledgment that federal law does not direct procedures regarding fitness for duty examinations, such implementation details are severable from the policy determination itself.

significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. This prong of the test rests on the assumption that many decisions of the public employer relate in varying degrees to express conditions of employment, and negotiation will nearly always impinge to some extent on the determination of public policy. The two conflicting interests cannot be reconciled by focusing solely upon the impact or effect of managerial decisions but instead the nature of the conditions of employment must be considered in relation to the extent of their interference with management rights as set forth in K.S.A. 75-4326. The requirement that the interference be "significant" is designed to effect a balance between the interest of public employees and the requirements of democratic decision making. A weighing or balancing must be made. The two conflicting interests cannot be reconciled by focusing solely upon the one element or the other but instead the significance of the topic's relationship to express conditions of employment must be balanced against the extent of their negotiation's interference with management rights as set forth in K.S.A. 75-4326. To the extent that subjects do not involve substantive governmental discretion and responsibility, but merely the procedural aspects of reaching and effectuating such determinations, they concern conditions of employment ordinarily subject to negotiation. *Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. Of Higher Educ.*, 449 A.2d 1244, 1251 (N.J. 1982).

Under the facts of this matter, it is the conclusion of the presiding officer that negotiating certain procedural or implementation aspects of the Employer's determination to require a fitness for duty (medical) examination, as opposed to its consistent and long-standing practice of accepting a fitness for duty certification, will not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. Given that public employers under Kansas law retain the ultimate authority to determine terms and conditions of

employment,[10] requiring good faith negotiations over procedural and implementation aspects of return to duty fitness examinations will help preserve a balance between the competing interests of employees in their terms and conditions of employment and the Employer's determination of governmental policy. Respondent's unilateral implementation of the new policy, that is, its adoption and use of a physical capacity test, without first meeting and conferring the procedural and implementation aspects of the PCT, constitutes a *per se* refusal to bargain in good faith and a violation of K.S.A. 75-4333(b)(5).

E. DID RESPONDENT WILLFULLY REFUSE TO MEET AND CONFER WITH PETITIONER BEFORE MAKING UNILATERAL CHANGES TO ITS FITNESS FOR DUTY EXAMINATION UNDER POLCIY 311?

Recall that PEERA mandates that "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". K.S.A. 75-4327 (emphasis added). The Kansas PEERA provides that it is a "prohibited practice for a public employer or its designated representative *willfully* to:

> (4) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required under K.S.A. 75-4327;

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

The Kansas Supreme Court has not addressed whether PERB, in a scope of negotiations determination, must expressly find that a prohibited practice was willfully committed. *See State Dept. of Administration v. Public Employees Relations Bd.*, 257 Kan. 275, 293 (1995)(ruling that

[10] K.S.A. 75-4332(f).

issue "whether PERB must make an express finding that a prohibited practice was 'willfully' committed was not necessary to resolve that controversy, "[t]hus [the court] express[ed] no opinion [and left the question] for another day and another case in which [it] must necessarily be decided.").

Both the adjective "willful" and the adverb "willfully" are derivations of the root word "will". "Will" is defined to mean "the mental faculty by which one deliberately chooses or decides upon a course of action; volition". AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Edition 1976), p. 1465. The same source defines "willful" to mean "[s]aid or done in accordance with one's will; deliberate" and provides a second meaning, "inclined to impose one's will; unreasoningly obstinate". *Id.*, p. 1466. BLACK'S LAW DICTIONARY defines the term "willful" as follows:

> "Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.
>
> Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.
>
> An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context.
>
> . . . .
>
> In civil actions, the word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act."

BLACK'S LAW DICTIONARY (Abridged 6th Ed. 1991, p. 1103).

Under the Kansas Wage Payment Act, K.S.A. 44-313 *et seq.*, use of the term "willfully" denotes an element or condition which, if present, mandates imposition by the Kansas Department of Labor of a statutory penalty for failure to pay wages. *See* K.S.A. 33-315(b). Under the Kansas Wage Payment Act ("KWPA"), K.S.A. 44-313 *et seq.*, an employer is required to pay an employee earned wages when due, that is on regular paydays designated in advance and "at least once during each calendar month". K.S.A. 44-314(a). Upon separation from employment, an employer must pay an employee's earned wages "not later than the next regular payday upon which he or she would have been paid if still employed." K.S.A. 44-315(a). In recognition of the important public policy of ensuring that Kansas workers receive compensation due them, the Kansas Legislature enacted the penalty provision to deter employers from failing to pay wages when due. This provision for a statutory penalty mandates that where an employer "willfully" fails to pay earned wages when due, the employer "shall" be liable for payment of damages pursuant to a statutory formula that effectively equates the penalty to the amount[11] of the unpaid wages.

In *A. O. Smith Corporation v. Kansas Department of Human Resources and Greg A. Allen, et al.,* 144 P.3d 760, Ks.Ct.App., (2005)(hereinafter *A. O. Smith*), the Kansas Court of Appeals reaffirmed long-standing Kansas judicial decisions holding that the term "willful act", in the context of the Kansas Wage Payment Act, K.S.A. 413 *et seq.*, means an act "indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another."

[11] K.S.A. 44-315(b) provides that this statutory penalty shall be assessed "in the fixed amount of 1% of the unpaid wages" per day, except Sundays and legal holidays, after expiration of an eight-day grace period "or in an amount equal to 100% of the unpaid wages, whichever is less." This presiding officer is readily familiar with requirements of the KWPA, having heard and decided numerous appeals thereunder and having supervised the staff of the Labor Department's wage payment unit in years past. It is not uncommon that in a disputed administrative claim for wages if the evidence demonstrates that an employer's failure to pay earned wages when due was willful, the mandatory statutory imposition of penalty will be in an amount equal to the wages found due and owing.

Under the KWPA, Kansas courts have consistently construed the term "willfully" to require a significant element of blameworthiness, proof of a wrongful state of mind or of intent to injure, before the mandatory and substantial monetary penalty will be imposed. *See A. O. Smith, supra*; *Holder v. Kansas Steel Built, Inc.,* 224 Kan. 406 (1978); *Weinzirl v. The Wells Group, Inc.*, 234 Kan. 1016 (1984).

An identical formulation of willfulness is used when imposing penalties under other Kansas laws. *See, e.g., Dold v. Sherow*, 220 Kan. 350, 354-355 (1976)(in action to recover damages for breach of express and implied warranties arising out of sale of cattle, if Plaintiff was entitled to recover actual damages and act of defendant was willful, that is, defendant's act was "one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another", Plaintiff can be awarded punitive damages to punish defendant and to deter others from like conduct); *Anderson v. White*, 210 Kan. 18, 19 (1972)(plaintiff in personal injury case was entitled to recover monetary damages only upon a showing that injury was result of willful or wanton misconduct by defendant, willful conduct defined to be "action indicating a design, purpose or intent on the part of a person to do wrong or to cause an injury to another."); *Burdick v. Southwestern Bell Telephone Co.*, 9 K.A.2d 182 (1984)(general exchange tariff filed by telephone company limits its liability, precluding plaintiff's recovery of damages for company's alleged negligence resulting in plaintiff's loss of business unless conduct of company was more than merely "willful" in the sense that it was "intentional"; for plaintiff to prevail, defendant's conduct must be shown to be "wanton and willful" in which context willful means "action indicating a design, purpose or intent on the part of a person to do or cause injury to another."). However, such a formulation of willfulness is not appropriate in a scope of negotiations determination under PEERA.

In a scope of negotiations case the consequences of and purposes to be served by a finding of willfulness is manifestly different than it is in the wage payment, personal injury, negligence or breach of contract arenas. As noted by BLACK'S LAW DICTIONARY in the passages set out above, willful "is a word of many meanings, with its construction often influenced by its context". "Willfully", as used in a scope of negotiations determination under labor relations laws, should be neither administratively nor judicially construed to be identical in meaning to the term "willfully" where that term signifies a prerequisite or condition for imposing punitive damages or other forms of penalty or punishment. Instead, the relative differing purposes of the laws, the consequences of a finding of willfulness, and the contexts in which the terms are used should serve as guideposts for their differentiation. In a labor relations setting, with regard to a charge of failure to bargain in good faith in a scope of negotiations dispute, i.e., whether a given topic is mandatorily negotiable, the purposes for which the law was enacted are ill-served by the necessity of finding that a party "willfully" refused to meet and confer, when that term is construed to require proof of an intent to cause injury or do wrong. The purposes for which the Kansas Legislature enacted the Public Employer-Employee Relations Act are expressly articulated in the Act itself:

> "it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of the law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies."

In an early PEERA judicial decision regarding a scope of negotiations dispute, the Kansas Supreme Court noted that the Act is neither a strict "meet and confer" act, nor a "collective negotiations" act but a hybrid containing some characteristics of each. The Court then observed:

> "However it be designated, the important thing is that the Act imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations."

Kansas Bd. Of Regents and Pittsburg State University v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 804-805 (1983). If, as the statutory text states and the Court has affirmed, the purpose of the Act is to obligate both employers and employees, acting through their respective representatives, to meet and confer in good faith with affirmative willingness to resolve grievances and to negotiate conditions of employment, the necessity of establishing that a party willfully, that is, with intent to cause the other party injury, refused to meet and confer is starkly inconsistent with the plain, express purposes of the law. That is to say, if the goal of the Act is to obligate parties to meet and confer regarding conditions of employment and grievances in an effort to promote labor-management harmony, why should it be necessary to establish anything more than that a party refused intentionally, voluntarily or deliberately to meet and confer regarding an appropriate topic in order that they be directed back to the negotiating table?

Further, in a refusal to negotiate complaint, where the scope of negotiations is in dispute, the consequence of a finding of willfulness is markedly different from the penalties that may follow a finding of willfulness in other settings. The consequence of finding that a party willfully refused to meet and confer in good faith is typically an order that the parties resume bargaining and perhaps to post a copy of PERB's decision for review by affected employees. As noted earlier, a finding of willfulness in a wage payment act claim is a mandatory monetary

penalty that may effectively double the amount owed. *See, e.g., A. O. Smith, supra,* 144 P.3d 760, Ks.Ct.App., (2005)(wages found due in amount of $370,798.43, penalty assessed in amount of $366,552.28, difference in amounts was result of one claimant's failure to file within statutory limitations period for penalty). A finding of willfulness in the context of personal injury litigation may subject a defendant to an award of damages. *Anderson v. White,* 210 Kan. 18 (1972). A finding of willfulness in a breach of contract suit may lead to punitive damages. *Dold v. Sherow,* 220 Kan. 350 (1976). A finding of willfulness in a nursing license administrative action may subject the license-holder to license suspension or even revocation. *See Kansas State Board of Nursing v. Burkman,* 216 Kan. 187 (1975)(in judicial review of Board of Nursing proceeding to suspend nursing license, where registered nurse continued to practice nursing after negligently failing to apply for license renewal upon its expiration, courts reinstated license, finding that such negligence did not rise to generally accepted concept of willful conduct: "While willful has been said to be a word of many meanings depending on the context in which it is used, it generally connotes proceeding from a conscious motion of the will—an act as being designed or intentional as opposed to one accidental or involuntary."). *See also, Golay v. Kansas State Board of Nursing,* 15 K.A.2d 648 (1991)(in administrative licensing disciplinary proceeding, Board has authority, in furtherance of its duty to protect public by regulating nursing licensing, to initiate investigations on its own motions; finding of willful violation of Kansas Nurse Practice Act sufficient grounds for denial, revocation or suspension of license). While it is understandable that the threshold of "willfulness" for granting punitive monetary damages, or for stripping someone of a license to practice their profession, would be set high enough to reflect a significant element of blameworthiness, to ensure that the punishment was commensurate with the offense, when the consequence is that of being told to resume negotiations there is no need to

find substantially blameworthy intent or to find that actions were motivated by a wrongful purpose or an intent to cause injury.

Moreover, a plain reading of the law reveals that a finding of willfulness is necessary to sustain a prohibited practice charge, including that of refusal to meet and confer in good faith. K.S.A. 75-4333. If the element of willfulness is absent, then it logically follows that PERB cannot conclude that the Act was violated, and is without authority to take remedial action. In the absence of willfulness, and thus absent the conclusion that PEERA was violated, the PERB is without authority to direct the parties back to negotiations. In this context, and in light of such consequences, one cannot discount the possibility that the legislative conception of "willfulness" in labor relations envisioned a lesser degree of culpability compared with that term's usage in the context of punitive damages. In the scope of negotiations context with which we are here concerned, construing "willfully" to require proof of a wrongful state of mind or of an intent to injure is inconsistent with the purposes motivating PEERA's enactment.

Given that the legislature is presumed to know the meaning, or multiplicity of meanings, of the words it chooses for use in the statutes, one must conclude that the legislature was aware of the many variations and gradations of meaning for the term "willfully". We cannot presume, in the context of a scope of negotiations dispute, where a finding that a party "willfully" refused to negotiate over a condition of employment is a necessary prerequisite to ordering the party back to negotiations, or for ordering any other relief, that the legislature intended that "willfully" be construed in a manner inconsistent with the statute's salutary purpose of promoting labor harmony and stability, through bargaining, in the public employment sector work force. In point of fact, it is a fundamental rule of statutory construction that "'[t]he several provisions of an act, *in pari materia*, must be construed together with a view of reconciling and bringing them into

workable harmony and giving effect to the entire statute if it is reasonably possible to do so.' " *Guardian Title Co. v. Bell*, 248 Kan. 146, 151, 805 P.2d 33 (1991).

In order to give effect to the entire Act, and to reconcile PEERA's different provisions to bring them into workable harmony, the purpose of promoting cooperative relationships between government and its employees through the meet and confer process will be served by construing "willfully", in the context of a scope of negotiations determination, to mean that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, or that it was undertaken with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent.[12]

After careful review of the record and of the parties' arguments, it is the presiding officer's conclusion that Respondent's unilateral change in implementation of its section 311 policy coupled with its failure to meet and confer in good faith with Petitioner regarding procedural and implementation aspects of that change prior thereto[13] constituted a refusal to meet and confer in good faith. The record supports a finding that Respondent's actions were willful as construed above. Respondent's unilateral change in implementation[14] of its fitness for duty examination

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[12] Other states have construed the meaning of "willfully" in their states' labor relations law provisions regarding prohibited practices in a similar fashion. *See, e.g., Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters v. Iowa Public Employment Relations Board*, 522 N.W.2d 840, Iowa (1994)("'[w]illful refusal to negotiate' within meaning of public employee bargaining statute means that party either knew or showed reckless disregard for matter whether its action amounted to a refusal to negotiate in good faith with respect to scope of negotiations; action relied on to establish prohibited practice complaint based on such willful refusal must be so significant in its scope and done with such knowledge or reckless disregard for the facts as to effectively thwart negotiating proceedings".)

[13] As a defense, Employer asserted that Petitioner waived its right to meet and confer over the Employer's change in fitness for duty examination policy by failing to request negotiations over the issue. Respondent's Brief, p. 7. Respondent's assertion is meritless. Nothing in the record of this matter establishes that the City gave the IAFF timely, adequate notice of its change in policy prior to unilateral implementation.

[14] An employer's unilateral change to a condition of employment, without bargaining in good faith, is a *prima facie* violation of its employees' collective right to meet and confer. *See City of Junction City v.*

policy without first meeting and conferring in good faith with regard to procedural and implementation aspects of same was done voluntarily, deliberately or intentionally, with reckless indifference or disregard for the natural consequences thereof, or was done with wrongful intent. These actions constituted a prohibited practice, in violation of K.S.A. 75-4333(b)(5).

ISSUE TWO

DID THE CITY'S REFUSAL TO MEET AND CONFER REGARDING IMPLEMENTATION OF THE CHANGE IN POLICY REGARDING FITNESS FOR DUTY EXAMINATIONS CONSTITUTE THE PROHIBITED PRACTICE OF "INTERFERE[ING], RESTRAIN[ING], OR COERC[ING] PUBLIC EMPLOYEES IN THE EXERCISE OF RIGHTS GRANTED IN K.S.A. 75-4324", IN VIOLATION OF K.S.A. 75-4333(B)(1)?

K.S.A. 75-4333(b)(1) provides that it is a "prohibited practice for a public employer or its designated representative willfully to interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324. K.S.A. 75-4324 provides that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." In a "comprehensive article examining the nature and operation of PEERA", *State v. Public Employees Relations Bd.*, 894 P.2d 777, 782, 257 Kan. 275 (1995), its author, Raymond Goetz, observed that "[a]ny conduct which would violate [K.S.A. 75-4333(b)] (2) through (8) would also violate [K.S.A. 75-4333(b)] (1)." Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 264 (1980). The presiding officer concludes that

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Junction City Police Officers' Association, 75-CAEO-2-1992 (July 31, 1992); *Kansas Association of Public Employees v. Kansas Department of Corrections*, 75-CAE-17-1993 (December 15, 1994).

Respondent's violation of K.S.A. 75-4333(b)(5), detailed above, was also a violation of PEERA's "interference" provision, K.S.A. 75-4333(b)(1).

ISSUE THREE

DID RESPONDENT'S ACTIONS CONSTITUTE AN ATTEMPT TO "DOMINATE, INTERFERE . . . IN THE FORMATION, EXISTENCE OR ADMINISTRATION OF [AN] EMPLOYEE ORGANIZATION", IN VIOLATION OF K.S.A. 75-4333(B)(2)?

Petitoner did not elaborate on how or why Respondent's conduct constituted a violation of K.S.A. 75-4333(b)(2), stating merely that Petitioner's "position regarding this issue . . . is in essence identical to the rationale in section IV . . . ". Accordingly, the presiding officer deems the issue waived. *See State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010)(argument must be supported with pertinent authority; otherwise argument deemed abandoned).

ISSUE FOUR

DID THE CITY'S UNILATERAL IMPOSITION OF THE CHANGE IN POLICY AND ITS IMPLEMENTATION CONSTITUTE A VIOLATION OF K.S.A. 785-4333(B)(4)?

Petitioner asserts that Respondent's actions violated K.S.A. 75-4333(b)(4). Petitioner argues that because Respondent's actions had the potential to result in discharge of a unit member, its conduct violated K.S.A. 75-4333(b)(4). The presiding officer disagrees. K.S.A. 75-4333(b)(4) provides that it shall be a prohibited practice for a public employer or its designated representative willfully to "[d]ischarge 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, or because he or she has formed, joined or chosen to be represented by any employee

organization. A violation of (b)(4) has been found in other administrative disputes filed under PEERA. *See, e.g.,* Initial Order, Case No. 75-CAE-3-1999, Fraternal Order of Police Lodge No. 47 v. Leavenworth County Sheriff's Department December 22, 2000.

In a so-called "(b)(4)", or "discrimination" PEERA violation, the Petitioner bears the initial burden of establishing a *prima facie* showing that the employee's protected conduct was a motivating factor in an employer's taking of adverse action. Once a *prima facie* case is established, the employer can only avoid being held in violation of the prohibited practice provision by showing that the adverse action rested on the employee's unprotected conduct and that the same action would have been taken anyway. *See, e.g., Wright Line*, 251 NLRB 1083 (1980) (holding that once a prima facie case is established, the employer can avoid being held in violation of the NLRA section 8(a)(1) and (3), only by showing that the adverse action rested on the employee's unprotected conduct and that the same action would have been taken "in any event"). In the instant matter, the Employer did not take action adverse to the interests of an employee. There was no discharge or other adverse action. Petitioner complains only of the potential for adverse action. *See* Petitioner's Brief, p. 33 ("the City's unilateral imposition of the change in policy caused the employee [bargaining unit] members to be subject to potential discipline or discharge.") As such, there was no violation of K.S.A. 75-4333(b)(4) here.

ISSUE FIVE

DID THE CITY'S REFUSAL TO MEET AND CONFER REGARDING IMPLEMENTATION OF THE CHANGE IN THE FITNESS FOR DUTY EXAMINATION POLICY WAS A PROHIBITED PRACTICE BY DENYING RIGHTS ACCOMPANYING CERTIFICATION OR FORMAL RECOGNITION GRANTED IN K.S.A. 75-4328, IN VIOLATION OF K.S.A. 75-4333(B)(6).

K.S.A. 75-4333(b)(6) makes it a prohibited practice for a public employer willfully to "[d]eny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328." K.S.A. 75-4333(b)(6). K.S.A. 75-4328 provides that "[a] public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances . . .". A noted scholar opined that "[t]his prohibited practice is comparable to 'interference' under section 75-4333(b)(1) except that the right being protected is the right of the employee organization to represent employees, rather than the right of individual employees to participate in organizational activity." Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 273 (1980). Goetz notes that "[a]n example of the type of employer conduct that might be challenged under this prohibited practice would be the denial of union representation to an employee in a meeting with management." *Id.*

Petitioner urges that Respondent violated this provision of the Act's prohibited practice section because "the City's refusal to meet and confer interfered with the employee representative's right to engage in effective negotiations on mandatory issues of negotiation." Petitioner's Brief, p. 34. "Stripping the Union of its ability to negotiate by refusing to meet and confer, essentially interfered with their ability to exercise their rights as a collective bargaining [representative]" they were formally granted under K.S.A. 75-4328. *Id.* The presiding officer concurs. Respondent's actions also constituted a violation of K.S.A. 75-4333(b)(6).

CONCLUSION

To find a violation of K.S.A. 75-4333(b)(5), the object of unilateral implementation must be a "condition of employment." Here, the procedural aspects of implementation of changes in

its fitness for duty examination policy 311 is a condition of employment. Respondent violated K.S.A. 75-4333(b)(1), (b)(5) and (b)(6) when it willfully refused to meet and confer in good faith regarding these procedural and implementation aspects of changes in its fitness for duty examination section 311 policy through its unilateral action.

THEREFORE IT IS ORDERED that Respondent cease and desist making unilateral changes to conditions of employment without first meeting and conferring in good faith regarding such matters with Petitioner.

IT IS FURTHER ORDERED that Respondent cease use of its physical capacity test until it meets and confers in good faith, and if necessary, completes the statutory impasse process in good faith regarding the mechanics and procedural aspects of implementation under which unit members submit to such testing.

IT IS FURTHER ORDERED that Respondent post a copy of this order in a conspicuous location in all facilities operated by Respondent where members of the public employees' bargaining unit are employed.

IT IS SO ORDERED.

DATED this 4th day of May, 2012.

Douglas A. Hager, Presiding Officer
Public Employee Relations Board
401 SW Topeka Blvd.
Topeka, Kansas 66603
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This Initial Order of the Presiding Officer is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employer-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 May 22, 2012, addressed to: Chief Counsel Glenn H. Griffeth, Office of Legal Services, Kansas Department of Labor, 401 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

CERTIFICATE OF MAILING

I, Loyce Oliver, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 4th day of May, 2012, a true and correct copy of the above and foregoing Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

Joni J. Franklin, Attorney for Petitioner
Franklin Law Office, P.A.
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Paul W. Brown, Attorney for Respondent
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Loyce Oliver

Loyce Oliver, Office of Labor Relations