

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

Kansas Association of Public Employees)
(Petitioner))
vs.) Case No. 75-CAE-16-1988
Kansas State University)
(Respondent))
_____)

ORDER

COMES NOW on this 19th day of April, 1989,
the above-captioned matter for consideration by the Public
Employee Relations Board.

APPEARANCES

PETITIONER: KAPE appeared through Mr. Brad E. Avery, attorney
at law.

RESPONDENT: Kansas State University appears through Ms.
Dorothy L. Thompson, Associate University
Attorney,
Kansas Department of Administration appears
through Adele Ross Vine, attorney for the
Secretary.

PROCEEDINGS BEFORE THE BOARD

1. Complaint against employer filed by petitioner on
February 16, 1988.
2. Complaint submitted to respondent for an Answer on
February 17, 1988.
3. Extension of time in which to answer requested by
respondent and granted on February 23, 1988.

4. Answer and Motion to Dismiss filed by employer on March 4, 1988.

5. Employer's Answer and Motion to Dismiss sent to petitioner on March 15, 1988.

6. Petitioner's Reply to Motion to Dismiss was filed March 14, 1988.

7. Petitioner's Reply to Motion to Dismiss was sent to employer on March 18, 1988.

8. Notice of Pre-hearing conference was sent to parties on April 11, 1988.

9. Pre-hearing conference was held on May 16, 1988.

10. Proposed stipulation of fact submitted by petitioner on May 25, 1988.

11. Employer's response to petitioner's proposed stipulation of fact filed June 2, 1988.

12. Proposed stipulation of fact submitted by employer on June 3, 1988.

13. Order extending time frame established at Pre-hearing conference by 15 days to allow time to agree to stipulation of fact sent June 9, 1988.

14. Agreed to stipulation of fact submitted by the parties on June 28, 1988.

15. Supplemental Brief of Secretary of Administration to Kansas State University's Memorandum Brief submitted on July 18, 1988.

16. Employer's Amended Answer and Motion to Dismiss with memorandum filed July 18, 1988.

17. Supplemental Brief filed by petitioner on July 19, 1988.

18. Supplemental pleadings were sent to all parties on July 21, 1988.

19. Notice of time for filing rebuttal briefs sent to all parties on July 29, 1988.

20. Reply Brief filed by petitioner on August 19, 1988.

21. Plaintiff's Reply Brief was sent to employer and Department of Administration on August 22, 1988.

22. No rebuttal briefs were filed by employer or Department of Administration.

STIPULATIONS

The parties agree to the following stipulation of facts:

1. Kansas State University is a public employer by virtue of its status as a state agency, as defined in K.S.A. 75-4322(f) of the Public Employer-Employee Relations Act.

2. The Kansas Association of Public Employees (KAPE) is a recognized employee organization, certified by PERB as representing a majority of the employees in the Maintenance and Service Employees Unit, constituting an appropriate unit at Kansas State University as designated by the Public Employee Relations Board.

3. Wage/salaries is a "condition of employment" about which the public employer is required to meet and confer pursuant to the provisions of the Public Employer-Employee Relations Act. [K.S.A. 75-4322]

4. Conditions of employment about which an employer is required to meet and confer does not include public employer rights as defined by K.S.A. 75-3426. [K.S.A. 75-4330(a)]

5. Classified employees of Kansas State University are paid within the salary range adopted for the class to which his or her position is assigned.

6. Position reallocation may occur whenever the organizational structure of an agency or the duties of a position are significantly changed, or for any other reasons a position appears to be allocated incorrectly. [K.A.R. 1-4-7]

7. The appointing authority for Kansas State University has the authority to reallocate its positions.

8. On October 14, 1987, and November 4, 1987, KAPE wrote letters to Jerre Fercho, Director of Personnel Services at Kansas State University, requesting a meet and confer session to discuss "changes in the University's pay plan affecting employees covered by the contract."

9. Mr. Fercho conversed with local and state KAPE officials regarding these requests and agreed to meet with KAPE representatives to discuss what KAPE had termed "changes in the University's pay plan."

10. Informal discussion took place on December 1, 1987, but that discussion was not a "meet and confer" session as contemplated by the Public Employer-Employee Relations Act and no team of persons representing Kansas State University or the Secretary of Administration was constituted as provided by K.S.A. 75-4322(h).

11. On December 4, 1987, KAPE again wrote to Mr. Fercho saying "this is to request a meet and confer session to further discuss issues raised at our last session of December 1, 1987." In addition, the KAPE letter stated that their objective was to have KSU request reallocation of "certain positions in the Refrigeration and Air Conditioning Service Technician II and General Maintenance and Repair Technician I classes..."

12. On December 18, 1987, Mr. Fercho replied by describing the process by which employees may have the classification of their positions reviewed. In addition, he attempted to describe the appropriate purposes of meet and confer sessions and invited KAPE to submit any proposals they had for modification of and/or additions to the memorandum along with a list of potential meet and confer dates.

13. On December 23, 1987, Brad Avery, KAPE Counsel, set forth his arguments in support of KAPE's position that the allocation of specific job descriptions to job classes is a mandatory topic for meet and confer sessions.

14. On January 14, 1988, Mr. Fercho replied to those arguments, attempting to make it clear that KSU was not refusing to meet and confer in good faith concerning any conditions of

employment or grievances as set out in the Public Employer-Employee Relations Act or in the Memorandum of Agreement between KSU and KAPE.

15. On January 27, 1988, Brad Avery, KAPE Counsel, again requested a meet and confer session, this time "for the purpose of discussing your department's role in correcting what KAPE believes to be the misallocation of several University employees."

16. On February 9, 1988, Mr Fercho again replied, states that, although the allocation of individual job descriptions is not a subject on which KSU could meet and confer, the University would meet and confer to discuss "processes and procedures involved in the allocation of positions to classes within the pay plan."

17. KAPE's response to the University's interpretation of its request as a request to discuss "processes and procedures involved in the allocation of positions to classes within the pay plan" was the filing of this prohibited practice charge.

CONCLUSIONS OF LAW AND DISCUSSION

The issue before the Public Employee Relations Board is whether the decision to reallocate an individual position to a particular class is a mandatory subject on which the employer and the employee organization must meet and confer. It is the employer's position that the decision to reallocate particular positions to job classes is a right reserved for the public

employer under K.S.A. 75-4326 and is thus neither mandatorily nor legally negotiable. The Petitioner contends that the reallocation process, as defined by K.A.R. 1-2-69, can be considered a wage or salary issue and thus mandatorily negotiable under K.S.A. 75-4321(t) of the Public Employer Employee Relations Act.

If mandatorily negotiable, then the employer must meet and confer with the recognized employee organization regarding the issue of reallocation of a particular position, and to refuse could constitute a prohibited practice. By contrast, if the issue is not mandatorily negotiable, no such duty is imposed upon the employer.

"Meet and confer" is defined in K.S.A. 75-4322(m):

"Meet and confer in good faith" is the 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)

In addition, K.S.A. 75-4327(b) describes the "meet and confer" obligation as follows:

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

K.S.A. 75-4327(b) requires a public employer to meet and confer concerning "conditions of employment":

"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 provided in this Act, and may enter into a memorandum of agreement with such recognized employee organization." (emphasis added)

"Conditions of employment" on which the employer must meet and confer are defined in K.S.A. 75-4322(t):

"Conditions of employment" means salaries, wages, hours or work, vacation allowances, sick and jury 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."

However, the obligation to meet and confer concerning conditions of employment may not override the rights of the public employer as guaranteed by K.S.A. 75-4326 that:

"Nothing in this Act is intended to circumscribe or modify the existing right of a public employer to:

- (a) direct the work of its employees;
- (b) hire, promote, demote, transfer, assign and retain employees in positions within the public agency;
- (c) suspend or discharge employees for proper cause;
- (d) maintain the efficiency of governmental operations;
- (e) relieve employees from duties because of lack of work or for other legitimate reasons;

(f) take actions as may be necessary to carry out the mission of the agency in emergencies; and
(g) determine the methods, means and personnel by which operations are to be carried on."

The definition of "conditions of employment" in K.S.A. 75-4322(t) does not specifically include the reallocation of an individual position classification. Therefore to determine whether a topic not expressly listed in K.S.A. 75-4322(t) should be considered a mandatory topic triggering the meet and confer requirement, the following test is to be applied:

"If an item is significantly related to an express condition of employment, and if negotiating the item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable."

Kansas Board of Regents v. Pittsburg State University Chapter of Kansas National Educational Association, 233 Kan. 816 (1983).

Both conditions must be satisfied before the topic becomes mandatorily negotiable.

Wages and salaries are certainly conditions of employment. There is no question that an employee's job class is ultimately determinative of the salary to be paid, and that a change in job class could result in an increase or decrease in salary. As such, it would appear that position reallocation is significantly related to a condition of employment so as to satisfy the first prong of the mandatory negotiability test.

It is apparently the position of the petitioner that since certain employees are performing duties outside their position descriptions, those positions should be reallocated to one whose duties correspond to those duties actually being performed. The subsequent reallocation will result in an increase in wages or salaries. Since the reallocation could affect wages or salaries and wages or salaries are conditions of employment, the employer is required to meet and confer regarding the reallocation. Petitioner, therefore, would have the focus of the inquiry to be on the effect of the action upon wages or salaries. Respondent's arguments would place the focus on the duties of the employee.

In this case, the employees are allegedly performing duties outside their position description and job class. The employer has two options to rectify the problem: 1. Upgrade the position to a job class that includes the duties being performed; or 2. reassign those duties outside the position description to other employees in the appropriate job class such that the remaining duties conform to the position description. In either alternative, the focus is upon the duties to be performed by the employee rather than the wage or salary he/she is to receive, although wages or salary will be ultimately impacted by either alternative. Therefore, the situation wherein an individual employee is unsatisfied with their position allocation is more intrinsically connected with the assignment of duties rather than wages, a condition of employment.

Petitioner, in its brief, concedes "that PEERA does not allow it to request meet and confer regarding reduction of work load or elimination of duties so that actual duties are consistent with the position description. " As noted above, such represents one of the alternatives available to the employer when it is alleged that the duties of an employee do not match their position description. Also, as noted above, the decision to eliminate duties will impact upon wages or salaries. If an employer is not required to meet and confer if it intends to eliminate duties, how can it be required to meet and confer if instead it decides to upgrade the position? Both relate to duties to be performed, and both impact upon wages or salaries. The positions of petitioner are irreconcilable. The first prong of the test is not satisfied.

However, even if it were determined that reallocation was significantly related to an express condition of employment as to satisfy the first part of the Pittsburg State test, it fails the second prong. K.S.A. 75-4326(b) and (d) grant the employer the right to "hire, promote, demote, transfer, assign, and retain employees in positions within the public agency," and to "maintain the efficiency of governmental operations." (emphasis added). PEERA protects the employer from being forced to negotiate which duties are to be performed by which employee. Such equally applies to the judgement that a particular position description should be assigned to a particular class or whether duties will be eliminated to conform to a position description or the position reallocated to a different job class.

To accept petitioner's interpretation would require an employer to meet and confer at anytime an employee believes their position description is inaccurate or the position is not assigned to the appropriate class because duties outside the position description are being performed. To meet and confer on individual requests for reallocation will unduly interfere with management's right and statutory responsibility to establish job classifications and assign individual positions to a class. Petitioner's position is unreasonable and would greatly impair the efficiency of governmental operations as it would require the employer to duplicate activities already provided for by law and regulation. PEERA allows the employer to maintain the efficiency of governmental operation with circumscription or modification as petitioner concedes.

It must be noted that the employee is not deprived of a means to address a problem of with his or her job description. Mechanisms currently are in place for employees to have their positions reviewed for reallocation purposes. K.A.R. 1-4-7 provides, in pertinent part, as follows:

(a) Whenever the organizational structure of an agency or the duties of a position are significantly changed, or for any other reason a position appears to be allocated incorrectly, the director shall, upon his or her own initiative, or upon the request of an employee or appointing authority, review or have reviewed the affected position. After conferring with the appointing authority, the director may reallocate the position to a different class or may retain the existing allocation...

(b) Unless otherwise prescribed by the secretary of administration, an appointing authority who has been granted authority to allocate positions shall have authority to reallocate the same positions.

Additionally, K.A.R. 1-4-6 states as follows:

Each position shall be reviewed at least annually, to ascertain whether the duties being performed conform to the position description and whether the position is correctly allocated. Review shall be made in a manner as prescribed by the director. Reviews shall be conducted either by the agency, or the division of personnel services, or jointly. Accomplishment of the review shall be indicated on the position description by the date, and the initials of the employee, the supervisor, and the personnel specialist (if any) involved in the review. If a position has not been reviewed in the twelve month period preceding the date a performance evaluation is made of the incumbent, the position shall be reviewed in conjunction with the evaluation.

Therefore, any employee who feels that their duties have changed and that the position description no longer reflects the work actually performed, may have the position reviewed upon request or may wait for the annual review.

It should also be pointed out that a decision regarding the class standing of individual positions is reviewable by the courts as the final action of the agency under the Judicial Review Act. K.S.A. 77-602 et seq. and amendments thereto.

Such procedures insure that employees are properly paid within the class/position system and there is nothing that would prevent the employee the opportunity of representation in determining whether he remains properly classified.

That is not to say, however, that the process or procedure by which classifications are reallocated could not be a proper subject for meet and confer sessions.

The reallocation of positions topic, having failed to satisfy the two prong test set forth in Pittsburg, Respondent need not meet and confer on individual classification requests, as asserted by Petitioner, and that there has been no violation of K.S.A. 75-4333(b)(5). Additionally, without establishing that Respondent has violated K.S.A. 75-4333(b)(5), there is no violation of K.S.A. 75-4333(b)(6).

IT IS THEREFORE THE RECOMMENDATION of the Hearing examiner that Petitioner's complaint be dismissed.

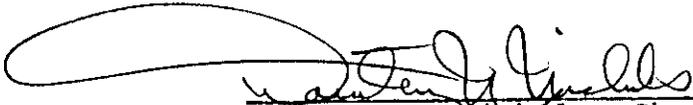
It is so recommended this 29th day of March, 1989.



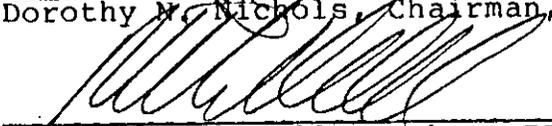
Monty R. Bertelli
Hearing Examiner

It is the decision of the Public Employee Relations Board that the recommendation of the Hearing Examiner be adopted as the final order of the Board.

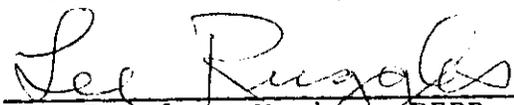
IT IS SO ORDERED THIS 19th DAY OF April,
1989, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.



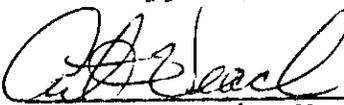
Dorothy W. Nichols, Chairman, PERB



Michael C. Cavell, Member, PERB



Lee Ruggles, Member, PERB



Art J. Veach, Member, PERB



Merrill Werts, Member, PERB