BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

FRATERNAL ORDER OF POLICE LODGE NO. 40, Petitioner/Complainant,	)	
and	)	Case Nos. 75-CAE-3-2006 and 75-CAE-10-2006
UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS AND WYANDOTTE COUNTY SHERIFF'S DEPARTMENT	)	
Respondent/Employer.	)	

INITIAL ORDER OF THE PRESIDING OFFICER
Pursuant to K.S.A. 77-526

NOW on this 9th day of April, 2009, the above captioned prohibited practice charges came on for decision pursuant to K.S.A. 75-4321 *et seq*. and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner Fraternal Order of Police, Lodge No. 40 appeared through counsel, Steve A. J. Bukaty, Attorney at Law, Steve A. J. Bukaty, Chartered. Respondent, Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department, appeared through its attorney, Mr. Ryan B. Denk, Attorney at Law, McAnany, Van Cleave & Phillips, P.A.

PROCEEDINGS

This matter comes before presiding officer Douglas A. Hager, designee of the Public Employee Relations Board, (hereinafter the "Board"), pursuant to two consolidated prohibited practice complaints filed by Petitioner employee organization Fraternal Order of Police, Lodge No. 40, (hereinafter "Petitioner" or "Employee

Organization"), against employer Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department (hereinafter "Employer" or "Respondent").

The first of the complaints filed with the Board was styled as case number 75-CAE-3-2006 and it raised four counts. *See* Complaint Against Employer, 75-CAE-3-2006. Exclusive of a charge that has since been dismissed, Count One alleges that Petitioner's President, Deputy Chuck Morris, and its Immediate Past President, Deputy Ronald Woolley, were discharged in retaliation for exercising rights protected by the Public Employer-Employee Relations Act, (hereinafter "PEERA" or the "Act"), in violation of K.S.A. 75-4333(b)(1), (2), (3) and (4). Count Two asserts that Respondent violated K.S.A. 75-4333(b)(1), (2), (5) and (6) when it refused to negotiate with the duly-elected President and Vice-President of the Employee Organization following their termination. Count Three alleges a violation of K.S.A. 75-4333(b)(1) and (3) by increasing the discipline given to bargaining unit member Deputy Les Still in retaliation for filing a grievance. Count Four alleges that by modifying the work schedule of bargaining unit members, imposing a Sergeant pre-test and by implementing wholesale changes in the work schedules and job bidding procedures, the Employer committed violations of K.S.A. 75-4333(b)(1) and (5). *Id.* Relief sought by the Petitioner in connection with the foregoing four counts of violations included findings that the Employer violated the Act as alleged, customary "posting" of the order, including admissions of violations of the Act and forward-looking pledges, for example, not to retaliate against employees for engaging in protected conduct, and restorations of the *status quo ante*, including, where appropriate, back pay and benefits, rescinding its

repudiation of material provisions of the parties' collective bargaining agreement, and so forth. *See* Complaint Against Employer, 75-CAE-3-2006, Attachment, pp. 3-6. Of critical importance with regard specifically to Count Two of its petition, the Employee Organization requested that the Board grant it the forward-looking relief of "prohibit[ing] the Employer from refusing to meet and confer in the future with any duly-designated representative of the Employee Organization". *Id.*, p. 4.

Petitioner's second complaint was styled before the Board as 75-CAE-10-2006. It alleged that the Employer violated K.S.A. 75-4333(b)(1), (2), (3), (5) and (6) by "refusing to permit the Union representative to speak on behalf of a bargaining unit member during a grievance hearing" and by "repudiating a material provision of the collective bargaining agreement". *See* Complaint Against Employer, 75-CAE-10-2006. For relief from this complaint, Petitioner sought an order finding that the Employer's conduct violated the Act, customary "posting" of the order, and restoration of the *status quo ante* by negation of discipline against the aggrieved bargaining unit member and removal of any adverse references to same from the member's personnel file. *Id.*

Pursuant to a motion from Petitioner, *see* Motion to Consolidate, April 6, 2006, the presiding officer consolidated these matters. *See* Order of Consolidation, April 25, 2006. Following discovery and other pre-hearing proceedings, including a motion for summary judgment which was denied and will be addressed in more detail later in this order, the matters came on for hearing. The parties presented evidence before the presiding officer over a period of ten days of hearings. Ten volumes of hearings transcripts exceeding 2,750 pages, transcripts of the voluminous deposition testimony of thirteen witnesses and numerous pages of documentary exhibits have been thoroughly

reviewed in reaching the findings herein contained. Briefing has been submitted for a considerable time. After researching applicable law and the PERB administrative decision database, as well as NLRB and other-jurisdictional administrative and judicial cases, the parties' written arguments were studiously reviewed and thoroughly considered before reaching the conclusions expressed herein.

MOTION FOR SUMMARY JUDGMENT

In seeking dismissal of Counts One and Three from the complaint docketed as case number 75-CAE-3-2006 by its Motion for Summary Judgment, Respondent averred that "the collective bargaining agreement between the parties contains an election of remedies provision which dictates that an employee may either pursue a grievance through the grievance procedure . . . or pursue a prohibited practice charge, but . . . not . . . both." Memorandum in Support of Motion for Summary Judgment, 75-CAE-3-2006, p. 2. In view that the terminations of Deputies Morris and Woolley, and the discipline of Deputy Still were grieved pursuant to the parties' negotiated agreement, Respondent contends, Petitioner is barred from seeking further relief as to Counts One and Three through these prohibited practice proceedings before the Board. *Id.*

Respondent seeks summary judgment on Count Two on the basis that the complaint contained therein is moot. Memorandum in Support of Motion for Summary Judgment, 75-CAE-3-2006, p. 2. According to Respondent, upon termination of bargaining representative President Deputy Chuck Morris and the bargaining representative's vice-president, the Employer refused to bargain with them or in their presence. *Id.* The Employer offered to bargain with then-current unit members, with registered business agents or with Petitioner's legal counsel. *Id.* Soon thereafter, Deputy

Morris and his vice-president registered as bargaining agents and the parties resumed negotiations. *Id.*, p. 3. "As the parties have continued to negotiate, any determination as to whether the Employer's refusal to bargain with terminated members of the bargaining unit would constitute a ruling upon a moot question." *Id.*

The parties' briefing relative to the motion was extensive. The parties agree that "summary judgment is appropriate when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law." *See* Memorandum in Support of Motion for Summary Judgment, 75-CAE-3-2006, p. 12 (reciting the stated standard for summary judgment); Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, 75-CAE-3-2006, p. 9 (reciting the same standard for summary judgment and citing for authority the same Kansas case relied upon by Respondent). Most of the facts relative to these charges were not disputed by the parties. *See* Memorandum in Support of Motion for Summary Judgment, 75-CAE-3-2006, pp. 3-11; Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, 75-CAE-3-2006, pp. 4-6. Petitioner, however, asserted that additional facts, beyond those supplied by Respondent in its memorandum brief in support of its motion for summary judgment, should be considered and that development of a full record was necessary "in order to fully explore key motive, intent and credibility issues." Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, 75-CAE-3-2006, p. 10.

Each of Respondent's grounds for summary judgment, however, can be addressed as questions of law. With regard to Petitioner's contention that Counts One and Three of the petition are barred by the election of remedies clause in the parties' Memorandum of

Understanding, the presiding officer disagrees.

The parties' MOU provides in Section 11.1 that:

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

Respondent correctly notes that this presiding officer and the Board have had a previous opportunity to examine this issue, with an identical election of remedies provision, *see* Memorandum in Support of Motion for Summary Judgment, 75-CAE-3-2006, p. 13. However, the presiding officer notes that the previous consideration of this issue came within the context of a significantly different set of facts and circumstances. In that previous case, the Petitioner, Public Service Employees Union Local 1132, filed a prohibited practice charge against the Unified Government of Wyandotte County/Kansas City, alleging that the Unified Government, as employer, failed to meet and confer in good faith by unilaterally reclassifying a position included in the employee bargaining unit, that of a Building and Grounds Specialist, to the position of Groundskeeper II, while simultaneously reassigning part of the tasks performed by the Building and Grounds Specialist position to a non-bargaining unit employee. *See* Initial Order of the Presiding Officer, 75-CAE-7-2003, Public Service Employees Union Local 1132 v. Unified Government of Wyandotte County, Kansas, December 20, 2004, p. 2 (hereinafter "PSEU Local 1132 v. UGWC").

In addressing a threshold question, whether an employer's actions of reclassifying a bargaining unit position to become a different position, while simultaneously

reassigning some of the duties previously performed by that position to a position outside of the bargaining unit are mandatory subjects of meet and confer negotiations, the presiding officer concluded that such did in fact constitute a mandatory subject under the statutory meet and confer process. After researching the question whether pursuit of a grievance under a contractual "election of remedies" provision governing same constitutes a waiver of the right to bring a prohibited practice, this officer ruled that:

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

Id., pp. 43-44 (emphasis added).

By its strict terms, even if such a prior administrative ruling constituted a binding precedent, which of course, it does not,[1] the previous decision recited above is inapplicable to the instant facts. As noted at Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, p. 3, the grievance procedures conducted pursuant to contract were initiated by the affected individuals, Deputy Morris and Deputy Still, not by the party filing this complaint, the bargaining unit representative FOP. Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, pp. 26-27. As such, it cannot be said that the Employee Organization FOP Lodge No. 40 waived its right to proceed before this Board by invoking the contractual grievance mechanism. In the matter relied upon by movant Employer, the bargaining

[1]"The doctrine of *stare decisis* is inapplicable to decisions of administrative tribunals; there is simply no rule that an administrative agency cannot refuse to follow a ruling of its predecessor in a different case." In re Genstler Eye Center & Clinic/Genstler Medical Care Facility, 192 P.3d 666, Kan. App., Sept. 26, 2008 (No. 98163).

representative, by action of its President, initiated the contractual grievance process. PSEU Local 1132 v. UGWC, pp. 17, 18, 30-33.

More importantly, as noted in the previous order's conclusion, italicized above, it was within the PERB's discretion whether to decline jurisdiction in such an instance and, in that matter, since the claims were predominantly contractual, not statutory, it was an appropriate exercise of PERB's discretion to decline jurisdiction. For an extended discussion of this critical distinction, *see generally*, Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, pp. 10-17. The importance of this distinction will become clearer after the discussion that follows.

As noted in the previous order, the question to be answered here, generally, is one of whether the Public Employee Relations Board should defer to a memorandum of agreement grievance procedure or whether it should adjudicate such disputes in furtherance of its statutory prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334. PSEU Local 1132 v. UGWC, p. 42 (*citing to* Initial Order of the Presiding Officer, International Association of Fire Fighters v. City of Junction City, Kansas, 75-CAE-4-1994, p. 43 (hereinafter "IAFF v. Junction City, Kansas")). While this presiding officer's prior PSEU Local 1132 v. UGWC decision cited to a previous PERB decision containing an extensive discussion of the issue, it did not elaborate on the reasoning, policy or standards to be gleaned from that decision. A more-detailed examination of that decision, one that was adopted by the Public Employee Relations Board in 1994, will illustrate persuasive policy reasons and analytical standards which compel the denial of Respondent's summary judgment motion's election of remedies argument.

The Board, through its designee, Presiding Officer Monty R. Bertelli, exhaustively researched the subject of state and federal labor relations boards' discretionary deferral to a contractually-agreed mechanism culminating in binding arbitration, for resolving disputes that could be alleged either to violate unfair labor (prohibited) practice provisions of the applicable labor relations act, or to constitute violations of contract subject to the parties' agreed contractual grievance mechanism. Nothing will be gained by attempting to paraphrase Bertelli's lengthy and well-reasoned conclusions. Accordingly, the presiding officer will reproduce them here in their entirety, including footnotes, as they first appeared in Presiding Officer Bertelli's Initial Order in PERB case number 75-CAE-4-1994, International Association of Fire Fighters v. City of Junction City, Kansas:

> "The threshold issue to be addressed is the propriety of PERB adoption of a deferral policy fashioned after that espoused by the NLRB in Collyer Insulated Wire, 77 LRRM 1931 (1971). The initial focus is whether the Public Employee Relations Board ("PERB") has the statutory authority to refuse to consider unfair labor practice charges. This will entail a consideration of the federal rationale in adopting the Collyer policy, and an examination of PEERA to ascertain whether the federal rationale is applicable to the Kansas labor law structure.
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> **Federal Consideration of Deferral**
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> The Collyer deferral doctrine had its origin in the National Labor Relations Board's resolution of a dilemma presented by two expressed, and potentially conflicting, Congressional policies. The first of these statutory policies is the National Labor Relations Act's ("NLRA's") directive that the NLRB should have exclusive jurisdiction to prevent unfair labor practices in the private sector. The second statutory policy is that of the Labor Management Relations Act ("LMRA"), 29 U.S.C., §§ 141 et seq., which favors the fullest use of collect bargaining and the arbitral process to promote voluntary resolution of private sector labor disputes. The result of the NLRB's effort to resolve the dilemma presented by opposing expressions of Congressional intent has been a policy favoring discretionary deferral authority in both post-award, or Spielberg Mfg. Co., and pre-arbitral, or Collyer Insulated Wire, deferral situations.
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> The doctrine of discretionary deferral takes two forms; pre-arbitral deferral first adopted in Collyer Insulated Wire, 77 LRRM 1931 (1971), and post-award deferral

addressed in Spielberg Mfg. Co., 36 LRRM 1152 (1955). In as much as the doctrine of discretionary pre-arbitral deferral, under consideration here, emanated from the decisional rationale and authority supporting post-award deferral, the Spielberg doctrine must be understood.[2]

Post Award Deferral

In Spielberg the parties agreed to submit their dispute to contractual binding arbitration. The arbitration panel found in favor of the employer and the union filed an unfair labor practice complaint with the National Labor Relations Board ("NLRB") covering the same dispute. The NLRB upheld the arbitrator's award holding that it was not legally bound by the private tribunal's resolution pursuant to § 10(a) of the NLRA, but concluded that it would not upset it where:

> "* * * the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desired objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award."

The Spielberg doctrine was elaborated upon and clearly reaffirmed in International Harvester Co., 51 LRRM 1155, 1157 (1962). The Supreme Court, in Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964), approved the deferral doctrine, quoting with approval the following statement from International Harvester:

> "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
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> "The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective."

In Raytheon Co., 52 LRRM 1129 (1963), the NLRB supplemented Spielberg, by requiring that the unfair labor practice charge cognizable under the parties' agreement have been presented to, as well as considered by, the arbitral tribunal before post-award deferral would be proper.

In summary, it has been determined that the NLRB is empowered with

[2] Since the issue of post-award deferral is not presented in this case, it need not be extensively discussed. Only a summary of the Spielberg policy is discussed to give the reader an understanding of the reasons underlying the development of this doctrine by the NLRB.

discretion to abstain from entertaining an unfair labor practice charge arguably covered by the parties' binding collective bargaining agreement, and to defer to the arbitral tribunal's award where the charge has been properly decided through private arbitration.

Spielberg is intended to promote economy of litigation. It is based on the policy that a party, having had the opportunity fairly to litigate an issue in one forum and lost, ought not to be permitted to try the same issue in another forum. As stated by the NLRB in The Timken Roller Bearing Co., 18 LRRM 1370 (1946):

> "[I]t would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits. In the interest of ending litigation and otherwise effectuating the policies of the Act, we shall dismiss that portion of the complaint relating to the [arbitrator's award]."

Pre-Arbitral Deferral

The seminal decision on pre-arbitral deferral is Collyer Insulated Wire, 77 LRRM 1931 (1971). It represents, what the NLRB called, *"an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress's grant to the Board of exclusive jurisdiction to prevent unfair labor practices."* Id., at 841.

In Collyer, the [employer] allegedly committed an unfair labor practice by implementing unilateral changes in working conditions. The employer maintained the changes were authorized by the contract, and the dispute should, therefore, be resolved through the parties' contractually binding grievance arbitration machinery. The NLRB concluded this was *"essentially a dispute over the terms and meaning of the contract."* The breadth of the arbitration provision satisfied the majority that *"the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes."* Id. at 839. Noting that *"the dispute between these parties is the very stuff of labor contract arbitration"*, the NLRB emphasized that *"[t]he competence of a mutually selected arbitrator to decide the issue and fashion an appropriate remedy, if needed, can no longer be gainsaid."* Id. at 842. Sensitive to the dissent's objection that deferral to private arbitral consideration would strip the parties of statutory rights and henceforth mandate private compulsory arbitration of otherwise statutory disputes, the NLRB majority responded:

> "We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement." Id. at 842.

The NLRB concluded that the threshold issue of whether to defer arises *"only when a set of facts may present not only an alleged violation of the Act but also an*

alleged breach of the collective-bargaining agreement subject to arbitration." Id. at 841. Elaborating on those factors favoring pre-arbitral deferral, the majority of the NLRB observed that:

> "[t]he contract and its meaning * * * lie at the center of [the] dispute, [such that] * * * the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes * * * under the contractually prescribed procedure." Id. at 842.

> "We conclude that the Board is vested with authority to withhold its processes in this case, and that the contract here made available a quick and fair means for the resolution of this dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred." Id. at 839.

The NLRB announced that, per Spielberg, it would reserve jurisdiction pending arbitration to *"guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law."* Id. at 843.

The legal basis for the NLRB's adoption of the deferral policy was its finding in Collyer that the federal labor laws intended arbitration to be, as far as practicable, the means of resolving labor disputes. The NLRB decided that in such a situation federal policy favors use of only one forum, and the preferred forum for resolution of labor contract issues is arbitration. [3]

The U.S. Supreme Court, in dictum, indicated its approval of the deferral doctrine when Mr. Justice Brennan remarked in William E. Arnold Co. v.

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[3]The NLRB quoted its previous decision in Jos. Schlitz Brewing Co., 70 LRRM 1972 (1969):

> "Thus we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union, and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that arbitral interpretation of the contract will resolve both the unfair labor practice issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an unusually long established and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and significantly, the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which, although it firmly believed in good faith in its right under the contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action. Accordingly, under the principles above stated, and the persuasive facts in this case, we believe that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established." Collyer Insulated Wire, 77 LRRM 1931, 1936 (1971).

Carpenters District Council of Jacksonville, 417 U.S. 12, 16-17 (1974):

> "Indeed, Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure. * * * The Board said in Collyer, 'an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. * * * We believe it to be consistent with the fundamental objectives of Federal law to require the parties * * * to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.' * * * The Board's position harmonizes with Congress' articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is * * * the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.'"

In summary, the NLRB has exercised discretionary deferral both prior to and following the decision of the parties' arbitral tribunal. Spielberg, and its progeny generally indicate that the Board will defer to a prior arbitral award, provided:

(1) the unfair labor practice dispute cognizable under the parties' collective bargaining agreement was presented to and considered by the arbitral tribunal;
(2) the arbitral proceedings were fair and regular;
(3) all parties to the arbitral proceedings agreed to be bound thereby; and
(4) the decision of the arbitral tribunal was not clearly repugnant to the purposes and the policies of the NLRA.

Collyer and its progeny generally indicate that the NLRB will defer an alleged unfair labor practice charge to the parties' binding grievance-arbitration procedures memorialized in their collective bargaining agreement, subject to Spielberg post-award review, provided:

(1) a stable collective bargaining relationship exists between the parties;
(2) the respondent is willing to resort to arbitration under a binding arbitration clause broad enough to embrace the dispute; and
(3) the contract and its meaning are at the center of the dispute.[4]

State Consideration of Deferral

Public employee relations boards from other states have been reluctant to embrace the Collyer-Spielberg doctrine dictating automatic deferral, and the state appellate courts have generally held that a state labor agency is not required to defer to contractual grievance arbitration procedures where the state law counterpart of an unfair labor practice is alleged. Of particular interest is Fasi v. State Public Employment Rel. Bd., 591 P.2d 113 (Hawaii 1979). There the union filed a

[4] For a discussion of cases representing the NLRB's development of these two doctrines, see generally, Charles J. Morris, The Developing Labor Law, Chap. 18 (hereinafter "Morris").

grievance and pursued it through the first three of four steps. The employer then sought a declaratory ruling from the PERB that its actions were lawful. The PERB found it had jurisdiction but on appeal the circuit court concluded:

> "[T]he parties were bound by the collective bargaining agreement to submit the dispute to an arbitrator, who should first determine that he has jurisdiction, and if he should so determine, should proceed to decide the matter on its merits. . . ."

The Supreme Court of Hawaii reversed, recognizing the PERB's power to refuse to defer to contractual grievance arbitration mechanisms in the unfair labor practice case. Neither the existence of applicable arbitration processes, nor the inevitability of a measure of contractual interpretation by the PERB, was sufficient to deter the court from holding that:

> ". . . [The statute] empowers the Board, upon complaints by employers, employees and employee organizations, to 'take such action with respect thereto as it deems necessary and proper.' Since the meaning and effect of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between [the employer] and [the union] was a question which related to an action which the Board might take in the exercise of its powers. The applicability of [the unfair practice statute] to the collective bargaining agreement is therefore a question which was properly placed before the Board by the petition."

Thus, construing a statute no more conclusive on the issue than the Kansas PEERA, the Supreme Court of Hawaii held that Hawaii's PERB is not required to defer its unfair labor practice jurisdiction to pending grievance arbitration proceedings. *See also,* PSEA v. Alaska, 135 LRRM 3137, 3144 (AK 1990)[Presence of grievance and arbitration provisions in the PSEA-State contract neither deprived PSEA of its statutory right to press its unfair practice claim before the Board, nor deprived the Agency of jurisdiction to hear that claim].

Some state courts have gone further, holding that a state labor agency must not defer to arbitration. In Portland Ass'n of Teachers v. School Dist. No. 1, 555 P.2d 943 (Or.App. 1976) the Oregon Employment Relations Board had deferred to an applicable, bargained-for grievance procedure, holding that whether the claim asserted could be grieved under the contract had to be determined by an arbitrator in the first instance. The appellate court reversed, holding that the Board's statutory mandate required it to investigate and decide unfair labor practice cases:

> "The initial issue is whether [the state Board] had a duty to determine if [the union's] complaint constituted a grievance under the agreement. The resolution of this issue turns upon the scope of [the Board's] duties as defined by . . . the statute which prescribes the procedures to be followed by the agency. Upon the receipt of an unfair labor practice complaint, [the Board] is required to first investigate the complaint to determine if a hearing on the complaint is warranted. . . . After a hearing, [the Board] must then determine whether any person named in the complaint was engaged in or is engaging in any unfair labor practice charged in the complaint. . . . These requirements as applied to this case can only mean that [the Board] had to determine whether the District was required by the terms of the professional agreement with [the Union] to process [the Union's] complaint as a grievance. . . . It necessarily follows that in order to so determine, [the Board] was required

> to look to the professional agreement's definition of grievable matters."

Similarly, in Detroit Fire Fighters v. City of Detroit, 293 N.W.2d 278 (Mich. 1980), the court, interpreting a statute which did not directly address deferral, held that the Michigan Employment Relations Commission could not, upon being presented with allegations of unfair labor practices by a public employer, defer hearing of those charges until after private arbitration, even though the subject matter of the alleged unfair practices was arguably covered by the collective bargaining agreement. In so holding, the court stated:

> "[O]ur legislature has determined that our state's policy is best served when public employment disputes, implicating statutory rights, are resolved under a system which provides a significant procedural, and appellate review, protection."

This holding was reaffirmed in Bay City School Dist. v. Bay City Educ. Ass'n, Inc., 390 N.W.2d 159, 165 (Mich. 1986), but the court provided some discretion to the PERB by stating, *"[t]he disputes that could not be deferred and delegated to arbitration were statutory claims."* Id., at p. 164.

The courts of Pennsylvania have reached a similar result. The Pennsylvania Supreme Court, addressing the issue of deferral in Hollinger v. Pa. Dept. of Public Welfare, 94 LRRM 2170, 2173 (1976), concluded:

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

Later, in Pennsylvania Labor Relations Bd. v. General Braddock Area School Dist., 380 A.2d 946 (Pa. 1977), the court reaffirmed its position:

> "[W]here a party seeks redress of an unfair labor practice, 'jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice, is in the [Pennsylvania Labor Relations Board] and nowhere else.' We cannot, therefore, conclude that the PLRB is powerless to investigate charges of unfair labor practices merely because a collective bargaining agreement exists under which grievance arbitration is available for the determination of issues similar to those upon which the charges are based. Nor, on the facts here, can we find error in the common pleas court's affirmance of the PLRB's refusal to defer to arbitration." *See also* Philadelphia Hous. Auth. v. Commonwealth, Pa. Labor Rel. Bd., 461 A.2d 649 (Pa. 1983).

While the Kansas appellate courts have not addressed the issue of deferral, in In the Matter of Diane Marie Taylor, Complainant v. Unified School District #501, Topeka, Kansas, Shawnee County District Court Judge James M. MacNish, Jr. addressed the jurisdiction issue in response to a Motion for Reconsideration in Case No. 81-CV-1137. In his Memorandum Decision and order dated October 17, 1985 Judge MacNish stated:

> "An arbitrator has the power to rule on matters concerning the interpretation and application of a professional agreement. Diane Taylor claimed her contract was violated by the Board's

> anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under 72-5430. That power is given to the Secretary of Human Resources under K.S.A. 72-5430(a)."

PEERA Deferral

Statutory Considerations

The NLRB's finding that federal law grants pre-eminence to arbitration rests on a three-part construct: (1) many labor disputes are resolvable in arbitration as well as in NLRB proceedings; (2) the NLRB's exercise of jurisdiction over cases that could be resolved in either forum discourages use of arbitration; and (3) national policy prefers resolution of such disputes in arbitration rather than by the NLRB. If the same construct can be built under PEERA, in the absence of contrary statutory language, there exists a sound foundation for the PERB to promulgate a Collyer-like automatic deferral policy.

The first two parts of the NLRB's rationale can be accepted as valid under PEERA with little hesitation. First, many disputes cognizable as unfair labor practices under PEERA are resolvable in arbitration. The second part is likewise satisfied. It is a reasonable assumption that some of those who file charges would not pursue arbitration if PERB remains willing to adjudicate their disputes. As the NLRB reasoned in Consolidated Aircraft Corp., 12 LRRM 44 (1943):

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

Meeting the third part of the NLRB's construct is not as simple. The NLRB based its deferral policy on a statutory provision that has no analogue in PEERA, i.e. the Taft-Hartley Act's declaration that "*[f]inal adjustment by a method agreed upon by the parties [arbitration] is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.*" 29 U.S.C. § 203(d). Although K.S.A. 75-4330(b) provides the parties may include a grievance procedure in a memorandum of agreement,[5]

[5] K.S.A. 75-4330(b) states:

> "Such memorandum agreement may contain a grievance procedure and may provide for the impartial arbitration of any disputes that arise on the interpretation of the memorandum agreement. Such arbitration shall be advisory or final and binding, as determined by the agreement, and may provide for the use of a fact-finding board. The public employee

such procedures are not required, and there is nothing in PEERA that gives arbitration the pre-eminence that section 203(d) of the LMRA vests it with under federal law.

At the same time, the Kansas Legislature gave PERB concurrent jurisdiction over disputes that are resolvable in arbitration. Two provisions of PEERA govern the duty of the PERB to adjudicate prohibited practice charges. K.S.A. 75-4323(d)(3) states that the PERB may:

> "Make, amend and rescind, from time to time, rules and regulations, and to exercise such powers, as may be appropriate to effectuate the purposes and provisions of this act."

Another provision, K.S.A. 75-4323(d)(1), provides, in part that the PERB may:

> "Establish procedures for prevention of improper public employer and employee practices as provided in K.S.A. 75-4333, . . ."

Finally, K.S.A. 75-4334[6] provides:

1) Any controversy concerning prohibited practices may be submitted to PERB;

2) Following the filing of the complaint and the answer, a hearing will promptly be held to take evidence on the complaint;

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relations board is authorized to establish rules for procedure of arbitration in the event the agreement has not established such rules. In the absence of arbitrary and capricious rulings by the fact-finding board during arbitration, the decision of that board shall be final. Appeals shall be taken in accordance with the provision of K.S.A. 60-2101."

[6] K.S.A. 75-4334(a) provides:

> "Any controversy concerning prohibited practices may be submitted to the PERB. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six (6) months of the date of such alleged practice by service upon it by the board of a written notice, together with a copy of the charges. The accused party shall have seven (7) days within which to serve a written answer to such charges, unless the board determines an emergency exists and requires the accused party to serve a written answer to such charges within twenty-four (24) hours of their receipt. A strike or lockout shall be construed to be an emergency. The board's hearing will be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required. The board may use its rule-making power, as provided in K.S.A. 75-4323, to make any procedural rules it deems necessary to carry on this function.
> "(b) The board shall state its findings of facts upon all the testimony and shall either dismiss the complaint or determine that a prohibited practice has been or is being committed. If the board finds that the party accused has committed or is committing a prohibited practice, the board shall make findings as authorized by this act and shall file the same in the proceedings. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the district court, in the judicial district where all of the major geographic area of the public employer is located, by filing in such court a petition praying that the order of the board be modified or set aside, . . ."

3) PERB is then required to make findings of fact, and to either dismiss the complaint or determine that a prohibited practice has been or is being committed;

4) If a prohibited practice is found, PERB shall file the same in the proceeding and grant or deny in whole or in part the relief sought by the complainant; and

5) PERB can file petitions in district court to enforce its orders.

The route of PERB relief of prohibited practices, like the route of arbitration relief, is one of the procedures designed to protect the rights guaranteed by PEERA and thereby to achieve the ultimate goal of preventing unresolved disputes from disrupting the supply of public services.[7] Neither is predominant. The foregoing analysis of PEERA does not reveal the clear preference for arbitration that is found in the LMRA. Rather, PEERA creates a system of meet and confer negotiations and a system for resolution of prohibited labor practices, and designates no preference for either. One cannot say that PEERA makes arbitration the preferred method of dispute resolution. The final part of the three-part construct on which the NLRB's adoption of its deferral policy is based cannot be built under PEERA. Accordingly, no statutory basis for requiring automatic deferral to a grievance and arbitration procedure included in a memorandum of agreement can be statutorily found. It cannot be said that the Kansas legislature intended the degree of delegation to private arbitration that would be effected under the Collyer-Spielberg deferral doctrine. PERB is not faced with the kind of conflicting expression of legislative intent which led the NLRB's adoption of the Collyer pre-arbitral deferral doctrine.

Policy Considerations

The fact that PERB is not required, by statute, to automatically defer to private arbitration a prohibited practice complaint arguably covered by both the parties' memorandum of agreement and K.S.A. 75-4333 prohibited practice provisions, does not necessarily prohibit PERB from exercising its discretion to so defer. Meeting and conferring in the public sector is obviously greatly affected by political pressures and concerns, as well as economic factors. The services performed by public employees, such as the fire fighters in this case, tend to be essential to the public health, safety and welfare. Certainly, the Legislature was cognizant of these considerations when it enacted PEERA, as is evidenced by that Act's prohibition of public employee strikes, K.S.A. 75-4333(c)(5). At the same time, however, it is clear that the Legislature intended to provide public employees with nearly the same collective bargaining rights as are possessed by private sector employees, to the

[7] K.S.A. 75-4321(a)(3) states it is the policy of the state of Kansas that:

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

extent that public policy will allow.[8] Toward that end, the Legislature has, through PEERA, assured public employees of protection against unfair labor practices, and of remedial access to a state level administrative agency with special expertise in statutory unfair labor practice matters. Additional safeguards with which PERB must comply have been provided: compliance with the Administrative Procedures Act, written findings of fact to support a decision, and reviewability by the courts. These processes seem well designed to promote and maintain the confidence and morale of public employees, who, being prohibited from striking, must rely heavily on the statutory protections afforded under PEERA.[9]

Analysis of PEERA, however, reveals no legislative intent forbidding or discouraging voluntary private arbitration of public employee grievance disputes. Rather, the Kansas legislature made it an expressed purpose of PEERA to:

> "obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law." K.S.A. 75-4321(a)(3).

While K.S.A. 75-4334 does provide a procedure to be followed by PERB once a prohibited practice complaint is filed, it should not be construed that such represents the sole means through which disputes may be resolved. As previously quoted, 75-4323(d)(1) authorizes PERB to establish other procedures for prevention of prohibited practices. This provision vests PERB with a measure of discretion to determine the appropriate manner in which such preventative action should be administered. Conceivably, deferral to arbitration could be a useful tool for use by PERB in preventing prohibited practices.

Certainly, pre-arbitral deferral has its advantages and disadvantages. In the Dickinson Law Review article Deferral to Arbitration by the Pennsylvania Labor Relations Board, 80 Dickinson L. Rev. 666, 681 (1977), the author lists policy considerations both favoring and opposing adoption of a deferral policy:

Policy Considerations Cited as Favoring Adoption of a Deferral Policy:

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[8] K.S.A. 75-4332(d) reserves to the public employer the ultimate determination of the terms and conditions of employment by allowing for unilateral action by the employer following unsuccessful meet and confer negotiations and subsequent mediation and fact-finding procedures.

[9] The right of private sector employees to strike has a significant role in private sector collective bargaining. The union is normally willing to give up that right in exchange for the employer's agreement to acceptable methods of grievance resolution. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974):

> "The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the Court stated in Boys Markets v. Retail Clerks Union, 398 U.S. 235, 248 (1970), 'a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.'"

It would seem reasonable then in concluding that the PEERA's important procedural guarantees were intended to offset the bargaining detriment to public employees which results from PEERA's prohibition of public employee strikes.

1. Avoids fragmentation of issues between different forums, and potential conflicting decisions.
2. Protects the union-employer relationship from disruption caused by Board intervention.
3. Permits caseload reduction and more efficient utilization of resources.
4. Permits resolution of contractual issues by arbitrators with special expertise in labor relations.
5. Power in impartial third party has beneficial effect.
6. Arbitration expense encourages voluntary resolution.

Policy Considerations Cited as Opposing Adoption of a Deferral Policy:

1. Remedies available in arbitration are inadequate to remedy unfair labor practices.
2. Deferral results in delay of dispute resolution.
3. Board action affords better protection to the aggrieved.
4. The high cost of arbitration means that unfair labor practices will go unresolved.
5. The availability of Board procedures as an instrument of coercion leads to voluntary settlement.
6. Deferral forces an aggrieved party to arbitrate against his will and sometimes in contravention of his contractual obligations.

From a policy perspective, it must be concluded that PEERA does not require exhaustion of contractual grievance or arbitration procedures in every case before PERB may entertain a prohibited practice complaint, but instead vests PERB with discretion to determine, once a complaint has been filed, whether to defer to the memorandum of agreement grievance procedure or to adjudicate such dispute in furtherance of its statutory prerogative to investigate and remedy prohibited practice complaints pursuant to K.S.A. 75-4334. *See* PSEA v. Alaska, 135 LRRM 3137, 3145 (AK 1990).

The benefits to be gained by a policy allowing PERB to defer to arbitration outweigh the factors which mitigate against deferral. Questions, as those presented in the instant case, depend on what the memorandum of agreement provides, and this, in turn, involves questions of interpretation and application of the memorandum of agreement provisions. As noted by the Michigan Supreme Court in Detroit Fire Fighters v. City of Detroit, 293 N.W.2d 278, 296 (1980), pre-arbitral deferral is appropriate where the dispute arises under the memorandum of agreement since:

> "[D]isputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application . . . of a particular provision of our statute."

A policy which leaves these questions to PERB seems highly undesirable, since in most situations, the formal K.S.A. 75-4334 prohibited practice procedures would

subject the parties to unnecessary costs and delays in resolving the dispute.[10]

In contrast, a policy which makes a private arbitrator the final and finding interpreter of the PEERA law is equally improper and untenable. Accordingly, when a dispute implicates statutory rights, deferral would be inappropriate. Therefore, in considering whether to defer a prohibited practice complaint to a memorandum of agreement's established grievance and arbitration mechanism, **the subject matter of the complaint must arguably be covered by the provisions of the memorandum of agreement and not be primarily statutory in nature.** Pre-arbitral deferral should be denied where the issue in dispute concerns the scope of the statutory duty to bargain and does not turn upon the interpretation of an existing memorandum of agreement. Additionally, even though a dispute may be arguably contractual in nature, deferral is inappropriate where interpretation of the contract becomes subordinate to the resolution of the statutory question, e.g. representation questions, discipline for grievance activities, or freedom of employees to engage in protected activities.

In summary, mirroring the Collyer doctrine, pre-arbitral deferral by PERB presumes satisfaction of three requirements: 1) a stable bargaining relationship between the parties; 2) intent by the respondent to the prohibited practice complaint to exhaust the memorandum of agreement grievance procedure culminating in final and binding arbitration; and 3) the underlying dispute centers on the interpretation or application of the memorandum of agreement.[11] A condition precedent to conditional dismissal of the prohibited practice complaint is an issue that may be determined through the memorandum of agreement grievance and arbitration procedure. It must be a dispute which directly involves the application, enforcement

[10] It should be noted that with the present low levels of staffing and budget available to PERB to administer PEERA, prohibited practice complaints usually require approximately twelve months from filing to Initial Order, with a potential for an additional six months if an appeal is taken to the full Board. Decisions from private arbitrators require considerably less time.

[11] The PERB will not police memorandums of agreement by attempting to resolve disputes by interpretation of the agreement and then deciding whether disputes as to the meaning and administration of the memorandum of agreement constitute a prohibited practice.

Under the pre-arbitral deferral policy announced here, when PERB decides that deferral to arbitration is appropriate, its procedure will be to dismiss the complaint conditionally without prejudice to either party and without deciding the merits of the dispute. PERB will retain jurisdiction to ensure that the prospective arbitration award complies with the standards set forth in Spielberg. In keeping with this policy, the right of either party to secure further PERB review of the dispute, upon a showing that the arbitration award has not satisfied the Spielberg standards, is explicitly preserved.

In accordance with these Spielberg standards, PERB will not adjudicate the merits of a dispute previously arbitrated where: 1) the arbitration proceedings were fair and legal; 2) all parties had agreed that the arbitration proceedings were final and binding; and 3) the arbitration award was not clearly repugnant to the purpose and policies of PEERA. Also required is that the prohibited practice issues giving rise to the complaint be considered and decided by the arbitrator.

If PERB determines review of the arbitration award is appropriate and should PERB and the arbiter disagree, the PERB interpretation would take precedence. *See* Carey v. Westinghouse, 375 U.S. 261, 268 (1964). *See also* Gorman, Labor Law, p. 733, ["in the event of a conflict between an arbitral interpretation of a contract and a Board interpretation of the Labor Act . . . the Board as guarantor of the public interest must prevail."]

> or interpretation of the memorandum of agreement. A statutory issue may also be the basis for the dispute, but unless there is a dominant memorandum of agreement issue, deferral is inappropriate. As stated above, even though a dispute may arguably be contractual in nature, deferral will be inappropriate where interpretation of the contract becomes subordinate to the resolution of statutory questions."

Although Bertelli's Initial Order dealt primarily with pre-arbitral deferral, and not specifically with an election-of-remedies issue, its general principles are applicable and provide guidance in what is clearly an analogous circumstance. In this matter, deferral to a contractual election-of-remedies arbitral provision is inappropriate. *See generally*, Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, pp. 10-32. Any issues of contract interpretation that might arise in this case are clearly subordinate to the resolution of statutory questions. Most notably, Counts One and Three involve the resolution of a statutory question: did the Employer violate PEERA's prohibition against retaliating for engaging in protected union activities? Respondent's motion for summary judgment as to Counts One and Three is therefore denied.[12]

With regard to Respondent's summary judgment argument that Count Two is moot, the presiding officer find's movant's arguments unpersuasive.

Count Two alleges that the Respondent, by its refusal to meet and confer with FOP President Morris and Vice-President Kimberly Tibbetts regarding terms and conditions of employment following their termination, violated K.S.A. 75-4333(b)(1), (2), (5) and (6). A central element of this complaint, the "(b)(5) charge", is the allegation

[12] In addition, the facts of this case clearly establish that neither of the other two considerations for deferral by PERB to a contractual arbitral mechanism exists. First, the parties' bargaining relationship did not possess the degree of stability that would have made deferral to contractual grievance procedures appropriate. Second, the Respondent's conduct of its contractual procedures was not performed in good faith and in a manner consistent with deferral as an appropriate exercise of the Board's discretion. *See* Findings of Fact Nos. 79-81. For a more detailed examination of Petitioner's generally valid contentions in these regards, *see generally*, Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, pp. 23-24, 28-31.

that Respondent willfully refused to meet and confer in good faith with representatives of the employee organization.

Respondent defends its refusal to meet and confer with Morris and Tibbetts after their termination by noting that "the Unified Government indicated that it would bargain with members of the bargaining unit, the registered business agents of the bargaining unit, and/or legal counsel for the bargaining unit with respect to . . . negotiations". Respondent's Memorandum in Support of Motion for Summary Judgment, pp. 2-3. "Within two weeks of making this indication to the [union, it] registered Deputies Morris and Tibbetts as [its] business agents". *Id.*, p. 3. "Accordingly, the Employer promptly resumed . . . negotiations [and] any determination as to whether the Employer's refusal to bargain with terminated members of the bargaining unit [was violative of the Act] would constitute a ruling upon a moot question." *Id.*

Petitioner responds by noting "[t]he fact that [Morris and Tibbetts] registered as business agents in no way changes the fact that the employer clearly and unequivocally violated its duty to bargain in good faith by refusing to bargain with a duly elected president and vice-president" of the union. Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, p. 33.

Petitioner correctly notes that the courts have been hesitant to apply the mootness doctrine to cases under the N.L.R.A., 29 U.S.C. §§ 151-186. National Labor Relations Board v. Clark Bros. Co., 163 F.2d 373, 375 (2d Cir. 1947)(in ruling that an unfair labor practice complaint was not moot, court stated "[i]f the court makes no decision as to Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."). This reluctance may find its root in a belief

by the courts that the mootness doctrine is inapplicable when viewed in the larger context of the Board's duty to fashion a remedy appropriate to effectuate the purposes and policies of the Act. *See, e.g.*, National Labor Relations Board v. Metalab-Labcraft, Division of Metalab Equipment Co., 367 F.2d 471, 472 (4th Cir. 1966)(in ruling against contention of mootness, the Court characterized "the sole issue" as "whether the remedy fashioned by the Board will . . . effectuate the policies of the National Labor Relations Act.")

A similar conclusion is warranted here. A case is moot if "the parties lack a legally cognizable interest in the outcome". United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Petitioner here seeks, among other relief, a forward-looking, prophylactic decree from PERB prohibiting the Employer, in the future, from refusing to meet and confer with the employee organization's duly-designated bargaining representatives. As part of its statutory authority to fashion a remedy for violating the law, i.e., to "exercise such other powers, as appropriate to effectuate the purposes and provisions of" PEERA, K.S.A. 75-4323(e)(3), granting a remedy that would prohibit an employer from refusing to negotiate with the unit's duly designated bargaining agent in the future would further legislative intent that the Board effectuate the Act's purposes. Since Petitioner has a legally cognizable interest in securing such forward-looking relief, it cannot be said that the case is moot.

Further, Kansas Courts have stated that "an issue is not moot where an issue of statewide importance has been raised which is capable of repetition, yet evading review". Brull v. State, 31 Kan.App.2d 584, 69 P.3d 201 (2003); Shanks v. Nelson, 258 Kan. 688, 907 P.2d 882 (1995). This same defense of mootness following an employer's refusal to meet with terminated employees as union bargaining representatives has been raised in

no fewer than two other cases just in the relatively brief time this hearing officer has served PERB in that capacity. *See, e.g.*, 75-CAE-5-2003, Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville, KS Police Department; City of Coffeyville, KS v. IBEW Local No. 53, et al., 270 Kan. 763 (2000). Here, Respondent's actions could very well be repeated in the future. Moreover, judicial review of a decision in this case would provide guidance to other employers and employee organizations facing such questions.

A ruling here of mootness ensures that the only way to remedy such future conduct would be for the exclusive bargaining representative, faced with an employer's refusal to bargain with its chosen negotiator, to completely forego any remedial actions, halting further talks until such time as a charge is filed and resolved, at the administrative or judicial level. This would be an untenable prospect in the context not only of annual, or otherwise regularly-scheduled, contract negotiations but also of the daily representation activities necessary to administer employment contracts through ongoing, day-to-day monitoring, discussions, adjustments and grievance proceedings.

Respondent's Motion for Summary Judgment on Count Two of case number 75-CAE-3-2006, urging mootness as its basis, is denied. *See also*, Initial Order of the Presiding Officer, 75-CAE-5-2003, Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville, KS Police Department, pp. 19-20 (denying motion to dismiss for mootness by refusing to extend the holding of City of Coffeyville, KS v. IBEW Local No. 53, et al., 270 Kan. 763 (2000) to "day-to-day contract interpretation and adjustments").

ISSUES OF LAW IN DISPUTE

The issues presented for resolution in this matter are as follows:

1) Did Respondent violate K.S.A. 75-4333(b)(1), (2), (3) and (4) by

discharging Deputies Chuck Morris and Ron Woolley in retaliation for exercising their right to engage in protected union activity?

2) Did Respondent violate K.S.A. 75-4333(b)(1), (2), (5) and (6) by refusing to meet and confer with FOP President Morris and Vice-President Kimberly Tibbetts regarding terms and conditions of employment following their termination?

3) Did Respondent violate K.S.A. 75-4333(b)(1) and (3) by increasing the discipline of Deputy Les Still, a Wyandotte County Sheriff's Deputy and member of the FOP, during the course of his appeal process in retaliation for his filing a grievance?

4) Did Respondent violate K.S.A. 75-4333(b)(1) and (5) by changing the bargaining unit work schedule and imposing upon the bargaining unit a Sergeant pre-test?

5) Did Respondent violate K.S.A. 75-4333(b)(1), (2), (3), (5) and (6) by refusing to allow Wyandotte County Sheriff's Deputy Mark Snelson, a union representative, to speak on behalf of the union and Wyandotte County Sheriff's Deputy Regina Strown during a grievance meeting conducted for Deputy Strown?

FINDINGS OF FACT

A. General Background Facts

1. The Petitioner in this matter is the recognized and acknowledged exclusive bargaining representative for all Sheriff's Deputies and Park Rangers below the rank of sergeant employed by the Respondent for the purpose of negotiating collectively pursuant to the Public Employer-Employee Relations Act ("PEERA") of the State of Kansas with respect to conditions of employment, and grievances, as defined by the PEERA.

2. The Petitioner and the Respondent were parties to a contract which became effective on January 1, 2003, and expired on December 31, 2005. It established certain

terms concerning wages, hours, benefits and other conditions of employment for the bargaining unit. Petitioner's Exhibit No. 3.

3. At all times relevant to these prohibited practice charges, said contract was in effect and governed the labor-management relationship between the Petitioner and the Respondent.

4. Chuck Morris, a bargaining unit member, has been employed as full-time Deputy Sheriff for Wyandotte County Sheriff's Department, ("Department"), since 1977 and served the Sheriff's Department as a reserve officer for a year and a half before that. Tr., p. 55. During his career, Morris has held many job assignments for the Department, including working in the jail, in dispatch, on road patrol, in the warrants division, as a supervisor in the records unit and in the field services division. Tr., p. 55-56. At times relevant to these prohibited practice charges, Deputy Morris held the bid position of Tax Deputy. Tr., p. 206.

5. From 1977 through roughly the end of 2004, Deputy Morris led a relatively quiet existence at the Department with regard to disciplinary incidents. Tr., pp. 84-86, 496, 497. In those 27 years, Deputy Morris was disciplined three times, including a written reprimand for backing into and scraping another vehicle and a vehicle pursuit of a suspect out of jurisdiction. Tr., pp. 84-86, 496, 497. During that entire time frame, Morris "[n]ever had so much as a one-day suspension prior to becoming FOP President." Tr., pp. 496-497.

6. After having served in several other lesser capacities, such as acting secretary, acting treasurer, state trustee and others, Deputy Morris was elected President of the Fraternal Order of Police Lodge No. 40 in November or December of 2004 and served in that capacity at all times relevant to these prohibited practice charges. Tr., pp. 61, 73.

7. LeRoy Green was appointed to and served as the Undersheriff by and to Sheriff Mike Dailey from 1995 to 1999. Petitioner's Exhibit 84, LeRoy Green, Jr. Deposition, pp. 3-8. Green has served continuously as the Wyandotte County Sheriff since 1999. *Id.*, p. 3; Tr., p.

918. Green appointed Rick Mellott to serve as his Undersheriff in 1999. Green Deposition, p. 7. Mellott has held that position continuously since being appointed. *Id.*

B. Findings Relating to Evidence of Antiunion Animus

8. Based on evidence presented at the hearing, it is readily apparent that Sheriff Green, Undersheriff Mellott, and Chief Deputy Freeman have a long history of disdain and animus toward the Union, and that their anti-union animus climaxed after President Morris' election.

9. Several witnesses testified that Sheriff Green and Undersheriff Mellott hated the Union dating back to their rank and file days. FOP Business Agent Richard Grosko, a retired Wyandotte County Sheriff's Department Deputy with seventeen years of service testified that, back when Sheriff Green was a sergeant, he made it clear that he preferred that there not be a bargaining unit. Tr., p. 814. Sheriff Green said "that it wouldn't effect him one way or another and that he would prefer that there was no bargaining unit, that he never had a bargaining unit to get him to where he was at." *Id.*

10. Over the years and on multiple occasion, Green demonstrated antiunion bias by making comments and in general discussions to Grosko that he didn't believe the FOP should exist and that he didn't believe the FOP had authority to do anything. Tr., p. 815.

11. After becoming Sheriff, Green's opinion did not change. Regarding a union proposal to seek substantial wage increases during contract negotiations, Sheriff Green told FOP Business Agent Richard Grosko that:

> "We've got plenty of money and if you guys weren't trying to take the authority of the sheriff's office away from me, I'd walk across the street and get you all the money you needed and we could handle this."

Tr., p. 812. Grosko elaborated that Green, "the way he viewed it . . . was never going to give us the raises that are necessary to bring the number of officers up that it takes to run

the facility effectively and properly and safely, that he just flat was not going to negotiate, he didn't feel as if he had to." *Id.* Grosko also stated that Green wanted the FOP to give up "bid rights" so he could "appoint anybody he wanted anywhere he wanted". *Id.* During this time, a grievance regarding bid rights was pending. *Id.*, p. 814.

12. Grosko testified that in using the phrase "you guys", Sheriff Green was referring to the FOP leadership. Tr., pp. 812-813.

13. Grosko testified, as to indications of Undersheriff Mellott's antiunion animus, that when the Union was first formed in the late 1980's, Rick Mellott told him that the Sheriffs employees served at the will of the Sheriff. Tr., p. 801. Grosko testified that, to this day, Mellott has made it clear to him that Sheriff Green and Undersheriff Mellott are in control of the Department and that the Union is not going to tell them how to run the Department. Tr., p. 801-802. "[W]e've had a lot of discussions during the various times that I've had [to] meet with him along those lines and his pretty strong resistance to the union itself." *Id.*, p. 802. "They seem to believe, meaning the undersheriff and the sheriff, that [their] authority is minimized or taken away by these bargaining units and agreements." *Id.* "It's been made clear to me by them that they feel like they should be able to change the rules at will and have said as much to me." *Id. See also*, Defendant's Exhibit 203, Deposition of Rick Whitby, pp. 27-28 (In response to an entreaty by FOP President Whitby to assist Sheriff Green in finding ways to address a manpower shortage in the jail, "[Undersheriff] Mellott spoke up at that time and said, 'Nowhere is it said or nowhere is it going to be that it's any deputy's business what we're going to do, or what we're not going to do, so it ain't none of your business what our plans are.")

14. Grosko testified that Undersheriff Mellott told him "he got to where he was at . . .

'by kissing ass,' and it's time for people to kiss his." Tr., pp. 802-803. These conversations took place either before or after disciplinary grievance hearings. *Id.*, p. 803.

15. Lt. Patrick works under the direct supervision of Freeman and carried out the will of Capt. Freeman during the traffic court incident. His involvement in that, (ordering discipline despite Merkel's findings and ordering Merkel to amend his report), demonstrates that he is willing, ready, and able to help carry out the Department's campaign to get rid of the Union President.

16. Grosko testified that Chief Deputy Freeman let it be known that he did not believe that the Union should exist "and said he didn't believe in it and didn't want any part of it." Tr., p. 816. Freeman also believed that the bargaining unit should not have the authority to bargain with the Department. *Id.* Grosko also testified that Chief Deputy Freeman and the other members of the current administration referred to former FOP President Rick Whitby and other prominent members of the Union as "Whitby and the fab five." Tr., p. 817. Grosko testified that "Whitby and the fab five" was known to be a derogatory term. Tr., p. 818. Rick Whitby was the original President of FOP Lodge No. 40, having gotten the Lodge its charter, and he negotiated Petitioner's first contract with Respondent. *Id.* Whitby now holds the title of President Emeritus for FOP Lodge No. 40. Tr., pp. 816-817. He will have that title for life. *Id.*, p. 817.

17. Kelly Bailiff, a Wyandotte County Sheriff's Department employee from 1989 to 2001, is a highly decorated former Lieutenant, graduate of the FBI National Academy, and current professor of criminal justice. Tr., pp. 1262-1276. Bailiff testified that after LeRoy Green became Sheriff, her direct orders from Chief Deputy Freeman were to treat the FOP leadership differently, i.e., more adversely, than other employees. Tr., pp. 1284,

1335-1336, 1411-1435. "[T]hey were trying to coax me and get me to do things that they would be doing against these union people." Tr., p. 1335.

18. Bailiff was in charge of the Department's Field Services Division, also known as the front office from approximately 1997 to 2001. Tr., pp. 1260-1261. In that capacity she directly supervised union leaders Whitby, Grosko, Morris and Snelson. *Id.*

19. Bailiff testified that Green's anti-union attitude was in extreme contrast to the previous three Sheriffs for whom she had worked, Owen Sully, Bill Dillon and Mike Dailey, who had never shown any animosity toward the FOP. Tr.. p. 1283.

20. The Green administration ordered her to spy on Deputy Grosko to see if he was running a business on the side, so that the administration could try to fire Grosko, Tr., p. 1284. For example, while Rich Grosko was Chief Lodge Stewart for the FOP, Captain Freeman asked Bailiff to spy on Grosko. Tr., p. 1411. "Captain Freeman wanted me to sit out in front of his home when he was there to feed his [elderly] father-in-law for lunch and to insist that he was working on [his] photography business."

21. Bailiff further testified that Chief Deputy Freeman ordered her to provide him with reports concerning daily activities of Union leadership..Tr., p. 1285. Freeman asked Bailiff about the actions of Grosko, Whitby and others during lunches that were for conducting FOP business. Tr., p. 1415. According to Bailiff, these inquiries were motivated by Freeman's desire to write up and terminate the Union's high-ranking leadership. Tr., pp. 1415-1416. "It was all, what is Rick [Whitby] saying, where's Rick spending his time, how much time is he spending with [FOP attorney Steve] Bukaty, where is he at, trying to get me to write him up on not having enough papers served." *Id.*, p. 1417.

22. Bailiff confirmed Grosko's testimony that Chief Deputy Freeman commonly used

the term "Whitby and the fab five" as a derogatory term. Tr., p. 1279. The term referred to Rick Whitby, Rich Grosko, James Beard, Debby Farris, Mike Monslow and Kelli Bailiff, all of whom were "very strong" charter members of the FOP Lodge. Tr., p. 1280.

23. Bailiff also testified about occasions where Captain Freeman wanted her to investigate or discipline Deputy Rick Whitby, a former Union President, for going to lunch with FOP attorney Steve Bukaty:

> "Q. So is it a fair characterization to say that on numerous occasions Captain Freeman wanted you to closely monitor the activities of the union president and meetings with the union's attorney in hopes of finding something to discipline him over?
>
> A. Yes. Absolutely."

Tr., pp. 1307-1308.

24. Chief Deputy Freeman wanted Bailiff to tell him what transpired at lunch meetings she attended with various FOP leaders. Tr., p. 1308. When Bailiff refused to do so, Freeman began asking her to monitor and report back to him where they were going for their FOP lunch meetings, and how much time they were spending. "I think they even wanted to see if [Whitby or Grosko] would tell the truth about where they were going with either [FOP attorney Bukaty] or other FOP business." *Id.* Bailiff testified that in her opinion, her refusal to cooperate with Freeman's plans led to retaliatory actions taken against herself. *Id. See also*, Finding of Fact No. 28.

25. Bailiff also testified that the Green administration was always looking for an excuse to discipline Deputy Morris, anytime that he was vocal about FOP affairs. Tr., p. 1284. In particular, she testified that Chief Deputy Freeman ordered her to spy on Morris

to see if he was speeding or breaking other traffic laws in his patrol car, was out of district, was smoking in his patrol car, or was associating with Rick Whitby or other prominent members of the FOP. Tr., pp. 1422-1423. Bailiff testified that "as a field supervisor, I was supposed to go find Chuck when he was periodically out to look inside his car to see if he'd been smoking." Tr., p. 1423. "They said, look to be sure if there's ashes on the side or on the outside. . . . You can tell if there's ashes coming down here off the side." *Id.* "Go find out if Chuck is smoking in his car today. . . .go try to follow Chuck around, see if he's going over the speed limit. . . . go see if Chuck accurately put on his garage report where he went to lunch. . . . go see if Chuck went and ate lunch with Rich Grosko and Rick Whitby . . . . [or] Mark Snelson . . . ." *Id.* This kind of scrutiny was not directed at "non-union people". *Id.*, p. 1424. Both Undersheriff Mellott and Sheriff Green knew that Freeman was directing Bailiff to undertake this kind of surveillance with regard to union leaders. *Id.*, p. 1425.

26. She also testified that Freeman and Mellott wanted her to write up Whitby if she ever caught him in his patrol car without wearing his seat belt. Tr., p. 1420. She testified that Freeman and Mellott were aware of other deputies who were not union leaders who smoked in their patrol cars and/or didn't wear seat belts, but did not want those individuals to be disciplined. Tr., pp. 1417-1420.

27. Chief Deputy Freeman ordered Bailiff to go to lunch with FOP leadership and report back to him about what they had discussed. Tr., pp. 1289. Bailiff refused and told Chief Deputy Freeman she was faithful to the FOP and would not comply with his order. Tr., p. 1290. She also told him that she would not scrutinize Union leadership. Tr., p. 1290. Bailiff's credible testimony established that Undersheriff Mellott and Sheriff Green

had knowledge of Freeman's orders to her to spy on the union leadership. Tr., p. 1425.

28. Bailiff testified that subsequent to her refusing Chief Deputy Freeman's order, she was treated differently by the administration. Tr., pp. 1290, 1344. For example, despite the fact that she was among the 1% of law enforcement officers in the country who had graduated from the FBI national Academy, the administration transferred from her post as a supervisor in the field services division to a totally clerical position in the records department, and then again to an even worse position in the jail. Tr., p. 1294. Bailiff testified that she was transferred to records and to the jail because she would not go along with the program of attacking the Union leadership. Tr., pp. 1295-1296.

29. Although Bailiff was not in the bargaining unit, she filed an internal complaint with the Sheriff regarding her transfers. Tr., p. 1296. The Undersheriff told her: "I had to kiss ass to get where I'm at and you guys had better start kissing ass, too." Tr., p. 1299. Bailiff testified that the Undersheriff's "ass kissing" quote was directed at the Union leadership and was accompanied by a negative comment about the Union. Tr., p. 1300. Mellott also told Bailiff that he was "done dealing with the Union, tired of them, and was going to go after them." Tr., p. 1301. He told her that the Union was not going to run his Department. *Id.* Mellott regularly used profanity in Bailiff's presence. *Id.*, p. 1302. Among the profanity Bailiff found especially offensive were the words "bitches" and "cunts", used with reference to Mellott's viewpoint that women should not be in law enforcement. Tr., p. 1303. Sheriff Green was made aware of Bailiff's concerns about Mellott's use of profanity in discussions she had with Green over the years. *Id.*

30. Bailiff also testified that after siding with the Union, management limited her from doing community work she enjoyed. She was told she couldn't wear her uniform

on a television show about missing and exploited children on which she regularly appeared, that she could no longer tape the show on-duty, that she couldn't go to community meetings, had to cancel speaking engagements for children, and was threatened she wouldn't be allowed to attend the FBI Academy. Tr., pp. 1291-1293. "When I held my ground firm for the [union], my life just turned upside down." *Id.*, p. 1291.

31. The Union introduced a substantial number of exhibits, Petitioner's Exhibit No. 4, showing numerous accolades which then-Sergeant Bailiff and the Wyandotte County Sheriff's Department received as a result of her efforts on behalf of missing and exploited children, including a TV program which she did weekly. Numerous letters from public officials, and from Sheriff Green's predecessors, Sheriff Bill Dillon and Sheriff Mike Daily, were introduced. These letters repeatedly praised Sgt. Bailiff for her outstanding efforts in this regard and made it clear that the positive publicity received by the Sheriff's Department was a real benefit.

32. During his testimony, Sheriff Green was asked why he stopped the practice of allowing Sgt. Bailiff to tape the television show in uniform and while on-duty. It was clear during this testimony and from his demeanor, that Sheriff Green disliked Sgt. Bailiff and had no legitimate reason for discontinuing her actions which had brought such praise for her and the Department and which had such a positive effect with the community. Tr., pp. 2380-2396. The conclusion drawn from this by the presiding officer is that Sheriff Green, Undersheriff Mellott and Captain Freeman strongly resented Bailiff because she would not give in to their pressures to go after FOP leadership and that their subsequent unfavorable treatment of her derived at least in part from that resentment.

33. In 2005, former Deputy and FOP Vice-President Kim Tibbetts was ordered not to

attend FOP meetings while on her unpaid lunch break. Tr., pp. 1559-1565. The order came from Undersheriff Mellott. *Id.*

34. Former Lieutenant Kelly Bailiff testified that during the time period she knew LeRoy Green when he was a Sergeant, "[h]e couldn't stand the union." Tr., p. 1305. "I thought he hated the union so bad because he had said many times that they'd never be able to do anything for him." *Id.*, pp. 1305-1306. "I think that if – well, at that time I had no clue he'd ever be a sheriff, but I definitely got the impression that if he was ever in a position to do anything, he'd try to take – get rid of them." Tr., p. 1306. Affirming that she meant that Green would "[t]ry to bust the union", Bailiff added that she "clearly understood he didn't like the union." *Id.* In later questioning, Bailiff clarified her opinion regarding the sheriff's department's leadership's view about the FOP:

> "Q. Can you recall any other specific antiunion type statements that you've heard from either LeRoy Green or Rick Mellott at any time?
>
> A. Antiunion statements?
>
> Q. Statements that were against the union or that showed a dislike for the union.
>
> A. Yes.
>
> Q. Can you tell the hearing officer about that?
>
> * * * *
>
> A. There was a couple time that I was in Captain Freeman's office going through our daily activities, our sheets and there would be numerous time and I would begin to see a patter that if on those sheets it said FOP that Captain Freeman would take the sheet, go up and walk to the door

next to him where the undersheriff sat. He'd look at it. And if they both had their door open and we couldn't hear – sometimes they'd close the door. There would be times that the undersheriff would say, 'Screw the union' and make comments like that and they'd walk back in.

And it was a taunting thing that they said – it's kind of hard to explain. When the undersheriff or when Mike Freeman would talk about the union, it wouldn't be, so he has FOP business today or he has union business today, it would be a very smurky, 'So he's got that FOP business,' or it would be just kind of very derogatory and very negative and condescending the way they would even use the term FOP to describe their business.

Q. Okay. Based on these dealing you say you had almost on a daily basis, did you form an opinion as to whether or not – let's start with Freeman – Mike Freeman strongly dislike the union?

A. He hates the union.

Q. Same question about Rick Mellott.

A. If I can find a word that's more than hate, he really hates the union.

Q. And based on what you observed, it would be your testimony that Rick Mellott hates the union more than Mike Freeman hates the union?

A. Yes.

Q. Okay. What about LeRoy Green?

A. He hates the union also.

Q. And that's based on your interactions with them, your observation

with them, the statements they've made to you?

A. Things he said in the past, how if he was there he would be getting rid of them. LeRoy does not say – he does not come across as cruel in the way he says things as far as Freeman, especially Rick Mellott does. But, yes, in LeRoy's way, he hates the union in the way he acts."

Tr., pp. 1308-1311.

35. The direct evidence establishes that Sheriff Green, Undersheriff Mellott, and Chief Deputy Freeman had a history of animosity toward the Union, which came to a head after the election of Deputy Morris as President of the Union. Deputy Morris' predecessor as FOP Lodge No. 40's President was Deputy Ron Woolley.

C. Findings Relating to Employer's Motivation to Terminate Union Leadership

36. Woolley testified that when he was President, the finances of the Lodge were weak. Tr., pp. 528, 1329. At that time, only approximately 50% of the bargaining unit members were members of the Union. Tr., p. 528. Business Agent Rich Grosko testified that, as a result of the Union's financial weakness, then President Woolley was not able to challenge the administration over several perceived contract violations. Tr., p. 819.

37. When Deputy Morris became President, he responded "due to popular demand" to the unit members' desire for "better representation" and "stricter enforcement of the contract." Tr., p. 79. *See also*, Tr., p. 2661 (testimony by Deputy David Dagenett that it was clear to him that the FOP was "more aggressive in pursuing grievances and contract violations" under President Morris than it had been under President Woolley). He and his Vice-President, Deputy Kim Tibbetts successfully engaged in an aggressive membership drive to beef up the Union bank account with additional membership dues,

so they could do more to enforce their contract through arbitration. Tr., pp. 79-80, 819, 1557. Due to President Morris' and Vice-President Tibbetts' efforts, the membership of the FOP doubled in early 2005. Tr., pp. 819, 1329.

38. Another component of Deputy Morris' strategy was for the Union to assist its members in joining the National FOP Legal Defense Plan. Tr., pp. 80, 820, 1330. The FOP Legal Defense Plan is a pre-paid legal insurance plan for FOP members which pay its members legal expenses in defense of any civil, administrative, or criminal proceeding that arises out of law enforcement duties. Tr., pp. 80-81. With the FOP Legal Defense Plan backing the Union, it had more strength to challenge disciplinary grievances. Tr., pp. 82, 821. The Legal Defense Plan has paid the legal expenses of approximately 20 disciplinary grievances for FOP Lodge No. 40 since President Morris took office. Tr., p. 82. Deputy Morris testified that the FOP would not have otherwise been able to afford to bring those cases. Tr., p. 83.

39. Deputy Morris also made it a goal to strengthen the contract. Tr., p. 95. President Morris wanted the contract upgraded so that it was more like the Kansas City, Kansas Police Department's Fraternal Order of Police Lodge No. 4 contract, which is one of the best law enforcement contracts in the country. Tr., p. 107. FOP Lodge No. 4's contract had a lot of rights and protections in its contract that Lodge No. 40 did not have. *Id.*

40. On August 30, 2005, at the first negotiating session between the parties for a new MOU for 2006, 2007 and 2008, *see* Petitioner's Exhibit 31, President Morris unveiled the Union's initial contract proposal, most of which was taken directly from the Kansas City, Kansas Police Department contract, and can be accurately described as a substantial reworking of the contract that would have significantly improved terms and conditions of

employment for the bargaining unit, while reducing the relatively unbridled authority of the Department to unilaterally control many of those terms and conditions. Tr., pp. 96-107. Undersheriff Mellott and Chief Deputy Freeman were both present. Tr., p. 96. Among the changes proposed by Morris was the inclusion of sergeants and detectives to the bargaining unit's membership. Tr., p. 97. The Respondent's representatives were opposed to virtually all of the Union's proposed contract changes. Tr., pp. 121-122. *See also*, Tr., p. 811 (testimony of Rich Grosko that Sheriff Green expressed his disagreement over inclusion of Sergeants when he stated to Grosko that: "[w]e could end all this right now if you guys would just give us what we want and not try to take the sergeants and quit trying to take the authority of the sheriff's office from me.").

41. The Department's three leaders, Green, Mellott and Freeman, were well aware of Deputy Morris' efforts to increase the union's membership, to increase collections of dues to improve the Lodge's finances, to challenge numerous contract violations and excessive disciplinary cases, to expand the bargaining unit's membership by including sergeants and detectives and to dramatically improve terms and conditions of the unit's MOA. *See, e.g.*, Tr., p. 811 (testimony of Rich Grosko that Sheriff Green expressed to him his disagreement over inclusion of Sergeants in bargaining unit); Petitioner's Exhibit 86, Deposition of Richard Mellott, pp. 24-26 (Mellott indicating his familiarity with FOP leadership and having dealt with Morris in contract negotiations and grievances). It is equally clear that they realized that under the Morris' leadership, the Union was attempting to regain many rights that had been lost in collective bargaining. The evidence is overwhelming that the Employer then set out on a course to get rid of President Morris.

42. Less than a month after the parties' first negotiating session held August 30, 2005,

Fraternal Order of Police Lodge No. 40 President Charles Morris, a 27 year Department veteran, was terminated. Tr., p. 154.

D. Findings Relative to Chronological Events Leading to Termination

January 14, 2005

43. On the morning of January 14, 2005, Deputy Morris parked his assigned vehicle and went inside for roll call and to work on traffic ticket paperwork from the prior day as usual. Tr., p. 163. At some point, Morris went outside and started his car, in anticipation of leaving the building to take tickets to the municipal court clerk on that "very cold" morning. Tr., pp. 165-166. After starting his car to warm it up, Morris returned to the office to finish up the ticket paperwork. *Id.*, p. 165. Soon thereafter, Sgt. Merkel, Deputy Morris' supervisor, approached Morris and told him that Chief Deputy Freeman wanted him to work in traffic court. Tr., p. 166. Morris immediately followed Merkel's order. Tr., pp. 166, 1480. Meanwhile, Morris forgot he'd left his car running. Tr., pp. 166-167. The car ran for the next three or four hours while Morris worked traffic court. *Id.*

44. While working the traffic court that day, Deputy Morris worked with Deputy Roger Riley. Tr., p. 156. Deputies working in traffic court are tasked with escorting citizens who have pled guilty or otherwise been convicted in the traffic court to the basement of the courthouse where the traffic court clerks are located so that the citizens can pay their fines. Tr., pp. 158, 840-841, 1208-1210, 1319-1326, 2000.

45. It is undisputed that a deputy working in traffic court will be absent from the traffic courtroom while escorting citizens to the basement of the courthouse. Tr., pp. 159, 840-841, 1208-1210, 1319-1326. During the course of performing traffic court duties, a deputy will be in and out of the courtroom. Tr., p. 159. According to Sgt. Merkel, "a

deputy working traffic court is carrying out his duties by escorting citizens, defendants [from the courtroom] down [to the courthouse basement] to pay their fines." Tr., p. 1481.

46. During Deputy Morris' stint in traffic court that day, Chief Deputy Freeman checked the traffic courtroom for his presence. Tr., pp. 160-161. Chief Deputy Freeman claimed, following what was, at best, a cursory examination of the traffic courtrooms, Tr., pp. 1978-1997, that Deputy Morris was absent from the traffic courtroom. Next, Chief Deputy Freeman directed Sgt. Merkel "to look into this and find out why Deputy Morris was not in the courtroom like he was instructed." Tr., p. 1997.

47. In his investigation, Sgt. Merkel made contact with both Deputy Morris and Deputy Riley. Tr., p. 1482. Both deputies told Sgt. Merkel that Deputy Morris had been attending to the traffic court duties. Tr., pp. 1482-1485.

48. Based on his investigation, Sgt. Merkel determined that Deputy Morris had been performing the traffic court duties and had not engaged in any misconduct. Tr., p. 1487. Sgt. Merkel reported his findings to Chief Deputy Freeman and Lt. Charles Patrick. Notwithstanding Sgt. Merkel's investigatory findings, Lt. Patrick ordered Sgt. Merkel to discipline Deputy Morris. Tr., pp. 1489-1491.

49. Lt. Patrick later ordered Sgt. Merkel to revise his written report regarding the incident several times in ways unfavorable to Deputy Morris. Tr., pp. 1492-1493. Chief Deputy Freeman did not dispute that he may have directed that Sgt. Merkel rewrite his report regarding the incident. Tr., pp. 2005-2006. Merkel testified that throughout this ordeal, Lt. Patrick and Chief Deputy Freeman seemed eager to discipline FOP President Morris. Tr., pp. 1494-1495.

50. Morris was officially disciplined for the events of January 14, 2005. He was

given a verbal warning for "misuse of Sheriff's Office equipment" for leaving his vehicle running. Petitioner's Exhibit No. 21. He received a verbal warning for "not attending to traffic court." Petitioner's Exhibit No. 2.

March 8, 2005

51. A prisoner escapes from the custody of Deputy Les Still. Petitioner's Exhibit Nos. 60, 61. See also, Defendant's Exhibit 204, Deposition of Leslie Martin Still, pp. 25-28.

March 24, 2005

52. Chief Deputy Freeman suspends Deputy Les Still for three days without pay as discipline for allowing a prisoner to escape his custody. Petitioner's Exhibit No. 60.

April 7, 2005

53. After Deputy Les Still grieved his 3 day suspension for allowing a prisoner to escape his custody, Undersheriff Mellott increases the discipline to a 5-day suspension without pay. Petitioner's Exhibit No. 61. Mellott testified that, if the grievance had not been filed, the discipline would not have been increased. Tr., pp. 2555-2556.

May 5, 2005

54. Deputy Morris was involved in a minor car accident, which caused no discernible damage Tr., p. 168. He was assessed 20-points and does not challenge it. Tr., p. 169.

55. After debriefing, Deputy Morris was informed by Deputy Dagennett, who was at the stand-off but had returned to the Sheriff's office, that the commanders had left the office for the day. Tr., pp. 177, 1476, 2598, 2613. Without further instruction, Morris and the other deputies, who were already on overtime (Tr., pp. 479, 2012), went off-duty directly from the field. Tr., p. 177. They did not make reports regarding their presence at the stand-off. It is standard operating procedure for deputies who simply perform back-

up and traffic control not to make reports. Tr., pp. 178, 835, 1207, 1316-1319, 2020. Typically, deputies performing these functions only make activity log notations. Tr., pp. 178, 835, 1208, 1316-1319, 2020. Morris and the other deputies did that. No commander present at the stand-off made reports, either. Tr., pp. 2024-2025, 2601.

September 2, 2005

56. The next day Sgt. Freeman confronted Deputy Morris and told him that he had just been chewed out because nobody made reports concerning the stand-off. Tr., p. 178. In response to Deputy Morris' claim that the deputies were not obligated to make reports, Sgt. Freeman replied "that's too bad, the Captain wants reports." Tr., p. 178. Sgt Freeman told Dagennett that he didn't know the deputies needed to do reports on the stand-off. Tr., pp. 2600-2601. Morris and the other deputies complied and wrote reports. Tr., p. 178. They were not informed that any discipline was forthcoming. *Id.*

September 6, 2005

57. The Petitioner and the Respondent engage in their second negotiation session.

September 8. 2005

58. Deputy Morris and the other deputies present at the stand-off receive 20 points for failure to provide necessary service, including making all necessary reports. Petitioner's Exhibit No. 23.

September 9. 2005

59. On that morning, Deputy Morris was ordered to help Deputy Woolley, a 10-year bid position court transport deputy, Tr., p. 523, execute a ten prisoner shuffle back and forth from the Wyandotte County detention center ("detention center") to the court house annex building ("annex building"). Unlike most court transports, court transports to the

annex building involve transporting prisoners in a vehicle. Tr., p. 210.

60. Deputy Woolley had extensive experience with multiple prisoner transports to the annex building. Tr., p. 523. Deputy Morris, although a tax collector for the Department, has had some experience assisting in court transport. However, his experience was limited to one on one prisoner transports on foot, not vehicle transports to the annex building involving multiple inmates. Tr., p. 313.

61. Multiple prisoner transports to the annex building often require Deputy Woolley to place prisoners in a holding cell which is located on the first floor of that building. The holding cell is well lit and has a toilet running water, air conditioning. Tr., p. 490. Adjacent to the holding cell is an area known as the officer's room. Tr., p. 540.

62. Because Deputy Woolley was working his bid position, he took the lead and Deputy Morris followed his instructions. Tr., p. 218. The first trip of the day involved transporting two prisoners from the detention center to the annex building. When those hearings were over, Deputy Woolley took one of the prisoners back to the detention center and brought back to the annex building another prisoner. While Woolley was gone, Deputy Morris waited with the other prisoner, Edward Franklin, a sexual predator and suspected serial killer, to see if his jury came back with a verdict in the meantime. The jury had not yet returned and when the hearing was over for the most recent inmate brought to the annex building by Deputy Woolley, the Deputies took both inmates back to the detention center. Tr., p. 225. The time was approximately 11:00 a.m. *Id.*

63. Next, Deputies Woolley and Morris transported six more inmates to the annex building for pre-trial conferences. At the end of those conferences, they took all six inmates back to the detention center without incident.

64. The next transport involved a single prisoner, Patrick Stuart. Tr., p. 226. While Morris and Woolley were at the annex building with Stuart, Edward Franklin's jury returned with a verdict, so Franklin had to be returned to the courtroom in the annex. Tr., p. 227. Deputy Morris volunteered to retrieve Franklin from the jail while Deputy Woolley stayed at Stuart's hearing. Tr., p. 227. At that time, Deputy Woolley warned Deputy Morris that Franklin was a sexual predator and suspected serial killer. Tr., pp. 227, 536.

65. Stuart's hearing concluded before Deputy Morris returned with Franklin. Deputy Woolley, acting alone, placed Stuart in the holding cell. Tr., p. 537. The time was approximately 12:30 p.m. Stuart was wearing leg irons and his hands were cuffed in front of his body.

66. When Deputy Morris arrived back at the annex building with Franklin, he found Deputy Woolley waiting alone for him. Tr., p. 229. After the Franklin verdict was announced, Deputy Woolley told Deputy Morris that they should immediately take Franklin to their vehicle and return him to the detention center. Tr., pp. 230-231. He never informed Deputy Morris that he had placed Stuart in the holding cell. Tr., p. 542. Woolley's sole focus was Franklin, since he was rumored to be so dangerous. Tr., p. 700.

67. Before they exited the annex building, Deputy Woolley instructed Deputy Morris to return to the officer's room adjacent to the holding cell to close a window that they had left open in the officer's area. Woolley said nothing about Patrick Stuart at that point. Tr. pp. 231, 540. The holding cell and the officer's area are adjacent rooms, separated by a thick door, which was closed. Tr., p. 2545. Deputy Morris did as he was instructed. While there, he did not know that Stuart was in the holding cell, nor did he hear anything

that would have made him aware of that fact. Tr., pp. 231-232. After transporting Franklin to the detention center, Deputies Woolley and Morris went to lunch. Afterwards, the rest of their workday was routine. Tr., p. 233. Deputy Morris still did not know that Stuart had been placed in the holding cell. Tr., p. 233.

68. Deputies working in the jail that night discovered that Stuart was missing at approximately 7:30 p.m. Tr., pp. 1541, 1607. Stuart was found and returned to the detention center by 9:15 p.m. Tr., p. 1618. He had missed dinner. Stuart was examined by a medic, who concluded that he had not suffered any injury. Tr., pp. 1640, 1700. According to witnesses, Stuart was in good spirits and had not soiled himself. Tr., pp. 1531-1532, 1620, 1700.

69. That night, Deputy Woolley called Deputy Morris to advise him of the incident. Tr., pp. 234-235. Shortly thereafter, Deputy Morris was called in to write a report. At that time, Lt. Dobbs asked for Deputy Mortis' commission and access cards. He also gave Deputy Morris a written notice of suspension with pay until further notice. Tr., pp. 148, 186.

September 10, 2005

70. Deputy Morris and the other two deputies who were at the scene of the stand-off received a 20-point penalty for "failure to provide necessary service, including making all necessary reports." Petitioner's Ex. No. 23. Chief Deputy Freeman testified that he knew Deputy Morris was involved and that he ordered discipline to all involved who did not write a report. Tr., p. 2021.

71. Deputy Dagennett, who was on the scene of the stand-off and was caught up in the discipline with Morris, testified that he "became a victim of an opportunity to

discipline Chuck Morris." Tr., p. 2600. He explained: "it was evident at that time that they were using everything that they could to try and punish Deputy Morris because of his FOP actions. He was very strong and adamant about contract violations and just trying to enforce the contract in general." Tr., pp. 2602-2603. Dagennett testified that it seemed to him that the current administration scrutinized Deputy Morris more closely than deputies who were not active in the Union. Tr., pp. 2610-2611.

September 13, 2005

72. Lt. Charles Patrick called Deputy Morris in for a show cause hearing. Deputy Morris was expecting to discuss the Patrick Stuart incident. Tr., p. 202. The September 13 show cause hearing dealt with the improper computer access allegation and the alleged public profane telephone call. Tr., p. 202. At the conclusion of the hearing, Lt. Patrick told Deputy Morris to come back on September 15, 2005 for his disciplinary recommendations. On that date, the show cause hearing for the Patrick Stuart incident would also take place.

September 15, 2005

73. Lt. Patrick conducted a show cause hearing concerning the Patrick Stuart incident. Tr., p. 202. Afterwards, Lt. Patrick rendered his disciplinary recommendations. He recommended 20 points for the cell phone incident, a 30-day suspension for improper computer usage, and termination for the lost prisoner incident. He issued all of the above disciplinary recommendations simultaneously and did not cite each as separate discipline for purposes of progressive discipline. Lt. Patrick forwarded his recommendations to Chief Deputy Freeman. Petitioner's Exhibit No. 10.

September 21, 2005

74. Chief Deputy Freeman held a disciplinary hearing, at which he increased the discipline for the phone incident from 20 points to a 30-day suspension. He approved the 30-day suspension for improper computer usage and also approved the termination for the Patrick Stuart prisoner incident. Chief Deputy Freeman supported his discipline by citing each incident as a prior discipline for the purposes of progressive discipline, even though by that time Deputy Morris had not had the opportunity to grieve any of them. Tr., p. 2036. Deputy Morris was officially terminated. Tr., pp. 121, 187.

September 23, 2005

75. The parties were scheduled to engage in a bargaining session. FOP President Morris and Vice-President Tibbetts attended the scheduled bargaining session in their capacity as President and Vice-President of the FOP. The Respondent refused to bargain with them, contending that it had no duty to bargain with the President and Vice-President of FOP No. 40 because they were no longer public employees. Petitioner's Exhibit Nos. 57, 58.

September 30, 2005

76. Following the Respondent's refusal to bargain with the duly elected President and Vice-President of FOP, President Morris, Vice-President Tibbetts, and a third labor leader, retired Deputy Sheriff Richard Grosko, were registered as Business Agents for the FOP. Petitioner's Exhibits Nos. 6, 7, 8.

October 5, 2005

77. Negotiations resumed.

November 14, 2005

78. FOP received notice that the Department would conduct on November 16, 2005 a

grievance board hearing concerning Deputy Morris' termination and suspension.

November 15, 2005

79. The Respondent surrendered some of the information requested by the Union to prepare for the grievance board hearing for Deputy Morris. Tr., p. 828.

November 16, 2005

80. The Sheriff's Department conducted the grievance board hearing for the termination of Deputy Morris. Business Agent Richard Grosko represented Deputy Morris at the hearing. He requested a continuance at the beginning of the hearing since the union had only received two days notice. Tr., pp. 1734, 2686. Grosko argued that he did not have sufficient time to prepare an adequate defense. Tr., pp. 247, 2686. The Chairman of the grievance board was Undersheriff Mellott. Tr., p. 248. He unilaterally denied Grosko's request for a continuance Tr., pp. 248, 1740, 2687, without allowing the board to vote on it. Tr., p. 2687. Capt. Eickhoff, who represented management at the hearing, testified that no harm would have resulted to the employer had a continuance been granted. Tr., p. 1786.

81. The Employer did not call any witnesses, Tr., pp. 1736-1737, 1740, 1760-1761, 2683, present any evidence, Tr., pp. 824, 1740, 1760-1761, 2689, or have any exhibits properly identified by authenticating witnesses. Tr., pp. 248, 824, 2689. Grosko objected to the proceedings because no evidence was presented. Tr., pp. 250. Mellott overruled the objection. Tr., pp. 250, 1740.

82. The grievance board voted to reinstate Deputy Morris with a 90-day suspension. Tr., p. 1741.

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83. At a grievance meeting held for Deputy Regina Strown, Lt. Paul Arnold, who represented the Employer at the meeting, refused to allow Deputy Mark Snelson, who represented the FOP at the meeting, to speak on behalf of Deputy Strown and the FOP. Tr., pp. 1205-1207, 1226-1233. Although characterized by Respondent as a "pre-disciplinary" show-cause hearing, it was reasonable for Deputy Strown, in her participation in the meeting, to believe she could be disciplined as a result of the meeting. Tr., p. 1206. When Snelson attempted to ask a question as Strown's FOP representative, Lt. Arnold told him he could not "ask any questions or talk or anything". *Id.*

D. Other Findings

84. According to the parties' contract, to be eligible for promotion to Sergeant, a deputy participates in a written test and an oral interview. Petitioner's Exhibit 3. No pre-test is required by contract. Tr., pp. 304, 2321. Respondent unilaterally implemented a Sergeant's pre-test in 2005 as an additional requirement for promotion to Sergeant. Tr., pp. 304-306. No bargaining preceded this requirement. Tr., pp. 304, 2114. Since 2005, the pre-test has been administered continuously, with the last one administered in 2006. Tr., p. 2322.

85. If Respondent had implemented procedures utilized by many Sheriffs, Deputy Woolley would not have been able to forget Stuart in the holding cell. Even if better procedures would not have prevented Stuart from being left in the holding cell, they certainly would have uncovered Woolley's mistake much quicker than the current system. The lack of modern-day procedures exacerbated Woolley's oversight. Better procedures would have mitigated the mistake. A simple record-keeping system at central control, that tracked all prisoners who left the detention center, would have done that. The

procedures used at the jail for keeping track of absent inmates are outdated and ineffective. Respondent has made no attempt to modernize its archaic system to eliminate, or at least reduce, the possibility of this happening again. Tr., pp. 2443-2446.

86. The presiding officer specifically accepts and credits testimony of Denver Sheriff's Deputy Frank Gale, a member of the FOP National Executive Board. Sgt. Gale testified from personal knowledge of procedures used at detention centers in several states. He helped establish that Respondent's procedures are outdated and ineffective. Tr., pp. 885-917.

87. Respondent's failure to take any remedial or corrective action is inconsistent with its official position that the incident was serious enough to warrant termination of a twenty seven year veteran.

88. The Sheriff was unaware of the procedures used to track inmates from their holding cells. He did not even know that his Department didn't have a centrally located tracking system for inmates who left the detention center. This evidences two things. The Sheriff failed to consider exculpatory facts regarding Deputies Morris and Woolley. The Sheriff didn't know what procedures were in place.

89. The Sheriff did not know the facts, did not review any of the so-called "investigation", did not rely in any way on the results of the "investigation", and did not review the video taped statements of Deputies Morris and Woolley before terminating them. When asked about the investigation, Green seemed unsure if any investigation actually took place, and couldn't even describe the most basic aspects of it. Tr., pp. 956-958, 961, 970. The Sheriff also testified that he could have ordered a more thorough investigation, but declined to do so.

90. The Undersheriff, after Woolley was reinstated, told him that he and the Sheriff knew that Woolley was going to get his job back, that the terminations were not about Woolley, and that President Morris was "a piece of shit" Tr., pp. 574-578. The totality of all the evidence presented in this matter demonstrates that Mellott's recommendation for FOP President Morris' termination was the culmination of Mellott's nine-month campaign to get rid of him.

CONCLUSIONS OF LAW/DISCUSSION

A General Overview of the Kansas PEERA

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

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

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

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

> "[T]he process whereby the representatives of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment."

The Kansas Supreme Court has stated that:

> "The Act [PEERA] imposes upon both employer and employee representative the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations."

Kansas Bd. of Regents v. Pittsburgh State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983).

The objective the Kansas legislature hoped to achieve by the meet and confer process can be equated to that sought by the Congress in adopting the National Labor Relations Act as described by the U.S. Supreme Court in *H.K. Porter Co.*, 397 U.S. 99, 103 (1970),[13] and cited with approval in *City of Junction City, Kansas v. Junction City*

[13] Where there is no Kansas case law interpreting or applying a specific section of Kansas' labor relations laws, decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 et seq. (1982), and decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations acts, while not controlling precedent, are persuasive authority and provide useful guidance in interpreting both the Kansas PEERA, *see* Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, and the Kansas Professional Negotiations Act. *See* Oakley Education Association v. USD 274, 72-CAE-6-1992. *See also*, Stromberg Hatchery v. Iowa Employment Security Comm., 33 N.W.2d 498, 500 (Iowa 1948). "[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." Hubbard v. State, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. Peasley v. Telecheck of Kansas, Inc., 6 Kan.App.2d 990, 994 (1981)(Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive).

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, 116, p. 370; 50 Am.Jur., Statutes, 323; 82 C.J.S., Statutes, 371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy.

Police Officers Association, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)("Junction City"):

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

In his insightful and thorough 1980 analysis of the Act and of this agency's implementation of it, University of Kansas Professor Raymond Goetz remarked that the new public employee rights established by the Act,

> "would in effect be meaningless without some provision for their enforcement." For this purpose, section 75-4333(b)(1) through (8) sets forth eight 'prohibited practices' for employers, the first five of which are patterned after the employer unfair labor practices in section 8(a)(1) through (5) of the LMRA. The Kansas Act differs from the LMRA in that the conduct specified constitutes a prohibited practice only if engaged in 'willfully' *The import of this qualification is far from clear*".

Goetz, *supra*, at 263 (emphasis added). We will now turn our attention to this qualification.

What Constitutes a Prohibited Act Engaged in "Willfully"

K.S.A. 75-4333(b)(1) prohibits a public employer, or its designated representative, from *willfully* interfering with, restraining or coercing public employees in the exercise of rights granted in K.S.A. 75-4324 of the Public Employer-Employee Relations Act. K.S.A. 75-4333(b) sets forth eight categories of acts which, if committed by the employer, constitute a prohibited practice and evidence of bad faith in meet and confer proceedings. Such conduct is considered a prohibited practice only if engaged in "willfully".

Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, 52.02, p. 329-31 (4th ed. 1973); Benton v. Union Pacific R. Co., 430 F.Supp. 1380 (1977)(A Kansas statute adopted from another state carries with it the construction placed on it by that state); State v. Loudermilk, 208 Kan. 893 (1972).

The Act does not define "willfully."

K.S.A. 75-4333(b) "parallels section 8(a)(1) of the federal [Labor Management Relations Act]", Goetz, p. 264, which doesn't contain the word "willfully", and which has been interpreted to not require specific intent. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). It can be inferred that Kansas' legislature included the word "willfully" to make proof of a prohibited practice more difficult under Kansas law than under federal law. *See, e.g.*, Goetz, *supra* at p. 264 (noting that "it would seem proof of a prohibited practice is more difficult under Kansas law than under federal law" and that statutory rights afforded under PEERA were "diluted by the imposition of this nebulous requirement" of willfulness).

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). Goetz also notes that "the term 'willful' is more commonly found in criminal statutes under which criminal intent is an essential element of particular crimes." Goetz, p. 263. He continues that "[u]nder [K.S.A.] 21-3201 proof of willful conduct is required to establish criminal intent and 'willful conduct' is defined as 'conduct that is purposeful and intentional and not accidental.'" *Id.*[14]

Under the Kansas Wage Payment Act, ("KWPA"), K.S.A. 44-313 *et seq.*, use of the term "willfully" denotes an element or condition which, if present, mandates imposition by this agency, the Kansas Department of Labor, of a statutory penalty for failure to pay wages. *See* K.S.A. 33-315(b). Under the KWPA 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

[14] In 1992, the Kansas Legislature amended K.S.A. 21-3201 to replace the term "willful" with "intentional", as follows: "Except as otherwise provided, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was intentional or reckless. . . . As used in this code, the terms 'knowing,' 'willful,' 'purposeful,' and 'on purpose' are included within the term 'intentional.'"

that Kansas workers receive compensation due them, the Kansas Legislature enacted a penalty provision to deter employers from failing to pay wages when due. This penalty provision 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[15] 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." Under the KWPA, courts have consistently construed the term "willfully" to require significant 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

[15] 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.

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 ppropriate for all determinations under PEERA. Indeed, it would seem odd that the appropriate measure of willfulness in the context of a labor relations dispute should somehow demand proof of a greater degree of culpability or blameworthiness than the "conduct-that-is-purposeful-and-intentional-and-not-accidental" formulation of willfulness that was required for imposition of criminal sanctions under the Kansas Criminal Code, *see* K.S.A. 21-3201, at the time of PEERA's enactment. *See also*, Goetz, at 263.

In many determinations under PEERA, 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, breach of contract or criminal law 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 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. 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 a noteworthy early labor relations decision under PEERA, 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 that:

> "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 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 representatives, to meet and confer in good faith with affirmative willingness to resolve grievances and to negotiate conditions of employment, the necessity, for administration of the law, 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. If the goal of the Act is to obligate parties to meet and confer over conditions of employment and grievances in an effort to promote labor-management harmony, that is, to work together for the common good of the employer and its employees, why would the Legislature have deemed it necessary to establish anything more than that a parties' actions in contravention of statutory mandates are intentional, voluntary or deliberate in order that the commission of a prohibited practice be established, and that, in furtherance of the purposes of the Act, the party be ordered to cease and desist violations, to post PERB's order for viewing, or that a return to the *status quo ante* be ordered?

Further, the consequence of a finding of willfulness in a prohibited practice case is markedly different from the penalties that may follow a finding of willfulness in other legal settings. The consequence of a finding that a party willfully refused to meet and confer in good faith is typically an order that the parties resume bargaining, an order to post a copy of PERB's decision for review by the affected employees and perhaps some form of remedial, or make-whole remedy to return the parties to their respective positions prior to the violation. 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 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 review of 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 the threshold of "willfulness" for imposing criminal sanctions, granting punitive damages, or for stripping someone of a license to practice their profession, should be set high enough to reflect a significant element of blame-worthiness, to ensure that the punishment was commensurate with the offense, when the consequence is that of being ordered to restore the *status quo ante* there is less need to find substantially blameworthy intent or to find that actions were motivated by, for example, an intent to cause injury.

Moreover, a plain reading of the law reveals that a finding of willfulness is a prerequisite to sustaining a prohibited practice charge. K.S.A. 75-4333. If willfulness is absent, then it follows that PERB cannot conclude 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, PERB is without authority to order restoration of the *status quo ante* or 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 substantial punitive damages. In the context with which we are here concerned, construing "willfully" to require proof of an intent to injure seems 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 statutes, one should 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 prohibited practices dispute, where a finding that a party "willfully" took some action is a prerequisite to ordering the parties back to bargaining, or for a return to the *status quo ante*, or ordering any other relief, that the legislature intended for "willfully" to be construed in a manner inconsistent with the statute's salutary purpose of promoting labor harmony and stability, through the meet and confer process, 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). Further,

> "'[e]ffect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.'"

Todd v. Kelly, 251 Kan. 512, 516, 837 P.2d 381 (1992). In order to give effect to the entire Act, and to reconcile PEERA's different provisions to make them consistent, harmonious and sensible, the purpose of promoting labor harmony through meet and confer will be served by construing "willfully" 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.[16] Proof of anti-union animus or of a specific intent to violate an employee's, employees' or the recognized employee organization's rights are examples of ways to establish willfulness in the wrongful intent sense of this element of a prohibited practice charge. In the instant matter, evidence of that sort of willfulness is notorious and plentiful, abounding throughout the lengthy record.

Having examined PEERA, generally, and the requirement of "willfulness" as it pertains to charges of prohibited practices, we will now turn to the individual provisions of the Act alleged to have been violated. We begin by examining the sections of the Act the Employer was alleged to have violated by its termination of Deputies Morris and Woolley.

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[16] Other states have construed the meaning of "willfully" in their states' labor relations laws 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".)

ISSUE 1

Did Respondent violate K.S.A. 75-4333(b)(1), (2), (3) and (4) by discharging Deputies Chuck Morris and Ron Woolley in retaliation for exercising their right to engage in protected union activity?

Petitioner alleges violations of subsections (b)(1) through (b)(4) of the Kansas Public Employer-Employee Relations Act with regard to Respondent's termination of Deputies Morris and Woolley. Violations of subsections (b)(5) and (b)(6) are alleged with regard to other factual scenarios which will be addressed in later issues. K.S.A. 75-4333(b)(1) through (b)(6) provide as follows:

> "[i]t shall be a prohibited practice for a public employer or its designated representative wilfully 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 under K.S.A. 75-4327;
>
> (6) deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328

* * *

K.S.A. 75-4333(b)(1) – "Interference" Charge; K.S.A. 75-4333(b)(3) – "Discrimination" (to Discourage Employee Organization Membership) Charge and K.S.A. 75-4333(b)(4) – "Discharge or Discrimination" (for Employee Organization Activity) Charge

The employee rights referred to in K.S.A. 4333(b)(1), above, are set forth in general terms in K.S.A. 75-4324 as follows:

> "Public 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 of their designated representatives with respect to grievances and conditions of employment. Public employees also shall have their right to refuse or join or participate in the activities of employee organizations"

K.S.A. 75-4324. There is little Kansas case law interpreting either K.S.A. 75-4324 or 75-4333(b)(1). However those statutes are similar to Section 7 and Sections 8(a)(1) of the NLRA. Likewise, K.S.A. 75-4333(b)(3) is our statute's counterpart to the Act's Section 8(a)(3). It is appropriate, in light of the close parallel between these sections of PEERA and the NLRA, to examine federal interpretations of the NLRA, where those decisions are consistent with the purposes of the Kansas PEERA. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that the legislature intended a different result, and, with respect to those areas where PEERA differs from the NLRA, federal authority may be of only limited value.

As the Kansas Supreme Court stated in National Education Association v. Board of Education, 212 Kan. 741, 749 (1973):

> "In reaching this conclusion we recognize the differences, noted by the court below, between collective negotiations by public employees and `collective bargaining' as it is established in the private sector, in particular by the National Labor Relations Act. Because of such differences federal decisions cannot be regarded as controlling precedent, although some may have value in areas where the language and philosophy of the acts are analogous. See K.S.A. 1972 Supp. 75-4333(c), expressing this policy with respect to the Public Employer-Employee Relations Act."

Petitioner's complaints with regard to the Employer's treatment of Deputy Morris are framed as both a K.S.A. 75-4333(b)(1) "interference" complaint, and a K.S.A. 75-4333(b)(3) "discrimination" complaint, as well as a K.S.A. 75-4333(b)(4) "discharge or discrimination" complaint. K.S.A. 75-4333(b)(3) provides:

> "(b) It shall be a prohibited practice for a public employer...willfully to:
> * * *
> (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."

K.S.A. 75-4333(b)(4) makes it a prohibited practice 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."

In most cases, K.S.A. 75-4333(b)(3) and (b)(4) discrimination complaints could just as easily be prosecuted on an interference or coercion theory under K.S.A. 75-4333(b)(1). *See* 3 Labor Law, Section 12.03(3). The scope of the phrase "membership in any employee organization" has been given a broad and liberal interpretation to include discrimination to discourage participation in employee organization activities as well as to discourage adhesion to union membership. *See* Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17 (1953). The result is that if a public employer deprives an employee of any rights guaranteed by K.S.A. 75-4324, and protected by K.S.A. 75-4333(b)(1), the public employer may be deemed to have discouraged employee organization membership within the meaning of K.S.A. 75-4333(b)(3) or (b)(4).

Discrimination in violation of K.S.A. 75-4333(b)(3), or (b)(4), lies in treating like cases differently. *See* Mueller Brass Co. v. National Labor Relations Board, 544 F.2d 815, 819 (5th Cir. 1977). The FOP alleges just such disparate treatment in its brief. PEERA does not require that the employees discriminated against be the ones discouraged for purposes of violations of K.S.A. 75-4333(b)(3), nor does it require that the change in employees' desire to join an employee organization or participate in organization activities have immediate

manifestations, Radio Officers', *supra* at 51. It is hard to argue that the termination of union officials for engaging in union activities does not have a chilling effect upon employee organization membership or participation in employee organization activities.

It should also be noted at this point that under both the NLRA and PEERA, an "interference" charge can be classified as either derivative or independent. The National Labor Relations Board has from its earliest decisions considered violations of the other employer unfair labor practice provisions to be a derivative violation of this broadest charge, the prohibition against interference, restraint and coercion of the free exercise of employee rights under the Act. *See* Charles J. Morris[17], The Developing Labor Law, 2nd Ed., Ch. 6 at p. 75 (hereinafter "Morris, 2nd Ed."). While he did not attribute to them the same classification by name, a noted commentator acknowledges the existence of derivative violations of K.S.A. 75-4333(b)(1) as well through violations of any of the other seven prohibited employer practices. An "interference" charge, according to Goetz,

> "really is a 'catchall' because of its broad general language. By its terms, it includes almost anything an employer might do that would tend to interfere with the statutory right to [representation]. The remaining seven employer prohibited practices enumerated in section 75-4333(b)(2) through (8) constitute specific applications of the sweeping prohibition against interference in section 75-54333(b)(1). Any conduct which would violate (2) through (8) would also violate (1)."

Goetz, *supra*, p. 264. PERB has also found that a violation of (b)(1) exists whenever any of the other prohibited practice violations have been established. *See, e.g.*, Fraternal Order of Police, Lodge No. 47 v. Leavenworth County Sheriff's Department, Case No. 75-CAE-3-1999 (Dec. 22, 1999)(finding that violations of (b)(3) and (b)(4) also constituted violation of (b)(1)); Fort Hays State University Chapter of the American Association of University

[17] No relation to the Petitioner FOP's President, Charles Morris.

Professors v. Fort Hays State University, Case No. 75-CAE-12-2001 (Mar. 10, 2004)(concluding that violations of (b)(5) and (b)(6) also constituted violations of (b)(1)).

Under the NLRA, some acts infringe upon its "interference" prohibition only and are not viewed as being incidental to the violation of some other subdivision of that section. Morris, 2nd Ed., p. 75. Likewise, PERB has historically viewed certain actions to be violations of 75-4333(b)(1) independent of any other prohibitions. *See* Service Employees Union Local 513 v. City of Hays, KS, 75-CAE-8-1990 (April 14, 1991)(disciplining a union steward for his efforts to represent a bargaining unit member in a grievance was determined to violate (b)(1), but it was noted that this action could also have been prosecuted as a (b)(3) violation for the chilling effect it could likely have on union membership); Service Employees Union v. Board of Ellis County Comm'rs, 75-CAE-1-1973 (May 3, 1973)(in PERB's very first prohibited practice adjudication, the Board found that suspension of workers three days in advance of representation election was in reprisal for organizing activities in violation of (b)(1) and employer's willful actions also violated (b)(3)).

Presumably, the first count of the instant petition was alleged as an independent (b)(1) violation and it will be treated as such. To determine whether given conduct by a public employer interferes with, coerces or restrains public employees in their exercise of protected rights, three inquires must be made:

a. Are the public employees engaged in protected activities as set forth in the Act?
b. Is there a reasonable probability that the employer's conduct will have an interfering, restraining or coercive effect on the public employees?
c. To what extent must the pubic employer's legitimate business motives be taken into account?

See, Service Employees Union Local 513 v. City of Hays, KS, 75-CAE-8-1990 (April 14,

1991)(adopting the analysis set forth by the Supreme Court in National Labor Relations Board v. Great Dane Trailers, Inc., 388 U.S. 26 (1967)). Petitioner's contention that Great Dane Trailers does not represent the appropriate theory by which to analyze this charge is acknowledged and will be addressed. *See* Petitioner's Supplemental Proposed Findings of Fact and Conclusions of Law, pp. 5-6 (hereinafter "Petitioner's Supplemental").

a. Protected Activity

Under K.S.A. 75-4324 public employees have the right "to form, join, and participate in the activities of employee organizations for the purpose of meeting and conferring with public employers with respect to grievances and conditions of employment." Here the right the Public Employer-Employee Relations Act seeks to protect is the right of public employees to organize for the purpose of meeting and conferring with respect to grievances and conditions of employment, without public employer interference. This right must be considered in the context of the policy of the Act, which fosters cooperation between public employers, public employees, and employee organizations. This policy necessarily envisions a balance to the extent that the rights of all parties are recognized and safeguarded to the maximum degree possible.

Employers violate the corresponding section of the NLRA, § 8(a)(1), prohibiting interference with or restraint of employee rights by engaging in activity or conduct that tends to chill an employee's freedom to exercise his rights. *See* Baldecher v. America West Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001). The test of an employer's interference, restraint, and coercion of employees engaging in concerted union activities, is not the employer's motive or the success or failure of coercion, but is whether the employer engaged in conduct which may reasonably be said to have tended to interfere

with free exercise of employees' rights to engage in concerted union activities. *See* NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946).

Holding union office embodies the essence of protected activity under PEERA. Employer action impairing some right or restricting some legitimate activity of union officials and thereby discouraging members from holding union office would inherently adversely effect employee rights. *See* Indiana & Michigan Electric Co. v. N.L.R.B., 599 F.2d 227 (7th Cir. 1979). Morris, as the FOP's then-current President and Woolley, as its past-President, were clearly engaged in protected activities, for purposes of these charges.

b. Reasonable Probability Test

A showing that the employer's conduct actually restrains, coerces, or interferes with the exercise of employee rights, or whether the public employer intends such a result is not usually required to prove a violation of K.S.A. 75-4333(b)(1). The test applied in the private sector is the test of reasonable probability, i.e., whether the employer's conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights to some extent. As the N.L.R.B. stated in American Freightways Co., 44 L.R.R.M. 1302 (1959):

> "It is well settled that the test of interference, restraint and coercion . . . does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

As noted in NLRB v. Grower-Shipper Vegetable Ass'n., 122 F2d 368, 377 (9th Cir. 1941):

> "The act prohibits interference with, restraint and coercion of the employees in the exercise of the rights, guaranteed (by statute)... Interference, restraint and coercion are not acts themselves but are descriptive and are the result of acts. Whatever acts may have the effect of interference, restraint and coercion are included in those terms, and are therefore prohibited. Thus they include a great number of acts which, normally, could be validly done, but

> when they interfere with, restrain or coerce employees in the exercise of their rights, they are prohibited by the act."

This test is equally applicable to public sector employers and K.S.A. 75-4333(b)(1). PEERA prohibits an employer from willfully engaging in acts which have the effect of interfering with, restraining and coercing public employees in the exercise of rights granted at K.S.A. 75-4324, that is, the employee's right to form, join and participate in activities of public employee organizations for the purpose of meeting and conferring with public employers with respect to grievances and conditions of employment.

The employer conduct complained of here is the disciplinary action taken against Deputy Charles Morris, President of Fraternal Order of Police Lodge No. 42 and Deputy Ronald Woolley, FOP Lodge No. 42's former President. FOP alleges "that the Respondent was motivated by anti-union animus when it discharged President Morris and Deputy Woolley". Petitioner's Supplemental, p. 5. Given the notorious and openly-expressed anti-union sentiments by management and its long-standing history, it is reasonable to believe that adverse employment action taken against not only immediate past-president Woolley, but also against both the FOP Vice-President, Tibbetts, and its President, Charles Morris, would have the effect of interfering with, restraining and coercing rank and file deputies in their exercise ofprotected rights, that is, the right to form, join and participate in activities of public employee organizations. Not only is this a reasonable inference, but there was ample credible testimony in the record to show that this was the actual effect of the employer's actions. *See, e.g.*, Tr., pp. 289-290 (Morris testifying that he wants to retire as FOP's President due to his cardiac health, but that "everybody says they're afraid to [run for office], they don't want to be the target"; "It's an atmosphere of fear, I call it . . . [e]verybody is just scared to death to be involved in the FOP because they say, you're just

targets and we don't want to be the target . . . [p]eople don't want to pursue grievances sometimes because they're afraid of what might happen . . . [n]o one wants to take an active stance, a pro-union stance and so it's left to the few board members to do it all themselves because we can't get anybody to help.")

c. Did the Employer's Acts Stem From a Legitimate, i.e., Non-discriminatory Motive?

Once it has been established that an employee was engaged in an activity protected by K.S.A. 75-4324, as has been shown here, the inquiry shifts to whether the public employer's conduct was motivated by a legitimate and substantial business justification. *See*, Service Employees Union v. City of Hays, Kansas, 75-CAE-8-1990 (April 14, 1991); Litton Dental Product, 90 L.R.R.M. 1592 (1975). Proof of an anti-union motivation may make unlawful certain public employer conduct which would in other circumstances be lawful. Some conduct, however, is so "inherently destructive" of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive. National Labor Relations Board v. Brown, 380 U.S. 278, 287 (1965); American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, 311 (1965).

Some conduct has "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." National Labor Relations Board v. Erie Resistor Corp., 373 U.S. 221, 231 (1963). The recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an "application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." Radio Officers', at 45-46.

If an employer's conduct falls in this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something

different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." Erie Resistor, *supra* at 228. Even if the public employer comes for-ward with explanations for his conduct, an inference of improper motive may be drawn from the conduct itself, and a proper balance must be drawn between the asserted justification and the invasion of public employee rights in light of PEERA and its policy. *Id.* at 229.

As the U.S. Supreme Court concluded in Radio Officers', *supra* at 45:

> "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established."

If an employer's conduct does not constitute behavior "inherently destructive" of K.S.A. 75-4324 rights, the impact must be considered "comparatively slight." If the resulting harm to public employee rights is "comparatively slight," and a substantial, legitimate business end is served, the employer's conduct is lawful, and an affirmative showing of improper motivation must be made. N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, 34 (1967).

Thus, in either situation, once it's been shown that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, it is the employer's burden to establish he was motivated by legitimate objectives since proof of motivation is most accessible to him. Great Dane Trailers, at 34. Merely proffering a legitimate business reason for the adverse action doesn't end the inquiry, for it must be determined whether the reasons advanced are *bona fide* or pretextual. If proffered reasons are a mere litigation figment or weren't relied upon, then the determination of pretext concludes the inquiry. Marathon LeTourneau Co. v. N.L.R.B., 699 F.2d 248, 252 (5th Cir. 1983). However, if the employer advances legitimate reasons for the disciplinary action, and is

found to have relied upon them in part, the case is characterized as one of "dual motive".

The result is that a two-part test is to be applied in a dual-motive context. As the Board remarked in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980):

> "Initially, the employee must establish that the protected conduct was a 'substantial' or 'motivating' factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct."

Or as put another way in National Labor Relations Board v. Eastern Smelting and Refining Co., 598 F.2d 666, 670 (1st Cir. 1979):

> "[The employer] is not to be charged unless its actions would not have been taken 'but for' the improper motivation . . ."

In other words, there must be a demonstrated causal connection between the employer's conduct and the employee's union membership or activities, or the employer's anti-union animus. In Wright Line, the Board articulates the parties' respective burdens by noting that "after an employee . . . makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity." Wright Line, *Id.*, at 1087.

The presiding officer noted earlier that Petitioner, in its Supplemental Brief, urged that the analysis used in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) and its progeny, and by PERB in Service Employees Union Local 513 v. City of Hays, KS, 75-CAE-8-1990 (April 14, 1991) "is not the appropriate legal theory". Supplemental Brief, pp. 5-6. Instead, "Wright Line controls this case." *Id.*, p. 5. The presiding officer concurs in that Wright Line's test was espoused by the NLRB for dual motive cases under the NLRA counterparts to K.S.A. 75-4333(b)(1) and (b)(3). At its core, Wright Line is NLRB's formal articulation of the procedure it uses to allocate burdens of proof

in discrimination cases under Section 8(a)(1) and 8(a)(3) of the NLRA. The procedure:

> "accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3 of the Act. As the Supreme Court noted in N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963), it is fundamental in 'situations present[ing] a complex of motives' that the decisional body be able to accomplish the 'delicate task' of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."

Wright Line, *Id.*, pp. 1088-1089. In its discussion setting out the analysis to be used in discrimination cases, Wright Line notes the consistency between the Supreme Court's decisional analysis in Great Dane Trailers and the Board's own decisional process:

> "In that case the Court was concerned with the burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:
>
> > '[I]f the adverse effects of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.'

Wright Line, *Id.*, at p. 1088. Thus, Wright Line and Great Dane Trailers are consistent in that they each utilize a shifting of the burdens. These decisional analyses will be applied to the instant matter. As the evidence amply demonstrates, the Respondent's conduct in this matter was both inherently destructive of employee rights and was motivated by anti-union animus. With regard to the latter, the Employer's conduct was willful.

It should be noted here that membership in an employee organization or participation in concerted activities of the employee organization does not immunize employees against discipline. Florida Steel Corp. v. National Labor Relations Board, 587 F.2d 735, 743 (5th Cir, 1979). It is unlawful under PEERA for a public employer to discipline an employee only if that discipline would not have been imposed "but for" the employee's membership in or his activities on behalf of an employee organization. Subject to this qualification, the Public Employer-Employee Relations Act does not restrict a public employer's right to discipline an employee for any reasons, whether it is just or not, and whether it is reasonable or not, as long as the discipline is not in retaliation for employee organization activities or affiliation. National Labor Relations Board v. Ogle Protection Service, Inc., 375 F.2d 497, 505 (6th Cir. 1967).

Maintaining discipline among its employees is clearly a part of management prerogative, and is recognized by K.S.A. 75-4326. The Public Employee Relations Board cannot substitute its judgment for that of the public employer as to what constitutes reasonable grounds for disciplinary action. National Labor Relations Board v. Wagner Iron Works, 220 F.2d 126 (7th Cir. 1955). The question of proper discipline of an employee is a matter left to the discretion of the employer. National Labor Relations Board v. Mylan-Sparta Co., Inc., 166 F.2d 485, 491 (6 Cir. 1948):

> "The Act does not take from the employer the right to make and enforce reasonable rules for the conduct of the business and to take disciplinary action against employees who either violate the rules, are inefficient or malcontent, or for reasons generally are not suitable for efficient production. The Act does not authorize the Board to substitute its [own] ideas of discipline or management for those of the employer, except barring discrimination or discharge for union membership."

The presiding officer is mindful of his limited role in this regard and will exercise caution

not to overstep appropriate boundaries in examining the employer's action. The court in National Labor Relations Board v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) admonishes against committing:

> " . . . the frequent [error by the Board is] one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not discharge when the real motivating purpose is to do that which section 8(a)(3) forbids."

In a (b)(3) case, once the employee initially demonstrates that "protected activities played a role in the employer's decision", the public employer then has the burden of establishing "that the discipline or other action would have occurred absent protected activities." Wright Line, p. 1089.

An employer's stated or avowed opposition to an employee organization is not, in itself, sufficient evidence to sustain a finding that his employees were disciplined because of discrimination against the employee organization. Ogle Protection, *supra* at 505.

The question of whether a public employee is disciplined because of his employee organization affiliations and participation in K.S.A. 75-4324 protected activities is essentially a question of fact. Since motivation is a question of fact, the Public Employee Relations Board may infer discriminatory motivation from either direct or circumstantial evidence. In Radio Officers', the court stated:

> "An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries." *Id.* at 48-49.

Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception", Radio Officers', *supra* at 51, "such that actual encouragement or discouragement need not be proved but that a tendency is sufficient, and such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination." A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers', *supra* at 50.

Anti-union motivation may reasonably be inferred from a variety of factors, such as an employer's expressed hostility towards unionizing, together with knowledge of the employee's union activities (Turnbull Cone Baking Co. v. National Labor Relations Board, 778 F.2d 292, 297 (6th Cir. 1985)); proximity between the employee's union activities and their discharge (National Labor Relations Board v. E.I. DuPonte De Nemours, 750 F.2d 524, 429 (6th Cir. 1984)); disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action (Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902 905 (3d Cir. 1981)); inconsistencies between the proffered reason for discharge and other actions of the employer (Turnbull, *supra* at 247); shifting explanations for the discharge (National Labor Relations Board v. Dorothy Shamrock Coal Co., 833 F. 2d 1263 (7th Cir. 1987)); Statements or conduct of the employer

manifesting discriminatory intent (Instrite Mfg. Co., 99 L.R.R.M. 1577(1978)); and absence of warnings for alleged misconduct and/or apparent condonation of infractions used to justify discipline (Boyles Galvanizing Co., 99 L.R.R.M. 1707 (1978)).

In the instant matter, one finds that nearly each and every one of these factors is evident. From the record, the presiding officer finds the existence of anti-union animus from, among other things, management's oft-expressed hostility to the union, coupled with its expressed disdain for contract changes sought by union leadership and its awareness of the employees' union activities; the proximity between those activities, such as upcoming negotiations over controversial contract proposals, and the terminations, as well as the obvious relative lack of discipline during Morris' prior twenty-seven years as a deputy and the near-constant drumbeat of disciplinary actions taken against him during and after his ascendancy to the union's top leadership post; the disparate treatment taken against Deputy Morris versus that taken against others; the employer's general, consistent and long-standing pattern of conduct targeting union leaders for surveillance, for discipline and for other adverse employment action; the inconsistency between, for example, the proferred reason for discharge, i.e., leaving an inmate, unattended, in a holding cell for several hours, when the actual escape of an inmate into the public at large was not met with comparable discipline, and the complete lack of any concern for changes in jail procedure to ensure such circumstances were not subject to repetition; and statements by Undersheriff Mellott to Deputy Woolley, manifesting a discriminatory intent, to the effect that it was not their desire to harm him, but rather to get Morris, whom Mellott characterized as "a piece of shit".

Inherently Destructive Test

Once it has been established that an employee or employee organization was

engaged in conduct protected by K.S.A. 75-4324 the initial determination must be whether the resulting harm from the public employer's action was "inherently destructive" or "comparatively slight" to that protected activity. In the instant matter, the initial determination of the resulting harm from the employer's action to the protected activities puts it squarely into the former category. Terminating the employee representative's current, as well as immediate past, hierarchy of leadership on the eve of what had promised to be notoriously contentious negotiations over far-sweeping union contract proposals markedly more advantageous to union interests than those of the parties' past MOA's, and which were openly and vocally opposed by management, is a classic example of an action inherently destructive of protected labor relations activities.

When the employer's conduct is characterized as "inherently destructive," unlawful motivation is presumed to exist. Western Extermination Co. v. National Labor Relations Board, 565 F.2d 1114, 1118, n. 3 (7th Cir. 1977). Based on careful review of all the evidence and upon the record as a whole, it is the presiding officer's findings and conclusions that the employer's actions, specifically those of terminating Deputies Morris and Woolley, were motivated by anti-union animus and were in retaliation for protected activities. Reasonable inferences drawn from an examination of the Employer's labor relations history, and of its persistent, concerted attempts to impose what can only be viewed as unwarranted progressive disciplinary steps against Morris, and ultimately of discriminatory terminations of Deputies Morris and Woolley, leads to the conclusion that its actions regarding Morris and Woolley were in retaliation for protected labor activities.

Respondent engaged in conduct which may reasonably be said to have tended to interfere with the free exercise of employees' rights to engage in concerted union

activities. There can be no questions but that to allow the employer to discipline the employee organization representative for asserting employee rights, such as those asserted by Morris through repeated, aggressive and effective membership drives to increase the union's funding, implementation of the FOP's national legal defense plan, taking a more aggressive stance with regard to contract enforcement and for seriously pursuing proposals in negotiations to bring the union's MOA into greater alignment with the "model" contract enjoyed by Kansas City, Kansas police officers would have a chilling affect upon membership and inhibit qualified employees from holding office, thereby "creating visible and continuing obstacles to the future exercise of employee rights." Loomis Courier Service, Inc. v. National Labor Relations Board, 595 F.2d 491, 494 (9th Cir. 1979). Such action is deemed "inherently destructive." By discharging Deputies Chuck Morris and, collaterally, Ron Woolley in retaliation for exercising their right to engage in protected union activity, Respondent's actions were in violation of K.S.A. 75-4333(b)(3) and (b)(4), and constituted an independent violation of K.S.A. 75-4333(b)(1).

K.S.A. 75-4333(b)(2) – "Domination and Assistance" Charge

Under PEERA, it's a prohibited practice for an employer willfully to "dominate, interfere or assist in the formation, existence, or administration of any employee organization." K.S.A. 75-4333(b)(2). "This provision is patterned after section 8(a)(2) of the [LMRA], which was designed to outlaw so-called 'company unions'—unions not independent of the employer." Goetz, *supra* at 266. Goetz explained the provision's purpose thus:

> "The objection to such organizations is not only that they are usually weak and ineffective but also that they deprive employees of the opportunity to be represented by a union of their own choosing and, in fact, of any true representation at all since the employer is sitting on both sides of the bargaining table by virtue of control over the union."

Id. In the instant matter, there is no allegation that the Employer is, in effect, trying to institute a "company union", nor to acquire a similar degree of control or influence over the FOP's affairs. Goetz notes, however, that "[v]iolations of this provision could take many forms". *Id.* The plain language of this provision supports this assertion.

In previous matters before the Board, violations of K.S.A. 75-4333(b)(2) have been found where an Employer's actions have interfered with an employee organization's choice of its bargaining representative. Most of the practices prohibited by law when done by the employer have counterparts prohibited if committed by an employee organization. The counterpart employee organization violation to K.S.A. 75-4333(b)(2) is found at K.S.A. 75-4333(c)(2). This formulation of the prohibited practice makes it clear that K.S.A. 75-4333(b)(2) also forbids an employer from interfering in the employee organization's selection of its bargaining representative. Based on the evidence of record, it is apparent that the actions of Respondent constitute the willful violation of K.S.A. 75-4333(b)(2). By its termination of Deputy Morris, coupled with its subsequent refusal to meet and confer with him, Respondent did "interfere . . . in the . . . administration of an[ ] employee organization," in effect trying to force the FOP lodge to select another bargaining representative to keep contract negotiations going. The union's response was to make bargaining agents out of its terminated deputies, thereby allowing them to continue its negotiations. However, such interference with the administration of the union is but one of the "many forms" violations of this provision can take. *See* Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville, Kansas, 75-CAE-5-2003 (September 29, 2006).

ISSUE 2

> Did Respondent violate K.S.A. 75-4333(b)(1), (2), (5) and (6) by refusing to meet and confer with FOP President Morris and Vice-President Kimberly Tibbetts regarding terms and conditions of employment following their termination?

K.S.A. 75-4333(b)(1) – "Interference" Charge; K.S.A. 75-4333(b)(2) – "Domination and Assistance" Charge; and K.S.A. 75-4333(b)(5) – Refusal to Meet and Confer

As previously noted, Kansas law provides that public employees have the right to form, join and participate in activities of employee organizations for meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The legislative parameters of this duty to meet and confer under the PEERA are found at K.S.A. 75-4327(b):

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

"This provision is buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer to willfully 'refuse to meet and confer in good faith with representatives of recognized organizations as required in K.S.A. 75-4327.'" Goetz at 268.

In this case, Petitioner alleges that Respondent's refusal to meet and confer with Deputy Morris and Deputy Tibbetts following their terminations, unless and until they registered as the union's business agents, was a violation of K.S.A. 75-4333(b)(5).

The presiding officer agrees. Kansas law, contrary to Respondent's assertions, does not require that an employee organization's bargaining representative is limited to attorneys, business agents or employees. As a matter of law, and policy, a public

employer cannot be allowed to determine whom it will negotiate with on behalf of its bargaining unit member employees by terminating that employee unit's bargaining representative. Respondent's actions in violation of K.S.A. 75-4333(b)(5) also constitutes a derivative violation of (b)(1), in that it was reasonable that the said action was likely to, or tended to, interfere, restrain or coerce public employees in their exercise of rights protected by the Act. As was previously noted, the record contains ample evidence that in fact the anti-union actions of Respondent did interfere, restrain and coerce the unit members in their exercise of protected rights.

K.S.A. 75-4333(b)(6) – Denial of Rights Accompanying Recognition

K.S.A. 75-4333(b)(6) makes it a prohibited practice for an employer willfully to "[d]eny the rights accompanying certification or formal recognition granted in section 75-4328." K.S.A. 75-4328 requires in pertinent part 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". In his "most informative analysis of the act", Kansas Bd. Of Regents v. Pittsburg State Univ. Chap. K-NEA, 233 Kan. 801, 805 (1983), Professor Raymond Goetz notes that "the right being protected [by K.S.A. 75-4333(b)(6)] is the right of the employee organization to represent employees, rather than the right of the individual employees to participate in organizational activity." Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 273 (1980). By its violation of K.S.A. 75-4333(b)(5), i.e., by its willful refusal to meet and confer in good faith with the employee organization's chosen bargaining representatives, Deputy and FOP President Charles Morris and Deputy and FOP Vice President Kimberly Tibbetts, the

Respondent violated its statutory obligation to extend to the certified employee organization the right to represent employees of the unit in meet and confer proceedings, in contravention of K.S.A. 75-4333(b)(6). It also follows here that Respondent's violation of K.S.A. 75-4333(b)(6), by its refusal to meet and confer with Morrris and Tibbetts, constitutes a derivative violation of K.S.A. 75-4333(b)(1). *See discussion, supra*, at pp. 68-69.

ISSUE 3

> Did Respondent violate K.S.A. 75-4333(b)(1) and (3) by increasing the discipline of Deputy Les Still, a Wyandotte County Sheriff's Deputy and member of the FOP, during the course of his appeal process in retaliation for his filing a grievance?

With regard to this charge, the presiding officer does not find sufficient evidence to conclude that Respondent increased Deputy Still's discipline in retaliation for his filing of the grievance. Rather, the presiding officer credits the explanations of Respondent's Undersheriff Mellott that, in effect, it was not until he learned of the grievance that he made the decision that, in his opinion, the initial discipline recommended by Captain Freeman for a three-day suspension was not sufficient in view of the seriousness of the offense of having an inmate escape into the population at large. Tr., pp. 2486-2487. Mellott testified that prior to the incident happening, he had "received [phone] calls from the district attorney's office about the casual way that deputies were acting in the courtroom with prisoners . . . [and because throughout the United States] there's been some courtroom violence where deputies and people have been getting shot". *Id.*, p. 2487. With that understanding of the Undersheriff's concerns, Mellott's testimony that he increased Still's discipline because he believed it insufficient seemed sincere and believable. The presiding officer finds and concludes under these circumstances that the

evidence does not evince an action undertaken willfully in retaliation for the exercise of protected activities.

ISSUE 4

> Did Respondent violate K.S.A. 75-4333(b)(1) and (5) by modifying the work schedule of the bargaining unit and imposing upon the bargaining unit a Sergeant pre-test?

Pursuant to the Collyer doctrine discussed at length above, it is the presiding officer's conclusion that, since this work schedule modification issue has previously been the subject of an arbitration decision finding that the Respondent violated the terms of the parties' contract, the Board should defer to that decision.[18] With regard to the Sergeant pre-test, the facts suggest that Respondent's unilateral imposition of the pre-test, a mandatory topic for meet and confer, *see* Pittsburg State University, *supra* at 826, occurred in the absence of bargaining, constitutes a continuing violation and represents a failure to bargain in good faith, (b)(5), and a derivative violation of (b)(1). *See* Finding of Fact No. 84.

ISSUE 5

> Did Respondent violate K.S.A. 75-4333(b)(1), (2), (3), (5) and (6) by refusing to allow Wyandotte County Sheriff's Deputy Mark Snelson, a union representative, to speak on behalf of the union and Wyandotte County Sheriff's Deputy Regina Strown during a grievance meeting held for Deputy Strown?

Issue Five raises the question whether so-called Weingarten rights are applicable, in appropriate circumstances, under PEERA. This issue has been addressed in prior PERB decisions. In the earliest of these cases, Kansas State Troopers Association v. Kansas Highway Patrol, 75-CAE-6-1990 (April 11, 1990), presiding officer William J.

[18] This issue is primarily one of contract interpretation, and is not statutory in nature. Such deferral by PERB assumes that the parties agreed to honor the arbitrator's decision.

Pauzauskie stated that "[a]t a minimum, PEERA allows representation of KSTA's choosing to the employee in his dealings with KHP." Pauzauskie based this conclusion on the following language from K.S.A. 75-4321(b): "It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state . . . by providing a uniform basis for recognizing the right of public employees to join organizations of their own choosing . . . *and be represented* by organizations *in their* employment relations and *dealings with public agencies.*" The recognition of this and other sources for Weingarten rights is consistent with conclusions reached in other jurisdictions. For an overview of these cases, consult footnote 296 of Anthony R. Baldwin, *Weingarten and the Taylor Law – A Claimed Difference Without Distinction*, 7 HOFSTRA LAB. L. J. 123 (Fall, 1989).

In the next of these, Service Employees Union Local 513 v. City of Hays, KS, 75-CAE-8-1990 (April 14, 1991), presiding officer Monty Bertelli addresses Weingarten rights in his inimitable, signature degree of detail. In that case, the Petitioner alleged that Respondent had violated K.S.A. 75-4333(b)(1) by reprimanding a union officer for making the statement that he should have been present and allowed to represent an employee in what amounted to a disciplinary investigatory interview. At page 22 of the order, Bertelli noted that:

> "In N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1974), the U.S. Supreme Court upheld an N.L.R.B. determination that Section 7 (employee rights section equivalent to K.S.A. 75-4324) gives an employee the right to insist on the presence of his union representative at an interview which he reasonably believes will result in disciplinary action."

The order goes on to cite to Weingarten to explain policy reasons in support of the order's ultimate conclusion:

> "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." Weingarten at 262-263.

The right of prior consultation was also addressed:

> "The right to union representation was further expanded in Climax Molybdenum Co., 94 L.R.R.M. 1177 (1977):
>
> > 'Surely, if a union representative is to represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and is to be "knowledgeable" so that he can "assist the employer by eliciting favorable facts, and... getting to the bottom of the incident," these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action . . ..
> >
> > * * *
> >
> > The right to representation clearly embraces the right to prior consultation . . .." Id. at 1178.
>
> The refusal of an employer to allow a consultation with union representative prior to an investigatory-disciplinary interview constitutes unlawful interference, **even in cases where the employee organization representative and not the employee requests the consultation**. As the N.L.R.B. concluded in Climax Molybdenum:
>
> > 'Our dissenting colleagues' final argument is that no violation of Section 8(a)(1) occurred here, even if employees have a right to prior consultation, because the employees did not request an opportunity to confer with union representatives prior to the interview. Even if it did not, the Union must have the right to pre-interview consultation with the employee in order to advise him of his rights to representation if that right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. Thus, since, in

> our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request is a denial of representation.'" Id. at 1178. (emphasis added).

Bertelli's conclusion followed:

> "Since the Union has the right to request a pre-interview consultation and, if requested by the employee, to attend the interview and assist the employee, the statement by Mr. Pipkin that he should have been present and involved is correct, and protected activity."

Service Employees Union Local 513, *supra* at pp. 22-24. Bertelli's, and PERB's, adoption of Weingarten rights rests on K.S.A. 75-4328. *Id.*, p. 20 ("Surely, if the representative of an employee organization is to effectively represent an employee in the settlement of grievances or disputes concerning conditions of employment the right must extend to informal as well as formal procedures. The right to representation clearly embraces all aspects of the employer-employee relationship whereby dissatisfaction with work practices, conditions of employment or contract interpretation is resolved, if that right is to have any substance"). In footnote number 2 at page 13 of AFSCME, Council 64 v. Kansas Department of Corrections, 75-CAE-9-1992 (December 30, 1993), Bertelli reinforced existence of the previous decision by noting that "[i]n Hays the PERB adopted the rationale of the U.S. Supreme Court in NLRB v. Weingarten, Inc., 420 US 251 (1974), to the effect that K.S.A. 75-4324 gives a public employee the right to insist on the presence of his union representative at an interview which he reasonably believes will result in disciplinary action. A denial of such a request constitutes a prohibited practice pursuant to K.S.A. 75-4333(b)(1)."

It is routinely argued that the absence of certain language[19] in PEERA, found in

[19] Weingarten held that the "employer violated s 8(a)(1) of the Act because it interfered with, restrained and coerced the individual right of the employee, protected by s 7, 'to engage in . . . concerted activities for . . .

the NLRA and used by the Supreme Court as the source of Weingarten rights, deprives Kansas public employees of similar protection. This presiding officer, as well as former presiding officer Susan Hazlett, *see* International Association of Fire Fighters, Local 64 v. City of Kansas City, Kansas Fire Department, 75-CAE-9-1993 (October 28, 1996), once shared that view. Such a restrictive and superficial reading of the statute, however, misses the mark and ignores both its plain language and its legislative history.

First, absence of the seeming magic words insisted upon by those opposing Weingarten rights for Kansas public employees is a reflection of the fact that strikes are not allowed under Kansas law. Nothing more should be read into the absence of this wording. Goetz acknowledges this fact in his article where he states that "federal law includes among protected activities the right 'to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection' – in plain English, the right to strike." Goetz at 263. Goetz makes an additional point:

> "The Act provides for three additional employer prohibited practices that have no counterpart under the LMRA. One is Section 75-4333(b)(6), which makes it a prohibited practice for a public employer willfully to "[d]eny the rights accompanying certification or formal recognition granted in section 75-4328." This 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. An 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 at a meeting with management**. (emphasis added).

Goetz, p. 273. The presiding officer finds and concludes that the language of K.S.A. 75-

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mutual aid or protection . . .', when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action." Kansas PEERA's counterpart to section 7 is K.S.A. 75-4324, and it does not contain language concerning "concerted activities for" "mutual aid or protection".

4321(b), 75-4324 and 75-4328 are all supportive of the right of a union representative to attend a meeting such as that at issue in the instant facts and circumstances pursuant to the employee's protected 75-4324 rights, as well as per the employee organization's 75-4328 right to represent the employees of the unit. Absence of the "concerted activities for . . . mutual aid or protection" language is not fatal to Petitioner's claim. Respondent's refusal here to permit an FOP representative to actively participate in the unit member's investigatory interview constitutes violations of K.S.A. 75-4333(b)(1) as an independent violation, and of K.S.A. 75-4333(b)(2), (b)(3), (b)(5) and (b)(6).

IT IS THEREFORE ADJUDGED, that Respondent has, for the reasons set forth above, committed prohibited practices in violation of K.S.A. 75-4333 in all the particulars set out therein.

IT IS THEREFORE ORDERED, that, with regard to Count One, Respondent shall compensate Deputies Morris and Woolley with full back pay and benefits so as to restore them to the *status quo ante* that existed prior to commission of its prohibited acts.[20]

[20] In another PERB case, a decision by the Kansas Court of Appeals currently awaiting a determination by the Kansas Supreme Court whether to grant PERB's requested review of it, determined that PERB lacks authority, at least under the facts of that case, to grant a monetary, or make-whole, remedy for commission of a prohibited practice. There, the Court of Appeals did not have the benefit of consideration of certain aspects of the legislative history of the Act. Such legislative history demonstrates that the original language of the Act as it was adopted in 1972 contained the same remedial authority language relied upon by the Kansas Supreme Court in its holding that under a similar statute, the Professional Negotiations Act, its final administrative decision-maker possesses the authority to order monetary make-whole remedies. *Unified School District No. 279, Jewell County v. Secretary of Kansas Department of Human Resources,* 247 Kan. 519, 802 P.2d 516 (1990). PEERA lacks this identical language now due only to a technical amendment adopted when the Legislature made the KJRA applicable to PEERA in 1986. The amendment deleting the remedial authority language was a technical one, and cannot be construed as carrying with it the legislative intent to strip PERB of the authority it has possessed, and exercised, since the days of its very first prohibited practice case, no. 75-CAE-1-1973. The facts of the instant case are distinguished from those underlying the Court of Appeals decision referenced above and this order treats the conclusion of that matter accordingly.

IT IS FURTHER ORDERED, that, with regard to Count Two, Respondent shall post, on appropriate bulletin boards, a notice stating, "The Wyandotte County Sheriff's Department and the Unified Government of Wyandotte County and Kansas City, Kansas have committed a prohibited practice by refusing to meet and confer with the Fraternal Order of Police Lodge No. 40 President Charles Morris and Vice-President Kimberly Tibbetts, regarding terms and conditions of employment. The Wyandotte County Sheriff's Department and the Unified Government acknowledge that this conduct is illegal and have taken appropriate steps to ensure that such conduct does not occur in the future."

IT IS FURTHER ORDERED, that, with regard to Count Two, that the Employer is prohibited from refusing to meet and confer in the future with duly-designative representatives of the Employee Organization, including its President and Vice-President.

IT IS FURTHER ORDERED, that, with regard to Count Four, that Respondent rescind its repudiation of material provisions of the parties' bargaining agreement and unilateral changes of terms and conditions of employment regarding imposition of a Sergeant pre-test.

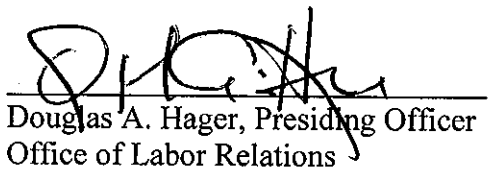
IT IS FURTHER ORDERED, that, with regard to Count Five, Respondent shall negate discipline imposed on the implicated unit member, and remove all references to the discipline from her personnel file.

IT IS FURTHER ORDERED, that, with regard to Count Five, Respondent shall cease and desist its refusal to allow participative representation by a union representative in grievance meetings and investigatory interviews and otherwise shall conform its actions with Kansas PEERA as gleaned from the written decisions of this administrative body.

IT IS FURTHER ORDERED, that Respondent shall post a copy of this order in a conspicuous location at all duty stations where members of the employee unit represented by the Fraternal Order of Police Lodge No. 40 are assigned to work.

IT IS SO ORDERED.

DATED, this 9th day of April, 2009.



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

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. *See* K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on April 27, 2009, addressed to: Public Employee Relations Board & Labor Relations, 427 SW Topeka Blvd., Topeka, Kansas 66603.

CERTIFICATE OF MAILING

I, Douglas A. Hager, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 9th day of April, 2009, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action through their attorneys of record in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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