

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC)
EMPLOYEES (KAPE),)
)
Petitioner,)
)
vs.) Case No. 75-CAE-17-1993
)
STATE OF KANSAS,)
DEPARTMENT OF CORRECTIONS,)
)
Respondent.)
_____)

INITIAL ORDER

ON the 10th day of August, 1993, the above-captioned matter came on for hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Scott A. Stone, attorney
Kansas Association of Public Employees
1300 S.W. Topeka Boulevard
Topeka, Kansas 66612-1817

RESPONDENT: Appeared by Timothy G. Madden, attorney
Department of Corrections
900 S.W. Jackson, Suite 400
Topeka, Kansas 66612

ISSUES PRESENTED FOR REVIEW

The parties have stipulated that the following issues be submitted to the presiding officer for determination:

1. WHETHER THE DEPARTMENT OF CORRECTIONS HAS REFUSED TO MEET AND CONFER IN GOOD FAITH AS SET FORTH IN K.S.A. 75-4333(b)(5) BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT RELATING TO ROLL-CALL MEETINGS AND BREAKS FOR MEALS.

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2. WHETHER THE DEPARTMENT OF CORRECTIONS' ACTION OF CHANGING TERMS AND CONDITIONS OF EMPLOYMENT RELATING TO ROLL-CALL MEETINGS AND BREAKS FOR MEALS WAS IN RETALIATION FOR THE ORGANIZATIONAL ACTIVITIES OF THE PETITIONER AND EMPLOYEES IN THE BARGAINING UNIT AS PROHIBITED BY K.S.A. 75-4333(b) (1) AND (4).
3. WHETHER CONTROL OVER THE USE OF ROLL-CALLS AND OVERTIME IS EXCLUSIVELY RESERVED TO THE DEPARTMENT OF CORRECTIONS AS A MANAGERIAL PREROGATIVE PURSUANT TO K.S.A. 75-4326.
4. WHETHER THE PUBLIC EMPLOYEE RELATIONS BOARD LACKS JURISDICTION TO HEAR THIS COMPLAINT AS THE ISSUE IS PREEMPTED BY THE FAIR LABOR STANDARDS ACT.
5. WHETHER AN EMPLOYER MAY TAKE UNILATERAL ACTION CONCERNING A MANDATORY SUBJECT OF NEGOTIATIONS IF SUCH SUBJECT CAN BE RAISED LATER BY THE EMPLOYEE ORGANIZATION THROUGH THE MEET AND CONFER PROVISIONS OF K.S.A. 75-4327.
 - A. WHETHER THE KANSAS ASSOCIATION OF PUBLIC EMPLOYEES' COMPLAINT IS RIPE FOR DETERMINATION SINCE IT HAS FAILED TO SUBMIT TO THE DEPARTMENT OF CORRECTIONS A FORMAL PROPOSAL ON ROLL CALLS AND MEAL BREAKS.
 - B. WHETHER THE KANSAS ASSOCIATION OF PUBLIC EMPLOYEES IS ESTOPPED FROM CLAIMING A CONDITION OF EMPLOYMENT EXISTS RELATIVE TO MEAL BREAKS WHILE SIMULTANEOUSLY CLAIMING THAT MEAL BREAKS HAVE NOT BEEN PROVIDED.

SYLLABUS

1. **MEET AND CONFER IN GOOD FAITH** - *When Duty Satisfied - Statutory requirements completed.* Only after the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, and have either reached agreement or completed the impasse procedure set forth in K.S.A. 75-4332, can it be said they have satisfied their statutory duty under PEERA.

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2. **MEET AND CONFER IN GOOD FAITH** - *When Duty Satisfied - Bargaining after unilateral change implemented.* Providing an opportunity to meet and confer on a mandatory subject after unilateral action has been taken does not satisfy the employer's duty to meet and confer in good faith, and is not a defense to a K.S.A. 75-4333(b)(5) prohibited practice complaint.
3. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes.* A unilateral change, by a public employer, in terms and conditions of employment, is a prima facie violation of its public employees' collective negotiation rights.
4. **MEET AND CONFER IN GOOD FAITH** - *Managerial Prerogatives - Reduction in labor costs.* Decisions intended to reduce labor costs are not considered fundamental managerial decisions and must be pursued through the meet and confer process.
5. **MEET AND CONFER IN GOOD FAITH** - *Mandatory Subjects - Duty to Continue Past Practices.* Included in the public employer's obligation to meet and confer in good faith is the duty to continue past practices that involve mandatory subjects of negotiation.
6. **MEET AND CONFER IN GOOD FAITH** - *Managerial Prerogatives - Indirect linkage to avoid negotiations.* An employer cannot evade its duty to meet and confer over a mandatory subject by indirectly linking the subject to a managerial prerogative.
7. **PROHIBITED PRACTICES** - *Duty To Meet And Confer In Good Faith - Unilateral changes - Emergency Circumstances.* Certain emergency circumstances may develop which would relieve an employer of its duty to negotiate mandatory subjects before making unilateral changes. The burden is upon the employer to produce evidence of the emergency circumstances, and a defense based on alleged fiscal crisis will be rejected where the employer fails to show that the crisis did not allow time for negotiations.
8. **PROHIBITED PRACTICES** - *Burden of Proof - No presumption from filing of complaint.* The mere filing of a prohibited practice complaint by an aggrieved party creates no presumption of a violation of PEERA, and it is incumbent upon the one alleging violation of PEERA to prove the charges by a fair preponderance of all the evidence.

FINDINGS OF FACT¹

1. Petitioner, Kansas Association of Public Employees ("KAPE") is an "employee organization" as defined by K.S.A 75-4322(i). It is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for certain correctional officers at all Kansas correctional facilities other than the Lansing Correctional Facility. (Petition and Answer).
2. Respondent, State of Kansas, Department of Corrections ("Corrections"), is a "public agency or employer," as defined by K.S.A. 75-4322(f), which is covered by the Kansas Public Employer-Employee Relations Act in accordance with K.S.A. 75-4321(c). (Petition and Answer).
3. It was the policy at the Hutchinson, Lansing, and three other correctional facilities that every employee receive a thirty minute, duty free, lunch break to offset roll call fifteen minutes prior to each shift and a relief briefing fifteen minutes after each shift. (Tr.p. 13, 55, 6, 143; Ex. 4, 5). The four remaining correctional facilities do not utilize thirty minute roll call meetings offset by a thirty minute duty free meal break. (Tr.p. 26).
4. At the time of the hearing, and at all times pertinent to this case, Brad Avery served as the Executive Director of KAPE. (Tr.p. 9). Mr. Avery was also the attorney for the plaintiffs in two civil actions in federal court brought under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.; Brinkman, et al. v. Dept. of Corrections and Ackley (Bates), et al. v. Dept. of Corrections. The theory of both cases was that the Department of Corrections had made its employees work during their break times and therefore, the break times were compensable. (Tr.p. 11, 12, 28-29, 32-33, 55, 141).
5. The issue presented in the Brinkman and Ackley cases was that while the employer gave the employees what it called an unpaid meal break of thirty minutes in length, it was not a bona-fide

¹ "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). As the Supreme Court stated in NLRB v. Pittsburgh Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

meal break required by the FLSA. The Tenth Circuit Court of Appeals described the situation as follows:

"Plaintiffs, correctional officers at the Lansing Correctional Facility, were required to report to roll call fifteen minutes before their eight-hour shifts and also to remain fifteen minutes after their shifts to provide relief briefings to the officers who began work on the next shifts. To offset the extra thirty minutes their daily work schedules provided for a thirty minute meal break. Plaintiffs were not compensated for this scheduled break, although their activities were curtailed. For instance, they could not leave the prison grounds, go to their automobiles, or read, and were required to respond to alarms.

* * *

"[A]lthough defendant intended to routinely provide breaks those opportunities did not consistently materialize . . ." (Case No. 93-3019; see also Tr.p. 62).

6. As a result of the loss of the meal breaks, the correctional officers were working 42 1/2 hours per week rather than 40 hours per week thereby accruing 2 1/2 hours of overtime for which they were not compensated. (Tr.p. 154).
7. In the Brinkman lawsuit, the plaintiffs were successful in the federal district court where a jury determined that the breaks were compensable and overtime was owed to the correctional officers. The decision was rendered November 20, 1992. (Tr.p. 30-32, 63, 141).
8. Upon notification of the verdict in the Brinkman litigation on November 20, 1992, Charles Simmons, at the time Chief Counsel for the Kansas Department of Corrections, (Tr.p. 140), met with the Secretary of Corrections and advised the Secretary of the potential fiscal liability to which it was exposed by virtue of the management of meal breaks. In-house meetings with the Secretary of the Department of Corrections, the Deputy Secretaries, and the nine facility wardens were conducted from the first business day following the November 20, 1992 verdict through approximately the 20th of December, 1992 when a consensus as to how to approach the issue was

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reached. (Tr.p. 144). The Department of Corrections' plan concerning roll call, relief briefing, and meal breaks was quite simple; discontinue the policy. (Tr.p. 149; Ex. A). The Department viewed the change as a managerial prerogative to determine how work is done, who does it, and to control overtime. (Tr.p. 154).

9. At the time of the Brinkman verdict, KAPE had petitioned to represent a bargaining unit composed of correctional officers at all the Department of Corrections facilities except Lansing, but had yet to be certified as the exclusive representative for that bargaining unit. The Kansas Public Employee Relations Board conducted a certification election for the bargaining unit on December 14, 1992, and the order certifying the election of KAPE was sent to the parties on December 23, 1992. (Tr.p. 22, 37, 52, 57, 64, 145; Ex. B). The Department did not receive the certification until December 29, 1992. (Tr.p. 37-38).
10. Correctional officers at all institutions of the Department of Corrections were notified by memorandum dated December 28, 1992, that roll call and meal breaks would be discontinued effective January 18, 1993. (Tr.p. 10, 64, 137; Ex. 1, 2).
11. Charles Simmons attempted to contact Brad Avery of KAPE on December 28, 1992, the same day the memorandum was issued to correctional officers, to inform him of the memorandum. (Tr.p. 147). Mr. Avery and Mr. Simmons did discuss the matter by telephone on December 29, 1992. Mr. Avery stated the belief that it would be a prohibited practice for the Department to discontinue the breaks without first meeting and conferring. He indicated Correction's negotiator should contact Paul Dickhoff, KAPE's Director of Negotiations, to set up a negotiation session. (Tr.p. 14-15, 38, 39, 68, 110, 167; Ex. A).
12. Mr. Simmons attempted but was unable to reach Mr. Dickhoff by telephone on December 29, 1992. By letter dated December 29, 1992, Charles Simmons advised Mr. Dickhoff that Corrections had developed plans to discontinue roll call, relief briefings and meal breaks at all correctional facilities, and suggesting the parties meet to discuss those plans in the near future. (Tr.p. 14-15, 89-90, 147; Ex. A). Mr. Dickhoff did not receive the specific details concerning what was included in the plans developed by Corrections with the December 29, 1992 letter. (Tr.p. 121). Mr. Simmons and Mr. Dickhoff

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subsequently conferred by telephone and agreed to meet on January 12, 1993. (Tr.p. 147-48).

13. On January 12, 1993, representatives for KAPE - Brad E. Avery and Paul K. Dickhoff, Jr. - met with representatives of the Department of Corrections - Charles Simmons, Gary Leitnaker, and Judy Rickerson. (Tr.p. 40). The purposes of the meeting was to solicit from KAPE alternatives, options or ideas regarding roll call and breaks for meals, and to explore ways to resolve the break issue. (Tr.p. 15, 155). Neither party considered the meeting on January 12th to be a formal meet and confer session. (Tr.p. 76, 111-12, 146). Mr. Simmons, while believing that the January 12th meeting had all the elements of a meet and confer session, did not consider it at the time to be a formal meet and confer session. (Tr.p. 146).
14. The KAPE representatives to the January 12th meeting did not view it as a meet and confer session, but rather as an opportunity to explore options to avoid the filing of a prohibited practice complaint by KAPE if the proposed change was implemented. (Tr.p. 15, 16, 40, 46, 59, 64, 76, 87, 100, 104, 111-12). According to KAPE, if the January 12th meeting had been a formal meet and confer session, the individuals at the meeting would have been different from the KAPE representatives at the meeting, or Mr. Avery and Mr. Dickhoff, would have had to obtain authorization from the bargaining team to act on their behalf. No such authorization had been obtained. In fact, the bargaining team of the correctional officer unit had not been elected at the time. (Tr.p. 84).
15. Generally, once KAPE is certified as the exclusive representative of an employee bargaining unit, it organizes a "general council" composed of employees in the unit to serve in a leadership capacity for the unit. This general council then elects a bargaining team to represent the unit in meet and confer negotiations. A general council for the correctional officers was organized by KAPE. The general council included approximately forty-five individuals representing all the correctional facilities. (Tr.p. 70-72). Subjects for negotiations are identified by the general council. These subjects are refined and non-mandatorily negotiable items eliminated. The subjects are then put in appropriate language to form written proposals. (Tr.p. 72-74). KAPE does not proceed to negotiations without first going through this process and conferring with the employee bargaining unit. (Tr.p. 75). Prior to the January 12, 1993

meeting, no written proposal on meal breaks had been prepared by the correction officers unit bargaining team. (Tr.p. 75).

16. At the January 12, 1993 meeting, the Department of Corrections expressed a concern, following the Brinkman verdict, that additional litigation would ensue resulting in substantial fiscal exposure to the state for overtime wages if the existing break policy remained in effect. (Tr.p. 83, 142-43). The Department estimated, based upon the \$140,000 verdict in the Brinkman case, that the state's potential liability was approximately \$10,000 per day, for the five facilities that had the roll call and meal break policy. (Tr.p. 143, 145-46). Due to this exposure for overtime liability, time was allegedly of the essence to the Department regarding resolution of the roll call/meal break issue.
17. Various alternatives for addressing the issue of compensable meal periods were discussed during the meeting on January 12, 1993. (Tr.p. 41-43, 92, 94, 103, 128). KAPE proposed to leave the hours of the shifts untouched and to make the breaks true breaks. (Tr.p. 92). In exchange for allowing the break periods to continue, KAPE would agree to assemble its bargaining team in an expeditious fashion so meet and confer could begin. (Tr.p. 17, 41). KAPE indicated it could have its full package of proposals ready in a time period of thirty to sixty days. (Tr.p. 151). The Department of Corrections sought only to meet and confer on the single issue of meal breaks. (Tr.p. 148-49). There was an alternative proposal made by Mr. Avery that would have provided for a twenty minute lunch break within the eight hour shift. (Tr.p. 42-43, 95-96). No agreements were reached at the January 12th meeting. (Tr.p. 87, 114, 119, 149).
18. Following the January 12th meeting, while expressing a willingness to continue to meet and confer on the issue of roll call and meal breaks, the Department of Corrections indicated to KAPE an intent to go ahead and implement the plan for the January 18th cutoff of the roll call and meal period. (Tr.p. 149). The Department of Correction's existing policy of allowing thirty minute meal breaks and roll calls to its employees was rescinded, as threatened, on January 18, 1993. As Mr. Avery explained the situation that existed after the change in break and roll call policy:

"After the breaks were eliminated, there was no roll call and . . . no requirement that

they remain after shift, but there was no break either, so it would be a straight [eight hour] shift." (Tr.p. 62).

19. At the conclusion of the January 12, 1993 meeting, KAPE did not consider the parties to be at impasse. (Tr.p. 129). Since the meeting, neither party has requested or participated in mediation or fact finding pursuant to K.S.A. 75-4332. (Tr.p. 65, 129).
20. By letter dated June 10, 1993 from Mr. Simmons to Mr. Dickhoff, Mr. Simmons confirmed the "initial" meet and confer session between KAPE and the Department of Corrections for the correction officers unit was set for July 13, 1993. (Tr.p. 161; Ex. 6). On July 13, 1993 the parties had a preliminary meeting to discuss ground rules establishing procedures future meet and confer sessions would follow. (Tr.p. 116-17). As of the date of the hearing, no memorandum of agreement had been negotiated between KAPE and the Department of Corrections covering the correctional officer unit certified on December 23, 1992. (Tr.p. 35).
21. KAPE was unaware of any indicia of retaliation against it or its members as a result of the selection of KAPE as the exclusive representative at the December 14, 1992 election other than the change in roll call and breaks. (Tr.p. 65).
22. Some KAPE members in the correction officers bargaining unit have resigned their membership because of the loss of their break times. (Tr.p. 50-51, 59).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER THE DEPARTMENT OF CORRECTIONS HAS REFUSED TO MEET AND CONFER IN GOOD FAITH AS SET FORTH IN K.S.A. 75-4333 (b) (5) BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT RELATING TO ROLL-CALL MEETINGS AND BREAKS FOR MEALS.

ISSUE 3

WHETHER CONTROL OVER THE USE OF ROLL-CALLS AND OVERTIME IS EXCLUSIVELY RESERVED TO THE DEPARTMENT OF CORRECTIONS AS A MANAGERIAL PREROGATIVE PURSUANT TO K.S.A. 75-4326.

ISSUE 5

WHETHER AN EMPLOYER MAY TAKE UNILATERAL ACTION CONCERNING A MANDATORY SUBJECT OF NEGOTIATIONS IF SUCH SUBJECT CAN BE RAISED LATER BY THE EMPLOYEE ORGANIZATION THROUGH THE MEET AND CONFER PROVISIONS OF K.S.A. 75-4327.

- A. WHETHER THE KANSAS ASSOCIATION OF PUBLIC EMPLOYEES' COMPLAINT IS RIPE FOR DETERMINATION SINCE IT HAS FAILED TO SUBMIT TO THE DEPARTMENT OF CORRECTIONS A FORMAL PROPOSAL ON ROLL CALLS AND MEAL BREAKS.
- B. WHETHER THE KANSAS ASSOCIATION OF PUBLIC EMPLOYEES IS ESTOPPED FROM CLAIMING A CONDITION OF EMPLOYMENT EXISTS RELATIVE TO MEAL BREAKS WHILE SIMULTANEOUSLY CLAIMING THAT MEAL BREAKS HAVE NOT BEEN PROVIDED.

Duty to Bargain

The legislative parameters of the duty to bargain under the Kansas Public Employer-Employee Relations Act ("PEERA") are found in K.S.A. 75-4327(b):

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

K.S.A. 75-4322(m) defines "meet and confer in good faith" to mean:

"[T]he process whereby the representative 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."

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The Kansas Supreme Court has interpreted these statutes to mean:

"The Act [PEERA] imposes upon both employer and employee representative the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations." Kansas Bd. of Regents v. Pittsburgh State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983).

[1][2] Only after the parties have met in good faith, bargained over the mandatory subjects placed upon the bargaining table, and have either reached agreement or completed the impasse procedure set forth in K.S.A. 75-4332, can it be said they have satisfied their statutory duty under PEERA. I.A.F.F. v. City of Junction City, Case No. 75-CAE-4-1994 (July 29, 1994); Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, p. 29 (Feb. 10, 1992). Providing an opportunity to meet and confer on a mandatory subject after unilateral action has been taken does not satisfy the employer's duty to meet and confer in good faith, and is not a defense to a K.S.A. 75-4333(b)(5) prohibited practice complaint.

Unilateral Changes

KAPE alleges the Department of Corrections violated the Kansas Public Employer-Employee Relations Act (PEERA"), specifically K.S.A. 75-4333(b)(5), by unilaterally implementing the discontinuation of a policy that every employee receive a thirty minute, duty free lunch break to offset thirty minutes of roll call and relief briefing each shift. K.S.A. 75-4333(b)(5) of PEERA

prohibits an employer from refusing to meet and confer with the exclusive representative of employees in a bargaining unit over mandatory subjects of negotiations. Specifically, that section states:

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

* * * * *

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

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 ("NLRA") as described by the U.S. Supreme Court in H.K. Porter Co., 397 U.S. 99, 103 (1970),² and cited with approval in City of Junction City,

² Where there is no Kansas case law interpreting or applying a specific section of the Kansas Professional Negotiations Act, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA, Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992); See also Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 wherein the same conclusion has been reached under the Kansas Public Employer-Employee Relations Act.

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

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task. In particular, as it relates to the case under consideration here, the legislature created a definition, very much like the one in the NLRA, of those characteristics which, if possessed by an employee, would disqualify that employee from participation in a bargaining unit.

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

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

"The objective 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."

[3] The concept of refusal to bargain means more than simply refusing to discuss a subject. An employer is also deemed to have violated PEERA when it fails to bargain in good faith, or makes unilateral changes in terms and conditions of employment. It is a well established principle of labor law that a unilateral change, by a public employer, in terms and conditions of employment, is a prima facie violation of its public employees' collective negotiation rights. I.A.F.F. v. City of Junction City, Kansas, Case No. 75-CAE-4-1994 (July 29, 1994); See also Service Employees Union v. City of Hutchinson, Kansas, Case No. 75-CAE-21-1993 (January 28, 1994); City of Junction City v. Junction City Police Officers Association, 75-CAEO-2-1992 (July 31, 1992). Because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a "mandatory" bargaining

in harmony with justice and public policy. Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, §52.02, p. 329-31 (4th ed. 1973); Benton v. Union Pacific R. Co., 430 F.Supp. 1380 (19) [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).

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item. I.A.F.F. v. City of Junction City, Kansas; See also Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). The threshold issue, therefore, is whether meal breaks or roll call are mandatory subjects of meet and confer negotiations. This is to be determined by application of the three-prong test set forth in Kansas Association of Public Employees v. State of Kansas, Adjutant General, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991) .

Application of Balancing Test

1. Fundamental Concern to the Interests of Employees

As PERB concluded in Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 37 (Jan. 28, 1994), it is a general principle of labor law that a matter which affects the terms and conditions of employment will be presumed a subject of mandatory bargaining. See also Chemical Workers v. Pittsburg Plate Glass Co., 404 U.S. 157, 178-79 (1971); American Electric Power Co., 137 LRRM 1199, 1201 (1991); GHR Energy Corp., 133 LRRM 1069 (1989).³ In addressing this issue under the NLRA, the NLRB has consistently found the issue of breaks to be a term and condition of employment and mandatorily negotiable. Xidex

³ This should be read to mean that once the employee organization has provided proof sufficient to satisfy the first two prongs of the three prong test as set forth in Kansas Association of Public Employees v. State of Kansas, Adjutant General, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991) and produced evidence establishing an impact upon employee interests by the failure to bargain the subject, it has established a prima facie case and the presumption of mandatory negotiability attaches.

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Corporation, 132 LRRM 1331 (1989) [Employer violated LMRA by failing to bargain with union before changing lunch break from 30-minute unpaid break to 15-minute paid break]; Hedison Mfg. Co., 109 LRRM 1216 (1982) [Employer violated LMRA by failing to notify union before unilaterally requiring employees to report to work five minutes before usual starting time - new rule had substantial effect on employee's working conditions since it diminished their free time for relaxing and taking refreshments at cafeteria before starting work]; Technical Careers Institutes, Inc., 108 LRRM 1359 (1981) [Employer violated act by failing to bargain with newly elected certified union before unilaterally reducing length of lunch period]; Magnolia Manor Nursing Home, 109 LRRM 1198 (1982) [Employer violated LMRA by failing to consult with union before unilaterally changing policies with respect to lunches, vacations, uniforms and breaks]; Van Dorn Plastic Machinery v. NLRB, 132 LRRM 2200 (1989) [decision to abandon the lunch break policy affected the hours and wages of employees and therefore was subject to mandatory bargaining]. Certainly the discontinuation of a policy providing for a meal break is of fundamental concern to the interests of the correctional officers.

2. Preemption by Statute or Constitution

Before examining the issue of inherent employer rights it is necessary to determine first whether any constitutional or

statutory provisions relating to the subject sought to be negotiated would remove it from the area of mandatory negotiability. None can be found, and the Department of Corrections does not cite any such statutory provisions.

3. Inherent Managerial Right

In order to overcome the presumption of mandatory negotiability, and thereby counter-balance the fundamental concern to the interest of correctional officers found to exist under the first prong of the test, the Department of Corrections argues its actions were the exercise of a managerial prerogative not subject to meet and confer. Consequently, Corrections has the burden to come forward with evidence showing that the subject matter sought to be addressed by the change in the meal break policy goes to the "protection of the core purposes of the enterprise,"⁴ i.e. that it bears a direct, immediate, and proximate relationship to its legitimate business interests in safety, productivity, quality control or public appearance. Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 31 (Jan. 28, 1994); Peerless Publications, 124 LRRM 1331, 1332 (1987). The Department of Corrections has failed to meet this burden.

⁴ Basically the employer must produce evidence sufficient to prove that the probable effect upon the operations of the employer of having to negotiate the subject outweighs the impact upon the interest of the employees in the bargaining unit in that subject if the employer is to be allowed to take unilateral action. Kansas Association of Public Employees v. State of Kansas, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991) and reaffirmed by PERB in Service Employees Union Local 513 v. City of Hutchinson, KS, Case No. 75-CAE-21-1993, p. 30 (Jan. 28, 1994).

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[4] The evidence produced by Corrections to establish why the action constituted a managerial prerogative relates solely to the potential financial liability for overtime that allegedly would have resulted from continuation of the meal break policy. In First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the U.S. Supreme Court distinguished fundamental managerial decisions from those intended to reduce labor costs, concluding that a reduction of labor costs must be pursued through the collective bargaining process. Here the decision to discontinue meal breaks was intended to reduce labor costs of the Department of Corrections by eliminating the potential for overtime. As such it does not constitute a managerial prerogative relieving Corrections of its duty to meet and confer.

Application of the "balancing test" set forth in Kansas Association of Public Employees v. State of Kansas, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991) and reaffirmed by PERB in Service Employees Union Local 513 v. City of Hutchinson, KS, Case No. 75-CAE-21-1993, p. 30 (Jan. 28, 1994), results in the conclusion that the probable impact upon the operations of the Department of Corrections of having to negotiate the change to the meal break policy cannot be said to outweigh the impact upon fundamental concern to the interests of the correctional officers in the bargaining unit if the Department of Corrections is allowed to take

unilateral action. Accordingly, the meal break policy is a mandatory subject of meet and confer negotiations.

Past Practices of the Parties

[5] The Department of Corrections next argues the lack of a memorandum of agreement between the parties at the time Corrections took the unilateral action as relieving it of the duty to meet and confer. As previously stated, it is a prohibited practice for a public employer to refuse to negotiate in good faith with the certified representative of its employees. Included in the public employer's obligation to negotiate in good faith "*is the duty to continue past practices that involve mandatory subjects of negotiation.*" Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995, 997 (1987). See also Liberal-NEA v. U.S.D. 480, Case No. 72-CAE-8-1992 (March 5, 1993); Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981); Carolina Steel Corp., 132 LRRM 1309 (1989) [Employer violated LRMA when, without bargaining to impasse, it discontinued 20 year practice of granting Christmas bonus].

A past practice is a consistent prior course of conduct which has come to be accepted by employees and the employer alike, and has thus become an important part of the employment relationship. Such past practices between the parties may be relied upon in determining the parties' future relationship. cf. Lindskog v.

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U.S.D. 274, Case No. 72-CAE-6-1992, at syl. 8 (December 11, 1992). Whether a past practice has been established, and the exact nature of such practice, is a question of fact for the presiding officer. Lindskog, at p. 44; Unatego Non-Teaching v. PERB, 522 N.Y.S.2d 995 (1987).

To establish a past practice it must be proved both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice.⁵ Lindskog, at syl. 10; R.I. Court Reporters Alliance v. State, 591 A.2d 376, 379-80 (R.I. 1991). The record clearly reveals that, prior to the election of KAPE as the exclusive employee representative for the correctional officers unit, the practice existed at at least five correctional facilities that every employee receive a thirty minute, duty free, lunch break to offset roll call fifteen minutes prior to each shift and a relief briefing fifteen minutes after each shift. The federal district court in the Brinkman FSLA case reached this same conclusion. See finding-of-fact #5 above. Conversely, the Department of Corrections produced no evidence proving that: 1) no such practice existed; 2) it was unaware of or had not acquiesced

⁵ Five indices that assist in determining this mutual acceptance are: (1) clarity and consistency throughout the course of conduct; (2) longevity and repetition creating a consistent pattern of behavior; (3) acceptance of the practice by both parties; (4) mutuality in the inception or application of the practice; and (5) consideration of the underlying circumstances giving rise to the practice. Lindskog, at syl. 10; R.I. Court Reporters Alliance v. State, 591 A.2d 376, 379-80 (R.I. 1991).

in the practice; or 3) the practice was other than established by KAPE. Accordingly, even though no memorandum of agreement existed, after an exclusive employee representative had been elected, Corrections had the obligation to continue this practice until the parties had satisfied their obligation to meet and confer on any proposed change.

Did a Change in Working Conditions Occur?

Next, the Department of Corrections contends that while there may have been a break policy on paper, no such break existed in fact. Apparently, Corrections' position is that if, as KAPE maintained in the Brinkman lawsuit, the correctional officers were required to work through their breaks, no break in fact existed and, therefore, the action taken in discontinuing the meal break policy really did not change a term and condition of employment for the correctional officers. As Corrections argues:

"[P]etitioner should be estopped from contending that respondent ceased providing as a condition of employment a duty free meal break while at the same time contending that duty free meal breaks were never provided." (Respondent's brief p. 18-19).

Corrections mischaracterizes the situation. The analysis of this issue must begin with the understanding that the determination of whether overtime is to be worked and the amount of such overtime is the prerogative of management and not subject to meet and confer. Equally clear, the record established a practice existed at at least five correctional facilities that every employee

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receive a thirty minute, duty free, lunch break to offset roll call fifteen minutes prior to each shift and a relief briefing fifteen minutes after each shift. When Corrections decided that correctional officers would be required to work during a break period, which was ultimately determined to be compensable overtime, that was within its managerial prerogative, just as would be a decision to discontinue the overtime during breaks. The decision to work overtime however did not result in abolishing the meal break policy. The meal break was still there. The correctional officers were simply required to work through it. Had Corrections decided to discontinue working overtime during the meal break period, those correctional officers would have once again been entitled to the meal break. As the federal district court characterized the situation:

"[A]lthough defendant intended to routinely provide breaks those opportunities did not consistently materialize . . ."

Corrections argues, as justification for its unilateral action in abolishing meal breaks, "*[i]f the respondent does not have the prerogative to determine on its own whether overtime is to be utilized, it is significantly hindered in meeting its operational budget.*" True, abolishing meal breaks provides a means of controlling overtime since if no meal break exists no overtime can be assigned during that period. Equally true, however, is that Corrections could control overtime without abolishing the meal

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breaks by not requiring correctional officers to work during those meal breaks. The decision to work overtime and the decision to have or abolish meal breaks are two mutually exclusive subjects. The former involves a managerial prerogative and is not negotiable. The latter involves a condition of employment and is presumptively negotiable.

[6] An employer cannot evade its duty to meet and confer over a mandatory subject by indirectly tying the subject to a managerial prerogative. As PERB reasoned in Kansas Association of Public Employees v. Dept. of Administration, 75-CAE-12/13-1991, p. 46 (Feb. 10, 1992):

"Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by public employers involve some managerial function, ending the inquiry at that point would all but eliminate the legislative authority of the union representative to negotiate with respect to 'terms and conditions of employment.'"

In Service Employees Union Local 513 v. City of Hutchinson, Ks., Case No. 75-CAE-21-1993, p. 31 (Jan. 28, 1994), PERB concluded:

"In summary, where an item of dispute is a matter of fundamental concern to the employees interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under K.S.A. 75-4326 simply because it may touch upon basic policy. It is the duty of the PERB in the first instance and the courts thereafter to determine whether the impact of the issue on the interests of the employee in wages, hours and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If the affect on wages, hours, and other terms and conditions of employment outweighs its impact on inherent managerial prerogatives, the public employer shall be required to meet and confer on such subjects upon request by the public employees' representatives pursuant to K.S.A. 75-4327(b)."

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In essence, what is required is application of the third prong of the balancing test set forth in the Adjutant General case. As concluded above, when such a balancing test is applied, the probable effect upon the operations of the Department of Corrections of having to negotiate the change to the meal break policy cannot be said to outweigh its impact upon the interest of the correctional officers in the bargaining unit if the Department of Corrections is allowed to take unilateral action. Accordingly, the fact that elimination of the meal break policy indirectly serves as a means of controlling overtime, this is insufficient to take it out of the category of mandatory negotiability.

Did the January 12, 1993 Meeting Satisfy Correction's Duty to Meet and Confer

The Department of Corrections contends that even if meal breaks are found to be a mandatory subject of meet and confer, it satisfied its duty to meet and confer with KAPE on the issue of discontinuation of meal breaks when the parties met on January 12, 1993. Accordingly, when that meeting ended without agreement, Corrections could proceed with its unilateral action. The reason unilateral action is prima facie unlawful is in the high degree of probability that it may frustrate a bargaining opportunity. Even if there has actually been a unilateral change in a term and condition of employment, an employer may successfully defend the

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action by demonstrating that there was not a bad faith refusal to bargain. As the Court noted in Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984):

"The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith."

As concluded by PERB in City of Junction City v. Junction City Police Officers Association, 75-CAEO-2-1992 (July 31, 1992):

"In summary, where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 74-4333(b)(5)."

The record shows that Correctional officers at all institutions of the Department of Corrections were notified by memorandum dated December 28, 1992, that roll call and meal breaks would be discontinued effective January 18, 1993. Prior to this notice, Corrections did not seek to meet and confer with KAPE over the proposed changes. However, Corrections, through the memorandum, did provide adequate and timely notice of the intended change prior to implementation; here approximately three weeks. This provided KAPE an opportunity to request to meet and confer on

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the proposed changes, which they did. Waiver, therefore, does not become an issue.

There is no question that on January 12, 1993, representatives for KAPE - Brad E. Avery and Paul K. Dickhoff, Jr. - met with representatives of the Department of Corrections - Charles Simmons, Gary Leitnaker, and Judy Rickerson. But, as PERB has consistently pointed out, to meet and confer in good faith as contemplated by PEERA is something more than the mere meeting of the public employer with the certified employee organization. See Local 1357, Service and Maintenance Unit v. Emporia State University, Case No. 75-CAE-6-1979 (Feb. 18, 1980); Kansas Association of Public Employees v. State of Kansas, Case No. 75-CAE-9-1990, p. 9 (March 11, 1991); AFSCME v. Dept. of Corrections, Case No. 75-CAE-9-1992 (December 30, 1993). Of prime importance here is the fact that neither party considered the meeting on January 12th to be a formal meet and confer session. The KAPE representatives to the January 12th meeting viewed it rather as an opportunity to explore options to avoid the filing of a prohibited practice complaint by KAPE if the proposed change was implemented. Further, neither Mr. Avery nor Mr. Dickhoff had authorization from the correctional unit bargaining team to negotiate on their behalf, and the record indicates that had the January 12, 1993 meeting been a formal meet and confer session, the individuals representing the bargaining

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unit at the meeting would have been elected from the unit's general council rather than provided by KAPE.

True, various alternatives for addressing the issue of compensable meal periods were discussed during the meeting on January 12, 1993, but no agreements were reached. At the conclusion of the January 12, 1993 meeting, KAPE indicated it could have its full package of proposals ready in a time period of thirty to sixty days. While expressing a willingness to continue to meet and confer on the issue of roll call and meal breaks, the Department of Corrections indicated to KAPE an intent to go ahead and implement the plan for the January 18th cutoff of the roll call and meal period. No further meetings were held between January 12, 1993 and January 18, 1993, when the changes proposed were implemented. Since the meeting, neither party has requested or participated in mediation or fact finding pursuant to the K.S.A. 75-4332 impasse procedure, and KAPE maintains it did not consider the parties to be at impasse.

One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in negotiations, their frequency, the progress toward agreement, and the persistence with which the employer offers opportunity for agreement. AFSCME v. Dept. of Corrections, Case No. 75-CAE-9-1992 (December 30, 1993); Kansas Association of Public

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Employees v. State of Kansas, Dept. of Administration, ("Technical Unit"), Case No. 75-CAE-10/11-1990 (May 4, 1990); See NLRB v. Sands Mfg. Co., 91 F.2d 721, 725 (1938). No single factor is controlling but the weight to be given any factor is within the discretion of the finder-of-fact. AFSCME v. Dept. of Corrections, supra; NLRB v. Truitt Mfg. Co., 351 US 149, 157 (J. Frankfurter, concurring, 1956).

An employer attending a single meeting, which neither party considered to be a meet and confer session, lasting only a few hours, without attendance of representatives from the bargaining unit negotiating team, that resulted in no agreements, and ended with KAPE requesting the opportunity present written proposals for future negotiations, and then taking unilateral action seven days later without successfully completing the statutory impasse procedure⁶ is not indicative of an intent to meet and confer in good faith. Correction's participation in the January 12, 1993 meeting cannot be considered to have satisfied its duty to meet and confer on the issue of discontinuation of the roll call and break policy so as to allow it to implement the changes unilaterally on January 18, 1993.

⁶ K.S.A. 75-4332 requires completion of mediation and fact-finding as a prerequisite to unilateral action on the part of a public employer. So, even if the January 12, 1993 meeting were considered to have ended in an impasse in negotiations, Corrections failed to undertake and complete the impasse procedure prior to unilaterally implementing the changes to the roll call and meal break policy. Such action, standing alone, constitutes a failure to meet and confer in good faith.

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Emergency Circumstances

[6] It is recognized that certain emergency circumstances may develop which would relieve an employer of its duty to negotiate mandatory subjects prior unilaterally making changes. See IAFF, Local 3140 v. Tarpon Springs, PERC Order No. 92U-293 (Fla. 1992) ¶¶15 FL-24013. The burden is upon the employer to produce evidence of the exigent or emergency circumstances. IAFF, Local 3140 v. Tarpon Springs, PERC Order No. 92U-293 (Fla. 1992) ¶¶15 FL-24013. A defense based on alleged fiscal crisis will be rejected where the employer fails to show that the crisis did not allow time for negotiations. Los Angeles Unified School District Police Officers Ass'n v. Los Angeles Unified School District, Cal. PERB Docket No. LA-CE-3151 (1992), ¶¶ 14 NPER CA-23102.

There is no evidence in the record that the Brinkman decision created an emergency situation requiring discontinuation of the roll call and meal break policy before the Department of Corrections satisfied its duty to meet and confer in good faith. See Dayton Newspapers, 91 LA 201, 205 (1988). Likewise, the record is void of evidence that there was no other reasonable means of addressing the question of FSLA overtime liability other than by the unilateral action taken, or that Corrections tried other approaches which proved unsuccessful. Finally, the fact that almost two months elapsed between receipt of the Brinkman decision

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and implementation of the policy change mitigates against an emergency situation existing.

Summary

The Department of Corrections does not deny that it adopted and implemented the change to the roll call and meal break policy. Since it has been determined that meal breaks are a mandatory subject of meet and confer, and a past practice had been established relative to that subject, the showing by KAPE of a repudiation of that past practice by Corrections by unilaterally discontinuing the roll-call and meal break policy established a prima facie violation of Correction's duty to meet and confer in good faith, and a prohibited practice as set forth in K.S.A. 75-4333(b)(5). The Department of Corrections failed to produce substantial evidence to prove that its unilateral action did not change a term and condition of employment, or that it had satisfied its duty to meet and confer, or that its action was not subject to meet and confer negotiations as a managerial prerogative or due to the existence of an emergency situation. The fact that Corrections agreed to continue to negotiate after the unilateral change was implemented does not relieve it of its obligation to meet and confer prior to the change if such is requested by the employee organization. Consequently, the Department of Corrections must be

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found to have committed a prohibited practice as set forth in
K.S.A. 75-4333(b)(5).

ISSUE 2

**WHETHER THE DEPARTMENT OF CORRECTIONS' ACTION OF CHANGING
TERMS AND CONDITIONS OF EMPLOYMENT RELATING TO ROLL-CALL
MEETINGS AND BREAKS FOR MEALS WAS IN RETALIATION FOR THE
ORGANIZATIONAL ACTIVITIES OF THE PETITIONER AND EMPLOYEES
IN THE BARGAINING UNIT AS PROHIBITED BY K.S.A. 75-
4333(b)(1) AND (4).**

[8] The mere filing of a prohibited practice complaint by an aggrieved party creates no presumption of a violation of PEERA, and it is incumbent upon the one alleging violation of PEERA to prove the charges by a fair preponderance of all the evidence. Findings of a prohibited practice must be supported by substantial evidence. Service Employees Union Local 513 v. City of Hays, Kansas, Case No. 75-CAE-8-1990, p. 9 (April 14, 1991).

Here KAPE maintains that the action of the Department of Corrections in discontinuing the roll call and meal break policy was in retaliation for the correctional officers voting to be represented by KAPE. As KAPE correctly states in its brief, "*There is no direct evidence that the Respondent acted in retaliation of the PEERA election results . . .*" KAPE looks to circumstantial evidence from which to raise the inference of unlawful motivation on the part of corrections. The circumstantial evidence presented was the fact that the correctional officers were notified of the

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proposed change in the roll-call and meal break policy on December 28, 1992; just two weeks after KAPE was certified as the exclusive employee representative for all correctional officers except those employed at the Lansing Correctional Facility.

Anti-union motivation may reasonably be inferred from a variety of factors including the proximity between the protected employee activity and the alleged unlawful action of the employer. See Service Employees Union Local 513 v. City of Hays, Kansas, Case No. 75-CAE-8-1990, p. 33 (April 14, 1991); F.O.P. Lodge #4 v. City of Kansas City, Kansas, Case No. 75-CAE-4-1991 p. 25 (Nov. 15, 1991). As noted in the F.O.P. Lodge #4 case, "*Timing remains one of the singularly most important elements of circumstantial proof.*" Id. The evidence produced by KAPE, standing alone and uncontradicted, would support an inference that the discontinuation of the roll-call and meal break policy was in retaliation for the correctional officers election of an employee organization to represent them concerning terms and conditions of employment.

The inquiry does not stop at that point however. One must look to whether the record contains a preponderance of evidence that the employer would have taken the same action in the absence of the alleged protected employee activity. The issue of compensable time for correctional officers working during meal breaks had existed for a number of years prior to the December 1992

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PERB election, and was the subject of two lawsuits. The decision in Brinkman, which resolved that dispute, did not come down until November 20, 1992. That adverse ruling then presented the Department of Corrections with the problem of how to address staffing requirements given the future overtime liability if the existing roll-call and meal break policy remained unchanged.

Addressing the issue of overtime liability is a legitimate business activity. Considering the evidence of the potential substantial liability faced by the Department of Corrections should it continue to work correctional officers during their meal breaks, some action was required, and would have been taken even if the correctional officers had not elected KAPE to represent them. The action chosen was to do away with the roll-call and meal break policy. On its face, such decision is not an unreasonable solution to the problem. It certainly removed the potential for overtime and any resulting overtime liability. Additionally, four of the nine correctional facilities already were already working under the resulting straight eight hour shift. This brought all correctional facilities into conformity as well as resolving the overtime liability problem. Such are legitimate reasons for the action taken.

It should be noted that while the decision to do away with roll-call and meal breaks may have served a legitimate business

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purpose, this is not to say that the means employed to reach that end were permitted by PEERA. As noted above, the unilateral action taken was a violation of the Department of Correction's duty to meet and confer in good faith on the change. However, that is a distinctly different issue from whether the action was taken in retaliation for the election. The fact that Corrections committed a prohibited practice by failing to meet and confer in good faith does not prove the retaliation charge.

Merely proffering a legitimate business reason for the adverse employee action is not, in itself, sufficient. The reason must be *bona fide* and not pretextual. If the proffered reason is a mere litigation figment or was not relied upon, then the reason is pretextual. F.O.P. Lodge #4 v. City of Kansas City, Kansas, Case No. 75-CAE-4-1991, p. 27 (Nov. 15, 1991). Where the employer advances legitimate reasons for its actions, the burden is upon the complaining party to come forward with evidence that such reasons are pretextual. Id. No such proof can be found in the record. The retaliation charge must be dismissed.

ISSUE 4

WHETHER THE PUBLIC EMPLOYEE RELATIONS BOARD LACKS JURISDICTION TO HEAR THIS COMPLAINT AS THE ISSUE IS PREEMPTED BY THE FAIR LABOR STANDARDS ACT.

The burden is upon the Department of Corrections to come forward with evidence and authority to support its position that

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PERB's jurisdiction to hear this complaint is preempted by the Fair Labor Standards Act. Having failed to do either, this argument of Corrections will not be considered.

ORDER

IT IS THEREFORE ADJUDGED, that the Department of Corrections has, for the reasons set forth above, failed to meet and confer in good faith with the Kansas Association of Public Employees on the issue of discontinuation of the roll-call and meal break policy as required by K.S.A. 75-4327, and thereby committed a prohibited practice as set forth in K.S.A. 75-4333(b)(1) and (5).

IT IS FURTHER ADJUDGED, that the Department of Corrections has not, for the reasons set forth above, retaliated against the employees in the correctional officers' bargaining unit or the Kansas Association of Public Employees for the election of KAPE as the exclusive employee organization for the bargaining unit by the discontinuation of the roll-call and meal break policy, and therefor did not commit a prohibited practice as set forth in K.S.A. 75-4333(b)(1).

IT IS THEREFORE ORDERED, that the Department of Corrections shall restore the status quo relative to roll-call and meal breaks that existed prior to implementation of that new policy on January 18, 1993.

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IT IS FURTHER ORDERED, that the Department of Corrections shall return to the negotiations table with the Kansas Association of Public Employees on that proposed change in policy, and meet and confer in good faith.

IT IS FURTHER ORDERED, that the Department of Corrections shall post a copy of this order in a conspicuous location at all duty stations where members of the employee unit represented by the Kansas Association of Public Employees are assigned to work.

Dated this 15th day of December, 1994.



Monty R. Bertelli, Presiding Officer
Labor Conciliator III
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

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 Secretary of Human Resources, either on his 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 fifteen days after the order is served on you. See 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 December 30, 1994 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

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CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 15th day of December, 1994, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by hand delivering a copy to:

Scott A. Stone, attorney
Kansas Association of Public Employees
1300 S.W. Topeka Boulevard
Topeka, Kansas 66612-1817

Timothy G. Madden, attorney
Department of Corrections
900 S.W. Jackson, Suite 400
Topeka, Kansas 66612

And to the members of the PERB, by mail, on December 15, 1994.

Sharon Tunstall