BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fraternal Order of Police, Lodge No. 42 Petitioner,	)	
v.	)	Case No: 75-CAE-5-2003
City of Edwardsville, Kansas Respondent.	)	

INITIAL ORDER OF THE PRESIDING OFFICER

Pursuant to K.S.A. 77-526

NOW on this 29th day of September, 2006, the above-captioned matter came on for decision pursuant to K.S.A. 75-4333 before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner, Fraternal Order of Police, Lodge No. 42, appeared through counsel, Sean P. McCauley, Steve A.J. Bukaty, Chartered. Respondent, City of Edwardsville, Kansas, appeared through counsel, Carl A. Gallagher, McAnany, Van Cleave & Phillips, P.A.

BACKGROUND

This matter arises from a prohibited practice complaint filed by Fraternal Order of Police Lodge No. 42, (hereinafter "Petitioner"), against the City of Edwardsville, Kansas Police Department, (hereinafter "Respondent" or "Employer"). *See* Complaint Against Employer, Case No. CAE-5-2003, January 7, 2003. Petitioner's complaint alleged that the Employer, by its refusal to

meet and confer with Petitioner's duly appointed bargaining representative, violated the Public Employer-Employee Relations Act by interfering in the administration of the Employee Organization, refusing to bargain in good faith with the Employee Organization and denying rights accompanying certification granted in K.S.A 75-4328. *Id.* For these alleged violations of K.S.A. 75-4333(b)(2), (5) and (6), Petitioner requested customary remedial actions. *Id.*

The Employer denied Petitioner's allegations and asserted several affirmative defenses. *See* Answer of the City of Edwardsville, Kansas Police Department, 75-CAE-5-2003, February 3, 2003. A conference call was held in the matter thereafter in March, at which time the presiding officer was advised that this dispute stemmed from the City's refusal to meet and confer with Employee Organization bargaining representative and president, a Sergeant James F. Marble, following his dismissal from the Edwardsville Police Department allegedly for wrecking a car insured by his employer while driving under the influence of alcohol, (hereinafter "DUI"). As a part of the parties' contractual grievance process, the matter had been scheduled for arbitration in April and the presiding officer advised the parties to apprise him of any developments in the arbitration proceeding.

The parties advised the presiding officer in August that the arbitration proceeding had rendered a decision in favor of the Grievant, Sergeant Marble. The arbitrator's decision overturned the City's termination of Sergeant Marble, ordering that he be reinstated with back pay. The city then filed a petition for judicial review.

Thereafter, in September, a prehearing conference was held in this matter and deadlines for further proceedings were set. Respondent filed the first of its motions to dismiss, alleging that the complaint should be dismissed under principles of mootness. *See* Motion to Dismiss, 75-CAE-5-2003, filed December 11, 2003. Petitioner's complaint was moot, according to Respondent, because the underlying subject at issue at the time of Respondent's refusal to meet with Petitioner representative had been satisfactorily resolved by the parties in subsequent discussions. *Id.*, p. 3. "[T]here are no issues pending between petitioner and respondent and there is no reason to meet and confer," Respondent urged, "[t]hus, the matter that is . . . before the Board is merely academic." *Id.* Further, Respondent reaffirmed its willingness to resume negotiations with Petitioner representative Marble in the event of his reinstatement:

> " . . . in the event that James Marble's employment is required to be reinstated after exhaustion of all remedies, the respondent will meet and confer with petitioner through James W. Marble concerning terms and conditions of employment under the Memorandum of Understanding."

Id., p. 3.

Petitioner timely filed its response to the Employer's motion to dismiss, *see* Petitioner's Response to Respondent's Motion to Dismiss, 75-CAE-5-2003, January 9, 2004, and the presiding officer took the motion and response under advisement.

Thereafter, this matter came on for hearing and the parties submitted their respective evidence. Following requests for extension of time to submit legal arguments, the parties each filed proposed findings of fact and conclusions of law. Concurrently with these administrative actions,

judicial review of the arbitrator's decision progressed to its conclusion at the district court level. Judge Cordell D. Meeks, Jr. of Wyandotte County District Court upheld the arbitrator's decision to reinstate Marble. Respondent City of Edwardsville, Kansas appealed the district court order to the Kansas Court of Appeals. In an unpublished decision, the Court of Appeals affirmed the district court's refusal to overturn the arbitrator's award reinstating Sgt. Marble to his employment as a police officer with Respondent City of Edwardsville. The Respondent's subsequent request for review by the Kansas Supreme Court was denied January 27, 2005. Shortly thereafter, Respondent renewed its request that this matter be dismissed for mootness. *See* Letter from Respondent to Hager, 75-CAE-5-2003, dated February 22, 2005.

Prior to finalization and issuance of an order, however, Petitioner requested by letter that the presiding officer take no further action until so advised. *See* Letter from Petitioner's Counsel, 75-CAE-5-2003, February 25, 2005. No further communication was forthcoming from Petitioner and, in late October, the presiding officer convened a conference call with the parties *sua sponte* to determine the status of the matter. During that call, Respondent reaffirmed its contention that this prohibited practice complaint was moot. Among the reasons cited by Respondent were those previously noted and the additional facts that Petitioner's member Marble was no longer serving in a representative capacity with Petitioner nor employed by Respondent, having been called to active military duty in Iraq. Thereafter Respondent filed a Renewed Motion for Dismissal Based Upon Mootness and, after receiving an extension of time, Petitioner filed its response. Having researched and considered the parties' respective positions, the presiding officer issues this initial order.

ISSUES OF LAW

The issues of law presented for resolution in this order are whether actions of Respondent constituted a violation of the Public Employer-Employee Relations Act by willfully refusing to meet and confer in good faith with the representative of the recognized employee organization, interfering in the administration of the employee organization or denying the rights accompanying certification as the bargaining unit representative, and, if so, what is an appropriate remedy. *See* K.S.A. 75-4333(b)(2), (5) and (6). An additional question, raised by Respondent by its motions to dismiss will be addressed initially: are the substantive issues raised by Petitioner moot due to a lack of unresolved issues at the time of hearing this matter and due to Officer Marble's active duty service and his subsequent absence and inability to serve as Petitioner's negotiator?

FINDINGS OF FACT

The parties are in relative accord with regard to the material facts of this case. The presiding officer finds the facts to be as follows:

1. Petitioner, Fraternal Order of Police Lodge No. 42, hereinafter "Petitioner", is an "employee organization" as defined by K.S.A 75-4322(i). Petitioner is the exclusive bargaining representative, as set forth at K.S.A. 75-4322(j), for all City of Edwardsville, Kansas police officers at the rank of Sergeant and below. Tr., p. 26.

2. Respondent, City of Edwardsville, Kansas, hereinafter "Respondent" or "Employer", is a "public agency" or "public 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). *See* Complaint and Answer; Tr., pp. 26-27.

3. Petitioner seeks an order from the Public Employee Relations Board ("PERB") finding that Respondent's actions violated K.S.A. 75-4333(b)(2), (5) and (6) and directing the employer to do the following: post a notice specifically advising all employees in the bargaining unit that the employer engaged in a prohibited practice by its action of refusing to meet with Petitioner's duly-selected representative, FOP Lodge No. 42 President James Marble, prohibit the Employer from refusing to meet and confer in the future with any duly-selected bargaining representative including James Marble and grant such other relief as the Board may deem appropriate. *See* Complaint, p. 3.

4. Respondent denied all allegations of wrongdoing in Petitioner's complaint and plead several defenses: the Complaint failed to state violations of PEERA, the violations alleged should be dismissed pursuant to an election-of-remedies clause contained in the parties' bargained-for memorandum of agreement, Petitioner failed to exhaust its administrative remedies and the complained-of actions were not "willfully" committed as that term is used in the applicable statute. *See* Respondent's Answer.

5. The first witness to testify in the hearing of this matter was Edwardsville Police Department Officer James Tavis. Tr., p. 20. Officer Tavis began his career in law enforcement in 1974 and joined the Edwardsville Police Department in 1990. Tr., pp. 20-21. During the course of his career

in law enforcement, Officer Tavis had been a member of Fraternal Order of Police lodges in Kansas City, in Shawnee, Kansas, in Merriam, Kansas and in Edwardsville. Tr., p. 22. In addition, Officer Tavis started the Fraternal Order of Police lodge in Merriam, Kansas. *Id.*

6. In 1996, Officer Tavis was terminated from the Edwardsville Police Department over "an allegation that stemmed from a domestic dispute with [his] wife." Tr., p. 23.

7. Believing his termination to have been in retaliation for "pushing the FOP and wanting recognition for the officers [and] a binding contract", Officer Tavis sought legal counsel and sued the Edwardsville Police Department in federal court. Tr., p. 23.

8. "[A]pproximately 22 months later," Officer Tavis' federal lawsuit "was settled and [he] was reinstated with back benefits." The matter was settled out of court. *Id.*

9. Following Officer Tavis' termination and during the pendency of his subsequent federal lawsuit, Edwardsville Police Chief John Ellison hired Officer James Marble, whom he had previously known from the Ford County Sheriff's Department. Tr., pp. 24-25. Officer Tavis came to know Officer Marble and encouraged him to become involved in the Fraternal Order of Police. Tr., p. 25. Because Officer Tavis saw characteristics in Officer Marble that he felt were "necessary for FOP leadership", Tavis tried to influence Marble to become an FOP leader. *Id.*, p. 26.

10. In 1999, Officer James Marble ran for, and was elected, President of Fraternal Order of Police Lodge No. 42. Tr., p. 25.

11. After Marble became FOP Lodge No. 42's President, the union leadership continued ongoing political efforts to gain bargaining rights with the City of Edwardsville. Tr., p. 26. In January of

2000, union leadership petitioned the City to opt into coverage by the Public Employer-Employee Relations Act, hereinafter "PEERA". *Id.* The City's governing body elected to do so and the FOP immediately took steps to petition the Public Employee Relations Board, hereinafter "PERB", to make a unit determination and to become the exclusive bargaining representative for the Edwardsville Police Department officers' bargaining unit. *Id.*, pp. 26-27. PERB granted the petition and FOP Lodge No. 42 remains the exclusive bargaining representative of City of Edwardsville, Kansas Police Department police officers at the rank of Sergeant and below. Tr., p. 27.

12. Following the unit determination and certification of FOP Lodge No. 42 as the unit's exclusive bargaining representative, the parties were ordered by PERB to begin the meet and confer process regarding terms and conditions of employment and with regard to grievances. Tr., p. 27. The bargaining representative's negotiating committee was comprised of two retired Kansas City, Kansas police officers with negotiations experience from the Kansas State Fraternal Order of Police, Dennis Shell and Don Woolery, FOP Lodge No. 42 President James Marble and Officer James Tavis. Tr., p. 28. According to the sworn hearing testimony of FOP member Tavis, Shell and Woolery served as the unit's "chief spokespersons", with Tavis and Marble there "to inform them of individual concerns and to sit and learn and observe." Tr., p. 28. *See also,* Tr., pp. 132-133, Testimony of FOP Negotiator Don Woolery (affirming that there wasn't "any doubt in [his] mind" that he and Dennis Shell acted as chief spokesperson while Marble and Tavis' roles were that of providing input).

13. During negotiations toward their first labor agreement, the parties did not set any ground rules limiting discussions of personnel issues, Tr., pp. 31-32, 131-134, 139, including "disciplinary items". Tr., p. 32. Negotiators for the City did not "ever indicate during these negotiations that personnel issues were off limits" and could not be discussed. *Id.* Items related to specific officers' disciplinary records were discussed by "everybody", including negotiators Shell and Woolery. *Id.*

14. The parties concluded negotiation of their first agreement in July, 2001. *See* Petitioner's Exhibit 1.

15. Following negotiation and ratification of the agreement, other issues arose regarding interpretation of provisions of the contract which required representation of the labor bargaining unit by its representative, FOP Lodge No. 42. Tr., pp. 33-34. As the bargaining representative's elected president, Sergeant James Marble served as the main spokesman for FOP Lodge No. 42 with regard to ongoing disputes arising over contract interpretation. Tr., pp. 33-35.

16. It was established that Officer Marble would act as the exclusive spokesman for FOP Lodge No. 42, because he was its elected President, and because "he had the leadership capabilities to bring forth issues that might get [other officers] in hot water or cause officers individual grief." Tr., p. 35.

17. Officer Marble accepted a bid assignment during the spring of 2002 to serve on an "FBI drug task force". Tr., pp. 35-36. This job entailed multi-jurisdictional drug investigations in Kansas and Missouri. Tr., p. 36. This assignment involved collecting evidence to pursue arrests for sales or transportation of drugs. *Id.*

18. During this time, Officer Marble did not work out of the Edwardsville Police station, nor did he report to anyone with the City of Edwardsville. Tr., pp. 36-37. In his work with the FBI drug task force, Officer Marble reported directly to the FBI. Tr., p. 37.

19. Sergeant Marble was told to report to the City of Edwardsville Chief of Police on July 15, 2002. Tr., p. 37. Marble asked Officer Tavis to accompany him to the meeting as his FOP representative. Tr., pp. 37-38. Tavis did so, and when Marble "walked into the chief's office, chief told Marble he had probable cause to terminate him, he was therefore fired, he wanted his gun and badge. . . . that, in essence, was the meeting." Tr., p. 38.

20. No reasons were stated for the termination. "It was just that we had probable cause to terminate you and we're terminating you, but he never said." Tr., p. 38.

21. The lodge filed a grievance on behalf of Officer Marble. *Id.*

22. The grievance was presented to a grievance board, pursuant to the parties' memorandum of understanding. Tr., p. 38. An unfavorable determination was then appealed under the parties' MOU grievance procedure to binding arbitration. Tr., pp. 38-39.

23. In binding arbitration almost a year after Marble was terminated, "[t]he arbitrator ruled that [the City] fired Marble before they had collected evidence to justify that firing and he ordered Marble reinstated." Tr., p. 39. The arbitrator's decision was appealed to Wyandotte County District Court. Tr., p. 50.

24. While Marble's grievance procedure was pending, issues arose between these parties regarding terms and conditions of employment. Tr., pp. 39-40. The first of these concerned merit pay increases pursuant to the parties' MOU. Tr., p. 40.

25. Although at that point Marble had been terminated by the City, which determination was being contested, Marble remained the President of FOP Lodge No. 42. Tr., p. 41. Subsequently, Officer Marble attempted to meet with the Employer regarding the disagreement over merit pay increases. *Id.*

26. The Employer refused to meet with the employee organization's chosen representative, Officer Marble. Tr., p. 41. In approximately December of 2002 or January, 2003, the police chief advised Officer Tavis that the chief was not allowed to meet with Officer Marble "on any issues" because "he was no longer an employee". Tr., pp. 41-42. *See also*, Tr., pp. 101-102.

27. As a result of the City's refusal to meet with Officer Marble, the lodge contacted its legal counsel and filed this prohibited practice action. Tr., p. 42. The lodge believed that the City's "history of retaliating against the FOP and especially its leadership" made it important that the prohibited practice charge be filed. *Id.*

28. Even prior to his termination, the Employer's Police Chief had asked the lodge to designate someone other than President Marble to act as their spokesman. Tr., p. 43

29. In the months prior to Marble's termination, Chief of Police Ellison "would go to other members of the lodge . . . to get them to . . . undermine Marble's leadership". *Id.* "Ellison asked or

demanded that the Lodge pick somebody else and bring them in because he couldn't talk to Sergeant Marble [ ] Marble was unreasonable." Tr., pp. 44-45.

30. The lodge refused, during the timeframe relative to events described in the immediate preceding finding of fact, to designate a different spokesperson for the bargaining unit. Tr., p. 45.

31. The merit pay increase dispute was resolved by action of the City Council funding the full increases. Tr., pp. 46.

32. Another issue, one concerning the need for sergeants on specialty assignments to relinquish their stripes in order to maintain a balance of supervisors and officers, arose after Marble';s termination. Tr., pp. 48-49. Sergeant Marble attempted to meet with the police chief on this issue. Tr., p. 49. The City did not meet with Marble on this issue. Tr., p. 50. As of the hearing of this complaint, the City continued its refusal to meet with Marble on any issue. Tr., p. 102.

33. The arbitrator's decision to reinstate Marble was upheld by a decision of the Wyandotte County District Court. Tr., p. 50. The District Court's decision was appealed by the City to the Kansas Court of Appeals. *Id.*

34. Because of the City's refusal to meet with Sergeant Marble, the employee organization had to designate another individual to act on behalf of the lodge. Tr., pp. 89, 102-103, 112-113. Officer Sheila Rogoza was elected lodge vice-president and she was designated to meet with the city to get information from them, then meet and discuss that information with Marble, take that decision back to the City and so on. Tr, pp. 89-90, 94-95. "[I]t became a long process at that point. . . . [w]hen I would go I would basically be—have to gather information on anything that was at hand [and] I

would have to take it back to Sergeant Marble and discuss the matter and then I would be able to go back to the City [a]nd it was just repeated back and forth." Tr., p. 103.

35. Officer Rogoza's designation by Sergeant Marble to act in his stead in meet and confer with the City took place prior to Marble's deployment to Iraq. Tr., pp. 105-106.

36. Respondent's City Administrator, Doug Spangler, testified that there was unfavorable media attention regarding the off-duty wrecking of a city vehicle by Officer Marble while DUI. Tr., pp. 143-147, 150.

37. Spangler asserted that the City's decision not to meet and confer with Marble after his termination was that Marble was a litigant against the city involving his own personnel issue, the city had a duty to protect personnel records and finally, the city administrator has a policy not to talk to citizens about police department business. Tr., pp. 153-154.

38. Spangler acknowledged refusing to meet and confer with Sergeant Marble regarding "everything," Tr., p. 159, subsequent to his termination and prior to his reinstatement.

39. Sergeant Marble never did anything to disrupt the meet and confer process between these parties. Tr., p. 159.

40. Sergeant Marble did not attempt any physical altercation with regard to meet and confer. Tr., p. 160.

41. Sergeant Marble never threatened any physical altercation with regard to meet and confer. *Id.*

42. Sergeant Marble didn't express any ill will toward the City regarding meet and confer. *Id.*

43. Sergeant Marble's presence in meet and confer never made good-faith bargaining impossible. Tr., pp. 160-161.

MOTIONS TO DISMISS AS MOOT

In its Motion to Dismiss, Employer City of Edwardsville, Kansas Police Department asserted that this complaint was moot because after its refusal to meet and confer with Sergeant Marble but prior to the hearing of this matter, the parties met and conferred regarding contract issues, albeit not through Sergeant Marble but rather with Officer Rogoza acting as Petitioner's spokesperson. *See* Motion to Dismiss, December 11, 2003. In its Motion to Dismiss, Respondent only addresses an assertion that the charge of refusal to meet and confer in good faith is moot. *Id.* It does not contend that any of the other charges brought by petitioner are moot. *Id.* In its Renewed Motion for Dismissal Based Upon Mootness, Respondent alleges as additional grounds for dismissal the fact that Marble no longer held a leadership position in Petitioner employee organization, as he was on an extended tour of military duty in Iraq. *See* Respondent's Renewed Motion for Dismissal Based Upon Mootness, October 31, 2005; *See also*, Petitioner's Suggestions in Oppositions to Respondent's Renewed Motion for Dismissal, January 6, 2006.

Petitioner responds by noting that the issues surrounding the City's alleged refusal to meet and confer in good faith constitute a justiciable claim, that is, "a real and substantial controversy allowing specific relief through a decree of conclusive character, which is distinguished from an opinion from a court advising what the law would be based upon a hypothetical state of facts."

Petitioner's Response to Respondent's Motion to Dismiss, January 9, 2004 (citation omitted). Petitioner also notes that the Employer cannot dictate who will represent the employee organization in meet and confer proceedings by its refusal to meet with Marble, implicitly recognizing that its K.S.A. 75-4333(b)(2) charge is not addressed by Respondent's motion.

Kansas' Supreme Court has instructed that an appeal will be dismissed as moot "only when it clearly and convincingly appears that an actual controversy has ceased and the only judgment that could be entered would be ineffectual for any purpose." *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 815 P.2d 89 (1991). In this matter, a determination whether Respondent violated provisions of PEERA is not moot. Petitioner's claims are not limited to "refusal to meet and confer in good faith", but instead encompass additional charges expressly delineated by statute. Hence, Respondent's Motion to Dismiss is denied. The question whether the 75-4333(b)(5) charge is moot under Kansas law will be addressed in more detail below.

CONCLUSIONS OF LAW/DISCUSSION

A. K.S.A. 75-4333(b)(5)

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 the duty to meet and confer under the PEERA are found at K.S.A. 75-4327(b):

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

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

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

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

The Kansas Supreme Court has interpreted these statutes to mean:

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

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

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),1 and cited with approval in *City of Junction City, Kansas v. Junction City Police Officers Association*, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)("Junction City"):

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1 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 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).

> *"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 the instant matter, Petitioner alleges that Respondent's refusal to meet and confer with Sergeant Marble following his termination was a violation of K.S.A. 75-4333(b)(5). That is, Petitioner asserts that Respondent willfully refused to meet and confer in good faith with representative of the employee organization Officer James Marble. Respondent urges that this issue is moot, because of Officer Marble's unavailability due to his active military service and because there were no outstanding issues between these parties at the time of hearing this matter. Respondent/Employer's Post-Hearing Brief, pp. 3-4. Respondent cites to *City of Coffeyville, KS v. IBEW Local No. 53, et al.*, 270 Kan. 763 (2000), for support.

The City also urges that its refusal to meet with Sergeant Marble does not constitute a prohibited practice because although they must meet and confer with "representatives" of an employee organization, "those persons who are neither public employees nor their registered business agents are not persons with whom the public employer is required to meet and confer under the law." Respondent/Employer's Post-Hearing Brief, p. 6.

Finally, the City suggests that it was well within its rights to refuse to meet with this specific individual due to the public outcry relating to Marble's DUI and damage of a city law enforcement vehicle. "The City's continued dealing with Marble was disruptive to the orderly functions of the government, which the City reasonably believes affects pending litigation and privacy of both police

matters and police business [and] the City is justified in refusing to meet and confer with Marble." Id., pp. 9-10. In effect, the City's implicit argument is that its decision not to meet with Marble was not "willful". In the context of labor and employment law, the Kansas Supreme Court has determined that a willful act "is one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another". *Weinzirl v. The Wells Group, Inc.*, 234 Kan. 1016, Syl. ¶ 4 (1984). Hence, the City's argument suggests that its refusal to meet and confer with Officer Marble was not motivated by an intent to do wrong or cause injury to Petitioner.

There is no merit to the City's contention that its refusal to meet with Lodge President and employee organization representative Marble was justified by his lack of employee status. There is no requirement in the statute, implied or otherwise, that an employee organization representative is limited to an employee, business agent or attorney. Further, the bargaining history of these parties demonstrates the City's understanding to the contrary. *See* Findings of Fact Nos. 12, 13. Given the City's pre-termination attempts to coerce the employee organization to designate someone other than Marble to serve as their spokesman, *see* Findings of Fact Nos. 28, 29, their refusal to bargain with him post-termination can only be viewed as willful. With regard to the City's contention that this question is moot due to the lack of active disputes at the time of hearing or due to Marble's subsequent unavailability, the presiding officer is not inclined to agree. Although the Kansas Supreme Court's decision in *City of Coffeyville, supra*, suggests there may be some merit to Respondent's position, that case dealt only with contract negotiations, not day-to-day contract interpretation and adjustments. The presiding officer declines to expand the holding of *Coffeyville* to

include the present circumstances. Moreover, there is no evidence to suggest that the presence of Officer Marble in meet and confer would have made good-faith negotiations impossible or futile. *See* Findings of Fact Nos. 39-43. By its refusal to meet with the employee organization's designated bargaining representative, Respondent violated K.S.A. 75-4333(b)(5).

B. K.S.A. 75-4333(b)(2)

While neither party dwelled at length on either of the other two alleged violations, the presiding officer notes that the first of these makes it a prohibited practice for an employer willfully to "[d]ominate, interfere or assist in the formation, existence, or administration of any employee organization". K.S.A. 75-4333(b)(2). Most of the practices deemed by law to be prohibited by the employer have counterparts prohibited if engaged in by the employee organization. The counterpart of K.S.A. 75-4333(b)(2) is found at K.S.A. 75-4333(c)(2) and this formulation of the prohibited practice makes clear that K.S.A. 75-4333(b)(2) also forbids an employer from interference in the employee organization's selection of its bargaining representative. Based on the evidence of record, it is apparent that the actions of Respondent City of Edwardsville, Kansas Police Department constitute the willful violation of K.S.A. 75-4333(b)(2). By its refusal to meet with Officer Marble, Respondent did "interfere . . . in the . . . administration of an[ ] employee organization," in effect forcing the FOP lodge to select another bargaining representative to keep day-to-day contract administration from grinding to a halt. *See* Findings of Fact Nos. 24-27, 32-35.

C. K.S.A. 75-4333(b)(6)

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 representative Officer James Marble, the City of Edwardsville, Kansas Police Department violated its statutory obligation to extend to the certified employee organization the right to represent employees of the unit in meet and confer proceedings and in the settlement of grievances, in contravention of K.S.A. 75-4333(b)(6).

CONCLUSION

Based upon a careful review of the record in this matter, it is the conclusion of the presiding officer that the Petitioner has carried its burden of proving violations of the Act as discussed above. Accordingly, the employer is found to have committed prohibited practices as defined in K.S.A. 75-4333(b)(2), (5) and (6).

THEREFORE, it is hereby ordered that Respondent do the following:

1) Cease and desist from the aforesaid violations of the PEERA;

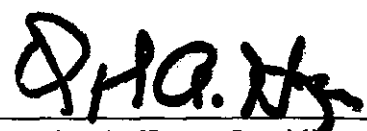
2) Post a notice specifically advising all employees in the bargaining unit that the employer will meet and confer in good faith with the bargaining unit's chosen representative over conditions of employment and grievances;

3) Post a notice specifically advising all employees in the bargaining unit that the employer will not dominate, interfere or assist in the formation, existence or administration of the employee organization; and

4) Post a notice specifically advising all employees in the bargaining unit that the employer will not deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328.

IT IS SO ORDERED.

DATED, this 29th day of September, 2006.



Douglas A. Hager, Presiding Officer
Public Employee Relations Board
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 October 20th, 2006, addressed to: Public Employee Relations Board, 427 SW Topeka Blvd., Topeka, Kansas 66603-3182

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager for Labor Relations, Kansas Department of Labor, hereby certify that on the 2nd day of October, 2006, a true and correct copy of the above and foregoing Initial Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

Sean P. McCauley, Attorney at Law
Steve A.J. Bukaty, Chartered
8826 Santa Fe Drive, Suite 218
Overland Park, KS 66212

Carl A. Gallagher, Attorney at Law
McAnany, Van Cleave & Phillips, P.A.
707 Minnesota Ave., Fourth Floor
P.O. Box 171300
Kansas City, KS 66117

Sharon L. Tunstall
Sharon L. Tunstall, Office Manager

And to the members of the PERB on 10th, October, 2006.

Sharon L. Tunstall
Sharon L. Tunstall, Office Manager