

SYLLABUS

1. **EMPLOYEE ORGANIZATION INPUT IN BUDGET PREPARATION -** Legislative Intent - Requirements. The intent of K.S.A. 75-4327(g) is to require the governing body, in preparing its budget, to be aware of the monetary requests of the employee organization, and make provision for sufficient monies in the final budget to fund any resulting memorandum of agreement. Input at all stages of the budget process, while encouraged, is not required nor must negotiations be finalized and monetary items agreed upon by the PEERA budget submission date of July 1 or even the time the final budget is adopted.
2. **DUTY TO BARGAIN IN GOOD FAITH -** Willingness to Resolve Grievances and Disputes - Tying proposals to provisions in contracts with other bargaining units. A number of factors must be considered in preparing proposals for negotiations. However, to place such importance on any single factor or group of factors as to result in an adamant or unyielding position and negate an affirmative willingness to resolve grievances and disputes is to bargain in bad faith.

FINDINGS OF FACT¹

1. Petitioner, the International Association of Fire Fighters, Local 135, ("IAFF") is an "employee organization" as defined by K.S.A. 75-4322(i) and is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for all non-exempt firefighters who are employed by Respondent, City of Wichita ("City"), for the purpose of negotiating collectively with the respondent pursuant to the Public Employer-Employee Relations Act of the State of Kansas, with respect to conditions of employment as defined by the K.S.A. 75-4322(t).

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. Pittsburg 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."

8. Robert Knight is the Mayor of the City of Wichita and has been either the Mayor or a member of the City Council for twelve years (Tr. v.2, p.20).

WAGE SURVEY

9. There was no agreement between the City and the IAFF as to when negotiations would begin for a 1991 contract (Tr. v.2, p.62; v.2, p.121). In 1987, 1988 and 1989 negotiations began in February or March (Tr. v. 2, p.62). The first 1991 negotiating session between the parties occurred on May 29, 1990 (Tr. v.1, p.62-3). Mayor Knight acknowledged that the meet and confer sessions for 1991 began later than they had in the past (Tr. v.2, p. 73-74).
10. By a letter agreement, made as part of the 1990 contract negotiations, it was agreed the City and the IAFF would conduct a joint salary survey (Tr. v.4, p.155). Beginning in December, 1989 and continuing into 1990, Aaron and/or Minton became involved on behalf of the IAFF, and Mr. Trail, Susan Smith, and Lanette Wolfe on behalf of the City, in the formulation of a salary survey (Tr. v.1, p.185-87).
11. The IAFF and the City began preliminary discussion regarding the wage survey toward the end of January or the beginning of February, 1990 (Tr. v.1, p.59, 187; v.4, p.154). There were subsequent meetings in February and March, 1990 (Tr. v.1, p.187; v.III, p.194). This was to be a joint survey which had not been attempted in the past (Tr. v.1, p.189). The purpose of the discussions were to reach agreement upon the geographical region to be used, the cities to be surveyed, the questions to be asked and who would conduct the survey (Tr. v.1, p. 60, 189). There was a concern by both parties that questions would be phrased or cities selected that could slant the survey in favor of one of the parties to the prejudice of the other in negotiations. The goal was a fair, unbiased survey (Tr. v.1, p.187).
12. It was agreed during the preliminary discussions that a qualified person from Wichita State University would be contracted to prepare and compile the survey. Dr. Sam Yeager was selected (Tr. v.4, p.155). He met with the parties at a series of meetings to discuss the specific

2. Respondent, City of Wichita, Kansas, is a "public agency or employer", as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c), and a municipality organized pursuant to the laws of the State of Kansas and is classified under those laws as a city of the first class. The Fire Department is an entity falling under the jurisdiction and control of the City and is charged with maintaining the safety and security for citizens residing in the City.
3. Lieutenant Ron Minton was elected President of the IAFF in November, 1989 (Tr. v.1, p.31). As President of Local 135, Minton is a member of the City's Labor-Management committee (Tr. v.1, p.32).
4. Lieutenant Ron Aaron is a Firefighter with the City of Wichita (Tr. v. 1, p.184) and was the chief negotiator for the IAFF in 1990 (Tr. v.1, p.185). Aaron had been involved in contract negotiations with the City on behalf of the IAFF the two previous contract years (Tr. v.1, p. 185).
5. Robert Lakin, a former City employee, was hired by the City as its negotiator in May, 1990 (Tr. v. 4, p. 5-6). In addition to representing the City in its negotiations with the Firefighters, Lakin was also hired by the City to represent the City in its negotiations with the Fraternal Order of Police and the Service Employees Union (Tr. v. 4, p.74-75).
6. Chris Cherches, City Manager of the City of Wichita, has been City Manager since October, 1985. He has previously served as City Manager of six other cities. He is familiar with the collective bargaining process, which occurs between public employers and public employee organizations (Tr. v.3, p.7).
7. Ray Trail has been the Assistant City Manager for the City of Wichita since 1978 and is currently assigned as Director of Finance. As Assistant City Manager he was involved in the meet and confer process since 1978 (Tr. v.4, p.151-52).

questions to be included in the survey and to select the cities to be surveyed. To resolve disagreements arising between the parties it was agreed that Dr. Yeager would have the final say as to matters relating to the survey (Tr. v.4, p.156).

13. The discussions resulted in an agreement between the parties set forth in a letter of agreement dated March 12, 1990 (Ex. 10; Tr. v.1, p. 188). The agreement covered the survey instrument to be utilized; the fire departments to be covered; that the final report would include an analysis of local labor market conditions based, in part, on availability of qualified applicants for recruit positions; and that the IAFF would be responsible for 50% of the cost of the analysis of the survey and related cost in compiling the wage survey (Ex. 10). No written agreement resulted between the IAFF and the City on how the results of the wage survey would or could be used by either party during negotiations (Tr. v.1, p.60-61).
14. The role of Ms. Smith in the salary survey was to administer the survey; send it out, receive the results, verify the results, verify ambiguous answers by calling responding departments, and ensuring continuity of interpretation of interpretation of the questions by calling responding departments to clarify answers when necessary (Tr. v.4, p.129; v.5, p.120).
15. In past years when the City alone generated the wage survey only the mean or average of the responses from the responding communities was used to prepare the analysis. Negotiations then revolved around the difference between wages paid by the City and the wage survey averages. For the 1991-92 negotiations the City chose to use the median of the responses rather than the mean to justify its positions on wage proposals (Tr. v.1, p.195-198). During the meetings on the joint wage survey there was much discussion by the IAFF on using the average of the responses in the analysis. When the discussion on averages ended Ms. Smith stated that she wanted the median also included. She expected to have to defend that position and was surprised when there was no objection. Mr. Yeager agreed to include the median statistics (Tr. v.5, p.124-25).

16. The IAFF considered the results of the wage survey a very important tool in the negotiation process (Tr. v.III, p.196). Since the survey results had a direct bearing upon the negotiations by delaying the IAFF's ability to formulate its monetary proposals, a delay in formulating the survey directly impacted negotiations. Aaron discussed with Mayor Knight the fact that Trail was objecting to the proposals of the IAFF concerning the survey, despite Dr. Yeager's recommendations, if he did not think the results would reflect well upon the City thereby delaying the survey process (Tr. v.2, p.104-06). At a meeting in early April, Aaron inquired of Dr. Yeager if he could complete compiling the survey information and prepare an analysis by May 1, 1990. Dr. Yeager stated that this could be done. Mr. Trail indicated that there was no need to hurry completion since, due to the work load of the finance department, he would be unable to look at the information until mid to late May (Tr. v.3, p.231).
17. Sometime between May 1 and May 21, 1990, the IAFF requested copies of the raw data received by the City in response to the wage survey (Tr. v.2, p.133). While the IAFF had a right to review the raw data because it was a joint survey, and Ms. Smith could provide no reason why the City believed it should have first look at the data, the request was denied (Tr. v. 5, p.147-151). The IAFF did ultimately receive a copy of the data when it was sent to Dr. Yeager. If any clarification or change was required, the original response was lined out but still visible, and the correct answers written in by Ms. Smith (Tr. v.5, p.147-51).
18. The completed wage survey and analysis was received by Susan Smith, senior personnel technician responsible for the management of classification and compensation, on May 23, 1990 (Ex.CC; Tr. v.5, p.162-63). While Ms. Smith was responsible for distributing the survey to both parties (Tr. v.5, p.155), after receiving the survey on May 23, 1990 she did not recall informing the IAFF that she had received the survey (Tr. v.5, p.155) but did distribute copies to Trail and Ms. Wolfe that morning (Ex. CC; Tr. v.5, p.151-52). She reviewed the survey and noticed Dr. Yeager had accidentally enclosed his computer printout showing a statistical program that had mistakenly excluded one variable. Ms. Smith contacted

Dr. Yeager who acknowledged the error, seemed very embarrassed about it, and requested she return all copies to her. The afternoon of May 24, 1990, after the telephone conversation with Dr. Yeager, Ms. Smith informed Trail that the packet of detail information accompanying Dr. Yeager's analysis did not correspond with the analysis, and that Dr. Yeager requested the detail packet be discarded. The analysis, however, was unaffected (Ex. DD; Tr. v.5, p.163-64). Pursuant to a later request from Dr. Yeager, the detail packets and analysis were retrieved by Ms. Smith from Trail and Ms. Wolfe and returned to Dr. Yeager (Tr. v.5, p.169).

19. None of the witnesses could remember when the final report on the wage survey was again received by the City. It was testified that it could have been approximately one week after the return of the first detail packets and analysis, Ms. Smith received the final report (Ex. C; Tr. v.5, p.169-70). A review of Exhibits 30 and 31 reveals Trail had received and reviewed the final analysis at least by the morning of May 28, 1990, and continued to consider the survey as late as 7:01 p.m. on May 29, 1990.
20. The exact date when the IAFF received the final detail packet and analysis is unclear but it is known that the IAFF did not have the analysis by the first negotiating session, May 29, 1990, but did have it for the session on June 1, 1990 (Tr. v.1, p.193).
21. When the IAFF inquired about picking up their copy of the final wage survey report they were informed by Ms. Smith that it would not be released until the IAFF paid the City for its share of the costs of the survey (Tr. v.1, p.192-93; v.5, p.149). Later that day Trail reversed his decision and released the survey to the IAFF, and directed Ms. Smith to inform Dr. Yeager to bill the IAFF directly for their share of the cost of the survey (Tr. v.5, p. 93; p.149). Both the IAFF and Ms. Smith assumed the City would be responsible for paying Dr. Yeager and seek reimbursement from the IAFF (Tr. v.5, p. 93; p.146). Ms. Smith testified she was surprised when Trail originally indicated payment would be required from the IAFF before release of the wage survey report (Tr. v.5, p.146).

CITY NEGOTIATOR

22. Chris Cherches was aware prior to January of 1990 that the contracts for the Fraternal Order of Police, Service Employees Union and the International Association of Fire Fighters would require negotiations prior to the 1991 budget submission date (Tr. v.3, p.93). In the past negotiations with the bargaining units began with the survey process starting sometime in January/February and the negotiations sometime thereafter, presumably March/April (Tr. v.3, p.94-95).
23. At the first preliminary discussion on the wage survey in January, 1990 Aaron asked if Trail knew who was going to be appointed negotiator for the City, and Trail responded that he did not know. Aaron advised Trail there were several items that the IAFF wanted to discuss, and desired to begin negotiations on, those items as soon as possible (Tr. v.1, p.188).
24. During the March 5, 1990 Labor-Management Committee meeting, the lateness for beginning negotiations on the 1991 contract and the failure of the City to identify its negotiator were discussed. Randy Lawson, F.O.P. President, expressed to Councilman Kamen the concern of the labor representatives as to the need to begin negotiations so that dates/schedules could be set to avoid negotiations lasting until late in the year (Ex. 5; Tr. v.1, p.38-39).
25. Up until 1989 the City used an in-house negotiator. Because of the past adversarial relationship which had existed between personalities of the City administration and the fire and police union leadership, the City decided to seek an outside negotiator in 1989 (Tr. v.3, p.150-52). Bob Fitch was retained to represent the City in 1989 for the 1990 negotiations (Tr. v.3, p.93). The City was under the assumption Fitch would be representing it in negotiations for the 1991 contracts (Tr. v.3, p.94). In early March, 1990 Fitch informed the City that he no longer wished to represent the City in negotiations (Tr. v.3, p.93). The City then tried to find someone to serve as its negotiator, and finally contacted Lakin in the latter part of March or early April (Tr. v.3, p.96-

97; v.4, p.71). Lakin was sort of a last resort for the City (Tr. v.3, p.97).

26. On March 30, 1990 Chris Cherches wrote to Randy Lawson to advise that a negotiator for the City would be selected within two weeks, and requested negotiations be stayed pending that selection but indicated he would be willing to meet to discuss negotiations if Lawson preferred (Ex. 2, p.2). At the time the 1990 negotiating process began, the City had not designated Trail as its negotiator. Trail perceived his role in the negotiations as simply involving the preparation of the wage survey, and never considered himself to be the City's chief negotiator nor had the authority to negotiate on behalf of the City. He was prepared to receive any proposals the IAFF desired to submit (Tr. v.5, p.45-46). Cherches never told Trail that he had the authority to begin meet and confer sessions on behalf of the City (Tr. v.5, p.45-46).
27. According to Cherches the City had experienced occasions when it was necessary to replace a Chief Negotiator so it would not be unusual to start with one negotiator and end with a different one. The City's negotiating team is more than one person so there is always a team there that knows what preceded. The Chief Negotiator serves as the spokesman for the team (Tr. v.3, p.112).
28. At the April 2, 1990 Labor-Management Committee meeting, Randy Lawson again expressed the concern of the labor representatives that negotiations were beginning later than in the past. Councilman Kamen indicated that according to the Cherches letter a negotiator would be appointed within two weeks. Lawson had not yet received the letter (Ex. 4; Tr. v.1, p.37-38).
29. At the May 7, 1990 Labor-Management Committee meeting Randy Lawson again expressed the concern of the labor representatives that no negotiator had yet been selected by the City. He pointed out that negotiations for last year's contract started in February, and that helped in reaching an agreement in a timely manner (Ex. 3).
30. By letter dated May 8, 1990 Randy Lawson, F.O.P. President, Ron Minton, IAFF President, and Art Veach, Service Employees Union ("S.E.U.") Business Agent, wrote to Chris Cherches indicating the labor representatives

had not agreed to such a lengthy postponement of negotiations and that they desired to begin negotiations immediately. The letter further advised that if negotiations did not begin by May 18, 1990 a prohibited practice complaint would be filed with the Kansas Public Employee Relations Board (Ex. 2; Tr. v.1, p.40-41).

31. The City did not enter into a contract with Lakin until after it received the May 8, 1990 letter from the three labor representatives. As Lakin testified Cherches furnished him a copy of the joint letter signed by the three bargaining units appealing for immediate appointment of someone or they would file a prohibited practice complaint before he signed the contract to serve as the City's negotiator (Tr. v.4, p.78). Four to six weeks past between the time Lakin was first contacted and he agreed to accept the position (Tr. v.4, p.73). According to Cherches, if Lakin had not accepted the position he would have appointed Trail to negotiate the agreements (Tr. v.3, p.98).
32. On May 9, 1990 Cherches wrote to Minton to advise that Bob Lakin had been appointed to represent the City in its negotiations, and that he would be in contact to arrange a meeting (Ex. 1; Tr. v.1, p.42-43). At the time of Lakin's appointment he was not aware of any member of the City administrative staff having been appointed to negotiate with the IAFF prior to his assuming the position (Tr. v.4, p.78).
33. IAFF negotiators Minton and Aaron met with City negotiator Lakin on May 29, 1990 (Tr. v.1, p.16-19). No negotiations concerning the conditions of employment occurred at the May 29, 1990 meeting but the parties did agree to ground rules surrounding the conduct of negotiating sessions which were executed at the June 1, 1990 meeting (Ex. 17).
34. The parties declared impasse on June 14, 1990. Approximately eight (8) meet and confer session (two each week) were held between May 29, 1990 and July 1, 1990. The City canceled one meeting (Tr. v.3, p.211-13). The parties met with a mediator from the Federal Mediation and Conciliation Service on July 3, 1990. The mediation sessions were not successful in resolving the impasse but did result in the IAFF reducing the number of issues it

sought to negotiate to seven (7) or eight (8). On July 20, 1990 the IAFF petitioned for implementation of fact-finding (Ex.15). According to Trail the fact that negotiations did not begin until May 29, 1990 was not an anomaly since, while the time frame for negotiations varied from year to year, it was not uncommon for meet and confer sessions to start in the latter part of May and go through June (Tr. v.5, p.36-37).

35. On June 1, 1990 the IAFF presented its first proposal package containing 22 or 23 proposals (Tr. v.3, p.213-14). Lakin made an effort to respond to the proposals as soon as he could stating the City's position and justification for that position (Tr. v.2, p.203). Aaron stated the City provided responses rather than counter-proposals. By "response," Aaron explained, is meant the City acknowledged the request but refused to make any movement alleging that the subject was a management right or not mandatorily negotiable. He recalled only receiving three (3) proposals from the City (Tr. v.3, p.211-19). Of the 22 or 23 proposals submitted by the IAFF, agreement was obtained on only 10% - 20% (Tr. v.3, p.217; v.4, p.107). Where agreement was reached it generally related to a change in wording, a minor item, or as Lakin stated, an item of little or no consequence (Tr. v. 3, p.215; v.4, p.106).
36. Mr. Lakin had meetings with City officials as to the boundaries of his authority and the latitude available to him to reach agreements with the F.O.P, IAFF and the S.E.U. He usually met with Trail, Cherches and Tom Powell, City Attorney, depending on the issue. Mr. Lakin met several times with the City Council in executive session to brief the members on the status of negotiations, inform them of the demands of the employee units, and to gather a consensus on how the City should respond to those demands. He viewed the Council,s advice to him as the limiting factor, and that it had the final say in negotiations (Tr. v.1, p.122; v.2, p.63, 67-68; v.3, p.37-39; v.4, p.5, 12-16, 21).
37. The first monetary proposal was made by the City at the third or fourth meet and confer session, approximately June 12 or 13, 1990, and that offer was a 2.75% base pay increase for 1991 (Tr. v.1, p.86). The parties are in agreement that the City's wage proposal increased from

2.75% to 3.0% to 3.5% between June 12 or 13 and the date of the fact-finding hearing on July 30, 1990 (Tr. v.1, p.86, 107). While the witnesses are not in agreement as to when the increases were offered, according to Lakin the 3.0% offer was made on July 20th and the 3.5% offer was made on July 29th, approximately (Tr. v.4, p.48).

38. Mr. Lakin testified that while he was not directed by the City Council or City management to offer the same percentage of wage increase to each of the employee units, he was given a total dollar figure allocated to wage increases to be apportioned between the IAFF, F.O.P. and S.E.U. The intent was to give Lakin flexibility in negotiations, but he was expected to produce agreements. This meant that if he give more to one group of employees then he had to figure out how to arrive at agreements with the other two units. Since he had little margin within which to work relative to base salary, he tried to work with insurance and other benefit issues to gain acceptance of an offer (Tr. v.4, p. 40-41, 70-71, 79-81).
39. According to Mayor Knight, it was the position of the City during the negotiations not to bargain with the units singularly but to tie contract provisions made to one of the employee units to the provisions made to the other two employee units. This was particularly true as to wage proposals (Tr. v.2, p.24-25). The same wage proposals offered to the S.E.U. would be offered to the IAFF and the F.O.P. (Tr. v.2, p.72-73).
40. Both the F.O.P. and the S.E.U. were able to reach agreement with the City during the 1991 contract negotiations (Tr. v.1, p.62). The F.O.P. ratified a two year agreement with a 3.5% increase for 1991 and a 3.5% increase for 1992 with an additional 1% to be distributed in a certain way (Tr. v.4, p.41). The S.E.U. agreement provided for a 3.5% increase for 1992 with a reopener clause which allowed the unit to renew negotiations if any other unit received more than the 3.5% (Tr. v.3, p.119-20). The F.O.P. agreement did not contain a reopener clause (Tr. v.4, p.85-86). Apparently, all other classified City employees received a 3.5% wage increase also (Tr. v.3, p.119-20).
41. Toward the end of the negotiations, Lakin advised the IAFF the Council would not budge off its proposal for a

3.5% increase because the budget had been wrapped up and the new S.E.U. agreement contained a reopener clause (Tr. v.4, p.80). The reopener provided that should either of the other employee organizations negotiate an agreement with an increase greater than 3.5% base wage, the S.E.U. had a right to reopen their agreement and re-negotiate the wage increase (Tr. v.4, p.88). During Aaron's last discussion with Lakin prior to putting the City's final offer to a vote of the IAFF membership Lakin stated that the IAFF would be foolish not to ratify an agreement because the City had two "in the barn" already, and the Council would not give the IAFF any more than the 3.5% the F.O.P and S.E.U. had accepted (Tr. v.4, p.136).

42. In past years, the City negotiated agreements with the three employee unions that provided wage increases of different percentages. In 1987 the IAFF received a 3% raise while the Service Employees Union increase was 2.6%. In 1988 the IAFF received a split range raise of 0% to 5% while the F.O.P. received a 4% across the board increase. In 1989 the IAFF received a 4% across the board increase while the F.O.P received a split range raise from 0% to 5% (Tr. v.2, p.140-45).
43. For contract year 1991-92 while the base wage increase was 3.5% for both the F.O.P. and the S.E.U., the actual total compensation package increase for the F.O.P. was approximately 4.2% and 3.84% for the S.E.U. (Tr. v.4, p.81-82). The total package increase for the IAFF was not available but in addition to the 3.5% base wage increase the firefighters also may receive additional compensation through longevity pay, emergency medical technician pay, emergency mobile intensive care technician pay, scheduled overtime pay, fire education pay, and the City's contribution of 23% of total payroll toward pensions (Tr. v.1, p.178).
44. The fact-finder's report recommended a base wage increase for the firefighters of 5.5% (Ex.15, p.26). The increase would have required an additional \$180,000 in wages for the fire department's 1991 budget, and, according to the City if that percentage was extended to all city employees, an increase of \$1,116,000 for the total city budget (Ex. 23; Tr. v.4, 23).

45. On August 14, 1990, the City Council held a formal hearing in accordance with K.S.A. 75-4332(d) to allow the IAFF and the City's representative to explain their positions relative to resolving the negotiation impasse. Each side was provided the opportunity to address the Council; Mr. Minton represented the IAFF and Lakin represented the City. After the presentations Mayor Knight read from a prepared statement indicating that the Council declined to accept the fact-finder's report and would accept Mr. Lakin's proposal which including a 3.5% wage increase, which was adopted by the vote of the Council (Ex. 26; Tr. v.1, p.82-83, 104-05, 209).
46. Although the IAFF wanted to continue working under the terms of their 1990 contract when it expired on January 4, 1990, except as to the compensation items changed by the Council's action, the city determined work would instead continue pursuant to the conditions of employment set forth in the City's Personnel and Procedural Manual (Tr. v.1, p.105). Mr. Lakin testified that rather than write a unilateral contract he recommended there be no document issued and no work rules issued in the form of a contract but rather anyone operating without a memorandum of agreement simply would fall under the City's Personnel Manual that applies to employees not in a bargaining unit (Tr. v.4, p.105-06).

BUDGET PARTICIPATION

47. In January, 1990 the first budget meetings for the 1991-92 budget were held. At the meetings, Cherches and Moir, then Director of Finance, directed the budget representatives from the various departments to use the 1990-91 budget figures for personnel and any raises would be added into the budget at a later date. In past years the City has had to prepare a budget before labor negotiations have been completed. Any anticipated increase in wages is projected or estimated and this amount is set aside in a contingency fund. Monies needed to pay the actual increases are taken from this fund and placed into the final budget adopted by the City Council (Tr. v.1, p.164; v.3, p.17; v.4, p.172-73).

48. The budget process for the City generally begins in January or February with the budget staff making forecasts and distributing the necessary budgetary forms to all departments. The Purchasing Department prepares general cost each department is to use in budget estimates for operating expenses, supplies and materials. The year's financial picture is presented to the Council for formulation of goals to be accomplished during the next budget year, and this information is distributed to each department head by memo from the City Manager's office. The Department heads are encouraged to solicit comments and input from employees. Employee meetings are held to solicit additional input for the budget (Tr. v.3, p.26-27). The IAFF negotiating team met several times with Chief Garcia, and was never denied the opportunity to discuss monetary issues with the Chief (Tr. v.2, p.135-38). Thereafter each department head submits its proposed budget for review by the Budget Review Cabinet composed of approximately eight management individuals. The Budget Review Cabinet makes recommendations and meets with the Manager's Office and the Finance Department, and a budget is formulated and submitted to the Council, usually the first week in July (Tr. v.3, p.8-11). The budget development process calendar is set forth on page 99 of the 1991-92 proposed city budget (Ex. 27).
49. It was Mr. Trail's opinion that while it is possible to begin negotiations earlier in the year to discuss nonmonetary items, the need to have as definitive information as possible about the overall condition of the budget in the formulation of monetary proposals results in substantive negotiations being delayed until later in the budget preparation process (Tr. v.4, p.187-194).
50. The City's budget, by law, must be certified to the county by August 25th of each year (Tr. v.2, p.38; v.3, p.15). Because the City's exact assessed valuation is unknown and constantly changing throughout the budget process, revenues are estimated until the levy is set by the county and the budget has been formally adopted by the City Council (Tr. v.3, p.18). Salary allocations are not finalized until virtually the last minute of the budget process specifically to provide as much time as possible for competition of negotiations to establish the level of funding needed (Tr. v.3, p.88). Once the

City's budget has been certified, the City lacks the authority to increase expenditure levels. It can change priority in funding, and transfer dollars away from one activity or expenditure and put them into another expense fund. Significant alteration of funding levels may require another public budget hearing (Tr. v.3, p.79; v.4, 192).

51. In past years, copies of the budget documents, including revenue projections, current budget, and proposed next year budget, were made available to the employee unit representatives, to use in negotiations. City financial personnel were also provided to explain and discuss the documents with the union representatives (Tr. v.4, p.171-72). Sometime in late May or early June, 1990, the IAFF representatives met with Moir and Trail to discuss the City budget process and some of the items contained in the proposed budget (Tr. V.1, p. 53-54; v.4, p.11-12). At the meeting it was discussed that the preliminary financial numbers indicated that expenditures could be increased by 4%. As negotiations proceeded, Trail advised the City Manager the 4% figure appeared too high because collection of property taxes was significantly lower than projected requiring revenue estimates to be scaled back. Accordingly, the 4% expenditure increase was reduced to 3% (Tr. v.4, 9.170-71). The IAFF received the budget information for the 1990 negotiations at the same point in time as in past years, and the same opportunities for input into the budget that existed in past years was available to the IAFF for the 1991-92 budget (Tr. v.5, p.97-98).
52. Mr. Cherches did not receive a formal request from the IAFF indicating they wished to participate in the budget process in a manner different from past practice (Tr. v.3, p.27). Mr. Minton, during the discussions on the salary survey did not raise the issue of IAFF input into the budget process because he believed once the City appointed their negotiator the IAFF would have input into the budget through the negotiation process (Tr. v.2, p.122-23). The first time IAFF input into the budget process became a topic for discussion during negotiations was after the IAFF filed this prohibited practice complaint (Tr. v.4, p.9). The IAFF then presented a proposal to the City regarding union input into the budgeting process. The City offered a counter-proposal

that would have provided a formal basis for specific IAFF input into the 1992-93 budget process (Tr. v.2, p.85; v.4, p.9). The proposal was included in a contract offer taken to the IAFF membership and rejected (Tr. v.2, p.106).

CITY BUDGET

53. The City operates on a balanced budget, i.e. projected annual revenue raised equals anticipated annual expenditures. In addition, the City attempts to maintain a cash reserve fund equal to 5% - 10% of the budget for purposes of bond rating and to meet unexpected occurrences, e.g. lower revenue collections than forecast or unanticipated expenses (Tr. v.5, p.15-18).
54. The projected City budget for 1991-92 was 207 million dollars. Of that amount, \$91 million was projected for employee compensation with \$70 million for salaries and \$21 million for benefits (Tr. v.3, p.21, 30). An estimated amount of money is set aside in a salary contingency fund during the period of contract negotiations. As negotiations are finalized the monies needed to fund the new benefits package is taken from the contingency account and apportioned to the respective department budgets (Tr. v.3, p.124-25). The salary contingency fund for the 1991-92 budget had a 2.75% increase figured in for the fire department (Tr. v.3, p.127). The final City budget contained a 3% salary increase (Tr. v.5, p.51-52).
55. Even after the budget is adopted by the City and certified to the County, it is not uncommon for funds budgeted for a particular expenditure to be transferred to another budget item where there is a deficiency due to insufficient funds being budgeted for that item (Tr. v.3, p.80, 127).
56. For the budget year 1991, the City was almost at its property tax lid (Tr. v.5, p.83). At the August 14, 1990 City Council meeting it was brought out that the City had lost \$1.6 million as a result of changes in the state motor vehicle tax, and that revenue from municipal court citations were down by \$600,000, causing some projects scheduled in the budget to be cut out or readjusted (Tr.

v.2, p.189-90, 192). The City maintains that tax revenue had been lost that hampered its ability to fund any wage increase above 3.5% (Tr. v.1, p.213, 215). The fact-finder in his report specifically noted that while the City did plead lost tax revenue, it did not argue a total inability to fund the amount demanded by the IAFF (Ex.15, p.26).

PUBLIC STATEMENTS

57. At the first meet and confer session on May 29, 1990, as one of the ground rules for the negotiation process, the IAFF and the City agreed that negotiation would take place at the table and there would be no public disclosures or contact with Council members during the period of negotiation. However, if impasse is declared, disclosures could be made to the media provided advance notice to the other party via copy of the release (Ex. A; B; Tr. v.1, p.69-74).
58. Copies of a 16 page document entitled "Fire Department Survey: 1990 Press Release" and dated July 16, 1990, were hand delivered by Minton to the Mayor's office to be distributed to the City Council members. The packet was distributed with no prior notice to the City's negotiator, Lakin. A cover letter on the document was dated July 20, 1990, and indicated that the packet contained information on the joint City/IAFF salary survey contained in the packet. The cover letter further stated the firefighters had continually lost ground in salary and benefits since 1980 (Ex. A; 13; 14; Tr. v.1, p.49-50, 74). Mr. Trail testified that negotiations tended to be somewhat less amicable following the press release and conference (Tr. v.5, p.101-02).
59. The IAFF sent a series of letters dated July 25, 1990, addressed to different individuals and organizations in Wichita asking for their support in obtaining an increase in wages. The letters were signed by Minton, and further indicated the City was only proposing a 2.75% raise to the fire fighters. The City had increased its wage proposal to 3.0% on July 20, 1990 (Tr. v.2, p.207-08; v.3, p.176).

60. In an August 1, 1990 memo entitled "Let's Fight" City Manager Cherches directed preparation of a press release on behalf of the City in response to the IAFF public activities. The memo resulted from the City Council's feeling that the IAFF was misstating and distorting the facts as they were being presented to the public (Ex. 28; Tr. v.3, p.55-59). It had been the past practice of the City to refrain for discussing negotiations publicly or to conduct negotiations in the media. This was the first time Cherches could recall that the City issued a news release in response to what an employee organization was saying in public concerning negotiations (Tr. v.1, p.55-56, 137-38). According to Cherches the intent of the City's press release and news conference was to set the record straight (Tr. v.1, p.137). While statistically correct, many of the statements contained in the City's press release did not give a complete or totally accurate depiction of the facts but rather presented the data in a manner most supported the City's bargaining positions (Tr. v.4, p.114-15). Mr. Cherches testified he was unaware as to the correctness of the factual representations made in the press release and did not verify them (Ex. 16; Tr. v.3, p.58).
61. Mr. Lakin testified it was his perception early in the fire fighter negotiations that the IAFF was not working toward a negotiated agreement for 1991. He also sensed that the IAFF was setting the stage to do a walk-out and a strike (Tr. v. 4, p.100-01). Mayor Knight expressed a similar concern early in negotiations (Tr. v.4, p.130-31). The IAFF tried to make it clear that it had no intention of going out on strike (Tr. v.4, p.131).
62. Mr. Lakin stated in his discussions with the City Council he indicated to them that if they maintained their 3.5% wage increase position the IAFF would not accept the offer and the City would be able to unilaterally impose terms and conditions of employment (Ex. 19; Tr. v.4, p.105). As early as July 23, 1990, Lakin wrote a memo to the Mayor and City Council indicating that he had been advised that the City would likely lose in fact finding, and the Council could reject the fact-finding recommendations and offer the IAFF a final opportunity to sign a contract on whatever terms the City decided to offer (Ex. 19).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE I

WHAT IS THE OBLIGATION IMPOSED UPON RESPONDENT BY THE K.S.A. 75-4322(v) "BUDGET SUBMISSION DATE," AND DID THE RESPONDENT BREACH THAT OBLIGATION THROUGH ITS ESTABLISHED BUDGET DEVELOPMENT PROCESS?

The IAFF maintains that by K.S.A. 75-4332(g) is meant the date [July 1] by which the City's salary obligations arising under the bargaining process are fixed and consequently the date by which all aspects of the meet and confer process must be completed (Brief p.56). K.S.A. 75-4322(v) provides:

"'Budget submission date' means (1) for any public employers subject to the budget law in K.S.A. 7925 et seq. the date of July 1, and (2) for any other public employer the date fixed by law. 'Budget submission date' means, in the case of the state and its agencies, the date of September 15."

A review of the Public Employer-Employees Relations Act finds three references to the "budget submission date." In K.S.A. 75-4327(g) it is stated:

"It is the intent of this act that employer-employee relations affecting the finances of a public employer shall be conducted at such times as will permit any resultant memorandum of agreement to be duly implemented in the budget preparation and adoption process. A public employer, during the 60 days immediately prior to its budget submission date, shall not be required to recognize an employee organization not previously recognized, nor shall it be obligated to initiate or begin meet and confer proceedings with any recognized employee organization for a period of 30 days before and 30 days after its budget submission date."

Further reference is located in K.S.A. 75-4332:

"(a) Public employers may include in memoranda of agreement concluded with recognized employee organizations a provision setting forth the procedures to be invoked in the event of disputes which reach an impasse in the course of meet and confer proceedings. Such memorandum shall define conditions under which an impasse exists, and if the employer is bound by the budget law set forth in K.S.A. 79-2925 et seq., and amendments thereto, the memorandum shall provide that an impasse is deemed to exist if the parties fail to achieve agreement at least fourteen (14) days prior to budget submission date."

* * * * *

(d) If the parties have not resolved the impasse by the end of a forty-day period, commencing with the appointment of the fact-finding board, or by a date not later than fourteen (14) days prior to the budget submission date, whichever date occurs first: (1) The representative of the public employer involved shall submit to the governing body of the public employer involved a copy of the findings of fact and recommendations of the fact-finding board, together with his or her recommendations for settling the dispute; (2) the employee organization may submit to such governing body its recommendation for settling the dispute; (3) the governing body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions; and (4) thereafter, the governing body shall take such action as it deems to be in the public interest, including the interest of the public employees involved. The provisions of this subsection shall not be applicable to the state or its agencies."

Only one case can be found in the State of Kansas examining the language of K.S.A. 75-4317(g). In Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 826 (1983) the court concluded K.S.A. 75-4327(g) "states the legislative intention

that employee organizations have input before budget preparation." The extent or time-frame for that input is not discussed. The issue of budget input has been addressed more frequently under the Professional Negotiations Act ("PNA"). Those PNA cases provide guidance for interpreting K.S.A. 75-4317(g).

In National Education Association v. Board of Education, 212 Kan. 741, 754 (1973) the court discussed the statutory budget process:

"What is important from the Board's point of view is that it have its salary obligations fixed in time to prepare its budget (and tax levy) for the next school year. The timetable prescribed by the budget law requires a hearing on the proposed budget not later than August 15 of each year (K.S.A. 1972 Supp. 70-2933; K.S.A. 79-1801). Notice of the hearing must be published not less than ten days before then, or by August 5 (K.S.A. 1972 Supp. 79-2929). Obviously the preparation of the multi-million dollar budget required by a unified school district requires several weeks -- time varying, no doubt, with the size of the district. While the record is silent on the actual time required for this district, it is apparent that if June ended with its salary requirements unknown the district's budget officer would be in serious trouble. (See K.S.A. 1972 Supp. 75-4322[u], fixing July 1 as the 'budget submission date' under the Public Employer-Employee Relations Act.)

The court approved fixing April 15th as the last day of required negotiations. The Professional Negotiations Act at that time did not include a detailed and complete process for the declaration of impasse and its resolution. The legislature, in 1977, amended the PNA to incorporate an impasse procedure. Chapter 248, Laws of 1977.

In 1978 the court reviewed the statutory budget process as it relates to PNA negotiations in light of the 1977 amendments, Garden City Educator's Ass'n v. Vance, 224 Kan. 732 (1978). The reasoning of the court appears applicable to the instant case under PEERA:

"One of the key arguments the Board advances for retention of a cutoff date in the negotiating process relates to the necessity that all salary disputes be resolved before the deadline for budget submission by the Board. We note that the issue of salary is only one of the many negotiable items discussed during the negotiating sessions. . . .

Although we realize the issue of salary is the most often disputed item in negotiations, we do not believe it was the intent of the legislature that it control the impasse procedures. Retaining a cutoff date for negotiations, particularly one that contemplates only the problems of preparing the budget for the following year, would be to ignore the other important items that are negotiated during these sessions. Furthermore, there appears to be ample evidence advanced by the Association that redistribution of monies among line items is a common practice in school districts. Even though the budget of a school district has been adopted, there remains a degree of flexibility in line item adjustment. To the extent of the flexibility of the budget, the issue of salaries of teachers continues to be a negotiable item.

The impasse procedures would be negated by a strict budget submission time because the resolution process could be prematurely cut short if not commenced well in advance of July 1. Although the legislature enacted the procedures in contemplation of a swift resolution process, as evidenced by the narrow timeliness provided in each step, we note there are several steps which contain built-in delays not controlled by a set time period, which either party could utilize to bog down the procedures. The statute would permit a board to avoid impasse procedures merely by exercising one of the opportunities for delay. The final power of a board to take 'such action as it deems in the public interest,' (K.S.A. 1977 Supp. 72-5428(f)), coupled with a mandatory cutoff date, would place the board in a much stronger

negotiating position than the professional employees' association. . . .

We believe the establishment of an arbitrary cutoff date would be a deterrent to a negotiated contract and contrary to the result sought by the legislature. Id. at 737-39.

The above quoted reasoning in Garden City is harmonious with the conclusion in Pittsburg State that K.S.A. 75-4327(g) expresses the legislative intention that employee organizations have input before budget preparation.

[1] The intent of K.S.A. 75-4327(g) is to require the governing body, in preparing its budget, to be aware of the monetary requests of the employee organization, and make provision for sufficient monies in the final budget to fund any resulting memorandum of agreement. Input at all stages of the budget process, while encouraged, is not required nor must negotiations be finalized and monetary items agreed upon by the PEERA budget submission date of July 1 or even the time the final budget is adopted. The important factor is that there remain a degree of flexibility in line item adjustment to fund the final memorandum of agreement.

It is not necessary here to discuss the affect or consequences on the duty to bargain in good faith should the governing body fail to make provisions for sufficient monies when finalizing the budget prior to completion of negotiations. No credible argument was presented that in the preliminary budget submitted in July, 1990,

or the final budget adopted in August, 1990, there did not exist a degree of flexibility in line item adjustment to fund an IAFF memorandum of agreement. The preliminary budget submitted to the City Council the first week of July contained a contingency line item to fund a three percent (3%) compensation increase for the three employee units then negotiating. The testimony revealed that even after the budget is adopted by the City and certified by the county, it is not uncommon for funds budgeted for a particular expenditure to be transferred to another budget line item where there is a deficiency. City association membership dues, conference attendance and travel, and non-capital funds related to the construction and manning of fire station 17 were identified as budget line items from which monies could have been transferred to fund the requested IAFF compensation increase.

In summary, the record reveals the IAFF had the opportunity, both informally through their department head and formally through the negotiation process, to have input during the budget preparation process. Clearly while negotiations had just begun, by July 1, 1990, the City budget staff was aware of both the level of IAFF monetary demands and the City's revenue projections.

The City has an obligation under PEERA to commence meet and confer sessions on monetary items at such a time and in such a manner as to provide the certified employee representative a

reasonable opportunity to present and discuss its monetary demands prior to the submission of the preliminary budget to the governing body. Salary obligations need not be fixed nor the meet and confer process completed by the budget submission date. The only caveat being sufficient line item adjustment flexibility to fund any subsequent memorandum of agreement beyond budgeted monies for wages. There is nothing in the City's established budget development process or its actions during the 1990 negotiations which establish a breach of that obligation.

ISSUE II

WHETHER THE TOTALITY OF RESPONDENT'S CONDUCT LEADING UP TO AND DURING NEGOTIATIONS ESTABLISH A REFUSAL TO MEET AND CONFER IN GOOD FAITH IN VIOLATION OF K.S.A. 75-4333(b)(3).

The legislative parameters on the duty to bargain under 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" as:

"the 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."

The Kansas Supreme Court in Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 804 (1983), ("Pittsburg State"), interpreted this to mean:

"the Act [PEERA] imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations." Pittsburg State, 233 Kan. at p. 805.

At the outset it appears advisable to summarize the basic principles that govern in reviewing a charge of bad faith bargaining. The duty to negotiate in good faith generally has been defined as an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement. N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943). Not only must the employer have an open mind and a sincere desire to reach an agreement but a sincere effort must be made to reach a common ground. Id. After the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. See National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952). If the parties are not able to agree on the terms of a mandatory subject of

bargaining they are said to have reached "impasse." West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526, 541-423 (Conn. 1972). Under PEERA when good faith bargaining has reached impasse and the impasse procedures set forth in K.S.A. 75-4332 have been completed, the employer may take unilateral action on the subjects upon which agreement could not be reached.

The duty to bargain does not require an employer to agree to a proposal, or require the making of a concession, or yield a position fairly maintained. N.L.R.B. v. General Electric, 418 F.2d 736, 756 (2nd Cir. 1969). The public employer, if it negotiates in good faith, retains the ultimate power to say "No," and "take such action as it deems to be in the public interest, including the interest of the public employees involved." K.S.A. 75-4332(d). On the other hand, the parties are obligated to do more than merely go through the formalities of negotiation. There must be a serious intent to adjust differences and to reach an acceptable common ground. See Pittsburg State, supra. To conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would violate K.S.A. 75-4327(b). Sophisticated pretense in the form of apparent bargaining, sometimes referred to as surface bargaining, will not satisfy a party's duty under PEERA.

"[Bad faith bargaining] is prohibited though done with sophistication and finesse. . . . [T]o sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by

which to conceal a purposeful strategy to make bargaining futile or fail." N.L.R.B. v. Herman Sausage Co., 275 F.2d 229, 232 (5th Cir. 1960).

As the court stated in N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953), in a case where the parties "got nowhere" through negotiations, the question is:

"whether it is to be inferred from the totality of the employe's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith, but was unable to arrive at an acceptable agreement with the union."

Determination of that question is inevitably difficult, since it generally requires the drawing of inferences concerning a state of mind from many facts, no one of which would have great significance if it stood alone.² The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit "bad faith" intention, his motive must of necessity be ascertained from circumstantial evidence. N.L.R.B. v. Patent Trader, 415 F.2d 190, 197 (2nd Cir. 1969).

Certain specific conduct may constitute "per se" violations of the duty to bargain in good faith since they in effect constitute

² In addition, there is a tension between the statutory obligation to "meet and confer in good faith . . . in the determination of conditions of employment" and the proviso that such obligation does not compel either party to agree to a proposal or require the making of a concession. See Cox, The Duty to Bargain in Good Faith, 71 Hav.L.Rev., 1401, 1415-16 (1958).

a "refusal to negotiate in fact." Absent such evidence the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual acts. General Electric, supra at p. 756. Specific conduct, while it may not, standing alone, amount to a "per se" failure to bargain in good faith, may, when considered with all of the other evidence, support an inference of bad faith. Continental Insurance Co. v. N.L.R.B., 86 LRRM 2003, 2006 (2nd Cir. 1974).

The question of good faith involves subjective considerations, that must be left to the inference drawing function of the finder-of-fact. N.L.R.B. v. Southwestern Porcelain Steel Corp., 317 F.2d 527, 528 (10th Cir. 1963). The question of whether a public employer has engaged in bad faith bargaining is essentially a question of fact. Since motivation is a question of fact, the Public Employee Relations Board may infer improper motivation from either direct or circumstantial evidence. N.L.R.B. v. Nueva Engineering, Inc., 761 F.2d 961, 967 (4th Cir. 1985). An administrative agency empowered to determine whether statutory rights have been violated may infer within the limits of the inquiry from the proven facts such conclusion as reasonably may be based upon the facts proven. Republic Aviation Corp. v. N.L.R.B.,

324 US 793, 800 (1944). In Radio Officers', 347 U.S. 17 (1953), (Radio Officer's), the court stated:

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

A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers', supra at 50. The finder-of-fact has the power to determine whether a party's conduct at the bargaining table evidences a real desire to come to an agreement, drawing inferences from the conduct of the parties as a whole. Southwestern Porcelain, supra at p. 528.

Applying the above principles to this case an examination of the record as a whole finds a preponderance of the evidence supports the IAFF's position that the City bargained in bad faith. Viewed in its entirety the record reveals that the City undertook negotiations with a dilatory attitude toward bargaining and

insincerity in attempting to resolve differences, coupled with an apparent anti-union animus.³

DILATORY CONDUCT

Much of the probative evidence on the intent of the City in regards to the IAFF negotiations comes through the testimony of individuals involved. Credibility therefore becomes a determinative factor. The credibility of a witness is generally a matter for the determination of the finder-of-fact. N.L.R.B. v. Ogle Protection Service, Inc., 375 F.2d 497, 500 (6th Cir. 1968).

"It may be that the Board improperly gave what other persons would think undue credit to various circumstances. But it is not for us [the court] to determine the credibility of witnesses; that is the function of the triers of the facts. N.L.R.B. v. Aluminum Products Co., 120 F.2d 567 (7th Cir. 1941)."

A similar position was adopted by the Kansas Supreme Court in Swezey v. State Department of Social & Rehabilitation Services, 1 Kan.App.2d 94, 98 (1977). From the demeanor of the witnesses, the

³ The Public Employer-Employee Relations Act (PEERA) does not set forth the standard of proof necessary to establish a prohibited practice. The Kansas Supreme Court has indicated that an examination of the federal Labor-Management Relations Act, 29 U.S.C. §§141-197, can "provide guidance" in interpreting PEERA. U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531-32 (1990). 29 U.S.C. §160(c) provides in pertinent part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

"[T]he mere filing of charges by an aggrieved party . . . creates no presumption of unfair labor practices under the Act, but it is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence." Boeing Airplane Co. v. National Labor Relations Board, 140 F.2d 4323 (10th Cir. 1944). Findings of unfair labor practices must be supported by substantial evidence. Coppus Engineering Corp. v. National Labor Relations Board, 240 F.2d 564, 570 (1st Cir. 1957).

directness and content of their responses to questions, experiences of the finder-of-fact, as well as from the record as a whole, the witnesses for the IAFF appeared more credible than the witnesses for the City, especially Mayor Knight, City Manager Cherches and Director of Finance Trail.

The City's dilatory attitude toward bargaining is demonstrated by: 1) Trail's continued objections to the proposals of the IAFF concerning the wage survey, despite Dr. Yeager's recommendations, if he did not think the results would reflect well upon the City; 2) despite the IAFF's desire to have the wage survey completed as soon as possible, Trail indicated there was no need to hurry completion since he would be unable to look at the information until mid to late May; 3) Trail's denial of the IAFF request for the raw wage survey data received until it was ready for submission to Dr. Yeager; and 4) Trail's initial refusal to release the completed wage survey report to the IAFF until it paid the City for its share of the survey expenses.

Of greater importance is the delay in negotiations resulting from the City's failure to name a negotiator. While the City administration was aware that the IAFF contract would require negotiations in 1990, and was advised in January by the IAFF that it had several items it wanted to discuss and desired to begin negotiations, and that knew past negotiations commenced in

March/April, it did not until early March confirm that the individual, Mr. Fitch, who had served as its negotiator before would be available. Learning then that Fitch no longer desired to represent the City, the City began a belated search for a replacement that resulted in a six to eight week delay in negotiations. At the March, April and May Labor-Management Committee meetings, the employee organization representatives expressed a concern at the lateness for beginning negotiations and the need for the City to appoint a negotiator.

By a letter dated March 30, 1990 the City indicated a negotiator would be selected in two weeks. This time frame was not met. On May 8, 1990 Randy Lawson, F.O.P. President, Ron Minton, IAFF President, and Art Veach, S.E.U. Business Agent, wrote to City Manager Cherches indicating the labor representatives had not agreed to such a lengthy postponement of negotiations and that they desired to begin negotiations immediately. The letter further advised that if negotiations did not begin by May 18, 1990 a prohibited practice complaint would be filed with the Kansas Public Employee Relations Board. Interestingly the City was able to name Mr. Lakin its negotiator on May 9, 1990 after receiving the May 8th letter from the organization representatives.

City Manager Cherches testified that negotiations could have begun prior to the appointment of Lakin with Trail serving as the

City's negotiator. However, Trail stated he never considered himself to be the City's chief negotiator nor had the authority to negotiate on the City's behalf. In fact, he testified that Cherches never told him that he had the authority to begin meet and confer sessions on behalf of the City. There is no evidence in the record that the IAFF was informed of the interim appointment of Trail as its chief negotiator. The public employer is under a duty to vest its negotiators with sufficient authority to carry on meaningful bargaining. N.L.R.B. v. Fitzgerald Mills, 313 F.2d 260 (CA 2 (1963)). An individual unaware that he has the authority to negotiate does not satisfy this duty.

The City also maintains part of the delay was the result of Lakin having to clear his calendar to make himself available to begin negotiations, and then to prepare for the negotiations. It is the public employer's obligation to furnish a representative so as not to interfere with the employees' statutory right to the expeditious resolution of disputes over contract terms. Radiator Specialty Co., 53 LRRM 1319, 1320 (1963). As the NLRB stated in Solo Cup Co., 53 LRRM 1253 (1963), "It is the employer's responsibility to furnish negotiators who are not too busy to bargain."

Finally, the City asserts that meaningful negotiations on the monetary items could not take place until the City had a sufficient

picture of projected revenues and anticipated expenditures to determine available monies to fund contract proposals. While there is no argument such data may be necessary to final monetary negotiations, as stated above in the section on budget submission date, "the issue of salary is only one of the many negotiable items discussed during the negotiating sessions."

SINCERITY

a. Subjects on which agreement was reached

When negotiations began on June 1, 1990 the IAFF presented its first proposal package containing 22 or 23 proposals. Lakin made an effort to respond to the proposals as soon as he could stating the City's position and justification for that position. Aaron stated the City provided responses rather than counter-proposals. By "response," Aaron explained, is meant the City acknowledged the request but refused to make any movement alleging that the subject was a management right or not mandatorily negotiable. He recalled only receiving three (3) proposals from the City. Of the 22 or 23 proposals submitted by the IAFF, agreement was obtained on only 10% - 20%. Where agreement was reached it generally related to a change in wording, a minor item, or as Lakin stated, an item of little or no consequence. Even after meetings with the mediator

and resulting reduction of subjects sought to be negotiated by the IAFF from 22 to 8, no significant movement was made by the City.

b. Wages

The IAFF initial proposal sought a 12% wage increase. The City countered with an identical offer of 2.75% to the IAFF, F.O.P. and S.E.U. No movement by the City on the issue of wages resulted until mediation when the offer was increased to 3%. That offer was subsequently increased to 3.5% just prior to the parties proceeding to the fact-finding hearing. The F.O.P. and the S.E.U. settled for the 3.5% increase but the IAFF declined the offer. The fact-finder recommended a 5.5% increase. The city council unilaterally implemented the same 3.5% increase for the fire fighters given the F.O.P. and the S.E.U.

The IAFF argues the actions of the City constitutes a refusal to meet and confer in good faith and further denies the IAFF the rights accompanying certification:

"Because of the City's policy of conditioning any compensation increases to the members of local 135 to that received by non-members or members of other bargaining units there is created for the City a situation whereby the City in a sense has a predetermined position, the limits of which cannot be exceeded regardless of the merit of Local 135's increased compensation claims."

The principle of exclusive representation is considered fundamental in labor law for the private sector. The intended

purpose of exclusive representation was to prevent an employer from playing one union against another to divide and conquer, and its practical purpose was to establish a single contract with standardized terms. In Summers, Bargaining in the Government's Business: Principles and Politics, 18 Toledo L.Rev. 265 (19), the author discusses the problem of carrying the principle of exclusive representation over to public sector negotiations:

"The principle has been carried from the private sector to the public sector with little recognition that in the public sector it is at most only half viable. The need for standardized terms is even greater in the public than in the private sector, for traditions of classified service and insistence on equal treatment generates nearly irresistible demands of equal pay for equal work, and an increase for one group must be matched by equal increases for other groups. But exclusive representation in bargaining units carved out according to the private sector pattern denies the political reality.

"If city officials negotiate first with the union representing employees in the public works department, that agreement will provide the benchmark for other bargaining units represented by other unions, from the parks department to the city clerk's office. The contract made with the police will be the blueprint for the contract with the firefighters. The increases won by the teachers union will determine the increases for the administrators. The public works union, the police union and the teachers union become, for purposes of negotiating wages and other economic benefits, the effective representatives of employees who have selected different exclusive representatives.

"City officials, in negotiating economic terms of one contract, must calculate its impact on other employees, for all of the money comes out of the same budget and is reflected in a single tax millage. In this respect, exclusive representation is a misleading myth. It is not the instrument for standardizing terms -- that is done by the employer, and it does not produce unity on

the employee side, but insures fragmentation and provides opportunity for manipulation by the public employer.

"Multiple bargaining units do, of course, serve the purpose of enabling special groups to deal with special problems, to make variations to fit particular preferences, and at times to make adjustments in the general wage structure. . . ."

[2] There is no question but that factors such as comparable worth, equal treatment for all employees, represented and non-represented, and tax millage must be considered in establishing a negotiating position. However, to place such importance on any single factor or group of factors as to result in an adamant or unyielding position and negate an affirmative willingness to resolve grievances and disputes is to bargain in bad faith. The Kansas Supreme Court in applying the requirement of good faith as applied to teacher negotiations under the Professional Negotiations Act in Teachers' Association v. Board of Education, 217 Kan. 233, 236 (1975) reasoned:

"'Good faith effort' as used in the foregoing statute means an effort actuated by honest intention. It follows, therefore, that said statute imposes a duty on parties engaged in professional negotiations to confer and discuss the terms and conditions of professional service with an honest intention of reaching agreement. A party does not bargain in good faith if it adopts an adamant or unyielding position on an issue which would fall within the category of issues reasonably subject of negotiation under the statute. Any intention on the part of the party to totally dominate the other party engaged in negotiations or to impose substantially all of its own terms on the other party without a fair consideration of such other party's terms is inconsistent with the good

faith requirement. Similarly, a party which refuses to negotiate at all or which engages in conduct calculated to obstruct negotiations, fails to satisfy the statutory duty to engage in professional negotiations prior to the issuance of contracts. Finally, a party which assumes a position characterized by excessive demands, unreasonable proposals or terms clearly beyond the capability of the other negotiating party is also acting in violation of the letter and the spirit of the act."

The IAFF maintains that once the F.O.P. and S.E.U. settled for 3.5% the City no longer entered into good faith bargaining over the issue of wages but adopted an adamant and unyielding position tying its wage increase to the negotiated F.O.P. and S.E.U. increases. While Lakin maintains he was not directed by the city council or management to keep wage increases the same for each of the three bargaining employee units, Mayor Knight stated it was the position of the City during the negotiations not to bargain with the units singularly but to tie contract provisions made to one of the employee units to the proposals made to the other two employee units. This was especially true as to wage proposals.

It is clear the 3.5% offer to the IAFF, ultimately adopted by the city council, was not predominantly related to the particular circumstances of the fire fighters or the City's ability to pay but rather to the affect it would have on other employee wages. Lakin advised the IAFF they would be foolish not to accept the 3.5% because the City had two "in the barn" meaning the F.O.P. and

S.E.U. units, and would not give the IAFF more than the same 3.5%. He further indicated the City would not budge because the budget was wrapped up and the S.E.U. agreement contained a reopener clause.

Additionally, to allow the public employer to tie negotiation proposals made to one employee bargaining unit to contract proposals made to and accepted by another employee representative is to defacto allow a non-certified employee organization to negotiate the terms and conditions of employment for employees it does not represent, is answerable to, or is aware of their special needs or interests. Such appears contrary to K.S.A. 75-4324, right to join and be represented by employee organization of own choice, and K.S.A. 75-4328, right to recognition of exclusive employee representative.

Finally, Lakin stated in his discussions with the City Council he indicated to them that if they maintained their 3.5% wage increase position the IAFF would not accept the offer and the City would be able to unilaterally impose terms and conditions of employment. As early as July 23, 1990, Mr. Lakin wrote a memo to the Mayor and City Council indicating that he had been advised, presumably by the City legal counsel, that the City would likely lose in fact finding if it maintained its wage proposal, and the Council could reject the fact-finding recommendations and offer the

IAFF a final opportunity to sign a contract on whatever terms the City decided to offer.

c. Mean v. Median

In past years when the City alone generated the wage survey only the mean or average of the responses from the responding communities was used to prepare the analysis. Negotiations then revolved around the difference between wages paid by the City and the wage survey averages. For the 1991-92 negotiations the City chose to use the median of the responses rather than the mean to justify its positions on wage proposals because the median reflected a smaller wage differential with surveyed cities.

ANTI-UNION ANIMUS

Assistant City Manager Trail characterized the IAFF conduct relative to the 1991 negotiations as "militancy," and in an August 30, 1990 memo argued against any additional money being added to the 1991 IAFF contract because it would "send a signal that militancy is rewarded by more money immediately."

At the first meet and confer session on May 29, 1990, as one of the ground rules for the negotiation process, the IAFF and the City agreed that negotiation would take place at the table and there would be no public disclosures or contact with Council members during the period of negotiation. However, if impasse was declared, disclosures could be made to the media provided advance

notice to the other party via copy of the release. Copies of a 16 page document entitled "Fire Department Survey: 1990 Press Release" and dated July 16, 1990, were hand delivered by Minton to the Mayor's office to be distributed to the City Council members. The packet was distributed with no prior notice to the City's negotiator, Lakin. Mr. Trail testified that negotiations tended to be somewhat less amicable following the press release and conference.

In an August 1, 1990 memo entitled "Let's Fight" City Manager Cherches directed preparation of a press release on behalf of the City in response to the IAFF public activities. It had been the past practice of the City to refrain from discussing negotiations publicly or to conduct negotiations in the media. This was the first time Cherches could recall that the City issued a news release in response to what an employee organization was saying in public concerning negotiations. While statistically correct, many of the statements contained in the City's press release did not give a complete or totally accurate depiction of the facts but rather presented the data in a manner most supported the City's bargaining positions. Mr. Cherches testified he was unaware as to the correctness of the factual representations made in the press release and did not verify them

Early in the fire fighter negotiations Mayor Knight expressed a concern that the IAFF was not working toward a negotiated agreement for 1991 and was setting the stage to do a walk-out and a strike. In response he indicated that any fire fighters who participated in such a work action would be terminated.

Finally, although the IAFF wanted to continue working under the terms of their 1990 contract, except as to the compensation items changed by the Council's action, when it expired on January 4, 1990, The City required work to continue pursuant to the conditions of employment set forth in the City's Personnel and Procedural Manual.

IAFF Actions

Although the IAFF was in part responsible for the slow-paced nature of negotiations up to and through the survey preparation and City negotiator selection process, the preponderance of the evidence supports the proposition that the City's actions were a major source of delay. While the employer presented apparently valid reasons for the delays and negotiation positions, the impression left by the record when considered as a whole was a lack of good faith on the part of the City in meeting and conferring with the IAFF on a 1991 contract. In particular, the actions of the City during this period failed to satisfy the obligation "to

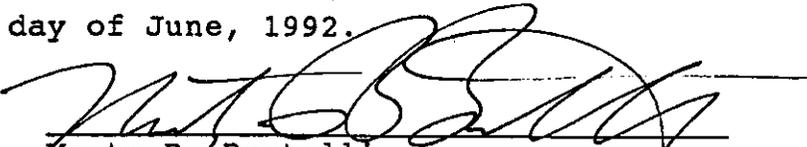
promote the improvement of public employer-employee relations" requirement established by the Kansas court in Pittsburg State, 233 Kan. at p.805, as an element of meeting and conferring in good faith.

ORDER

IT IS THEREFORE ADJUDGED that the City of Wichita through its course of conduct during negotiations for the 1991 IAFF contract failed to meet and confer in good faith as required by K.S.A. 75-4327(b), and committed a prohibited practice as set forth in K.S.A. 75-4333(b)(3).

IT IS ORDERED that the City of Wichita shall cease and desist such conduct designed or intended to delay the meet and confer process, and shall negotiate with the IAFF singularly rather than directly tying proposals on conditions of employment to provisions in contracts previously accepted by other bargaining units to the extent that it results in an adamant or unyielding position negating an affirmative willingness to resolve grievances and disputes.

DATED this 2nd day of June, 1992.


Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603

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NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final order fifteen (15) days from the date of service set forth below, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Secretary, Department of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, Topeka, Kansas 66603.

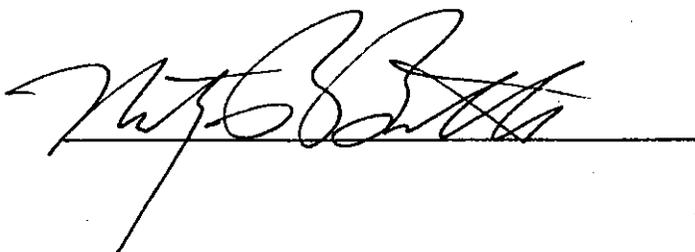
CERTIFICATE OF SERVICE

I, Monty R. Bertelli, Senior Labor Conciliator for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 2nd day of June, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Ed. L. Randels
Elizabeth Harlenske
City Municipal Building,
455 North Main,
Wichita, Kansas 67202

Ronald D. Innes
2326 South Dalton,
Wichita, Kansas 66101

Members of the PERB Board



A handwritten signature in cursive script, appearing to read 'Monty R. Bertelli', is written over a horizontal line.