BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
OF THE STATE OF KANSAS

AFSCME/ KANSAS PUBLIC EMPLOYEE COUNCIL 64, Petitioner, vs. DEPARTMENT OF CORRECTIONS - Lansing Correctional Facility, Respondent.	Case No. 75-CAE-9-1992

ORDER

ON the September 27, and October 7 and 8, 1992 the above-captioned prohibited practice complaint came on for formal hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appeared by Donald R. Hoffman
Tilton & Hoffman
1324 SW Topeka Blvd.
Topeka, Kansas 66612-1817

Respondents: Appeared by Charles E. Simmons
Chief Legal Counsel
Department of Corrections
900 SW Jackson St., Suite 400
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ISSUE PRESENTED FOR DETERMINATION

WHETHER THE DEPARTMENT OF CORRECTIONS HAS FAILED TO MEET AND CONFER IN GOOD FAITH WITH AFSCME/ KANSAS PUBLIC EMPLOYEE COUNCIL 64 AS REQUIRED BY K.S.A. 75-4327(b) THEREBY COMMITTING A PROHIBITED PRACTICE AS SET FORTH IN K.S.A. 75-4333(b)(5).

75-CAE-9-1992

SYLLABUS

1. **PROHIBITED PRACTICES** – *Burden of Proof - Preponderance of the evidence*. the burden of proving a prohibited practice lies with the party alleging the violation. The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under PEERA, and it is incumbent upon the one alleging the violation to prove the charges by a fair preponderance of all evidence.

2. **MEET AND CONFER IN GOOD FAITH** – *Mutual Obligation on Employer and Employee Organization - Requirements*. To meet and confer in good faith refers to a bilateral procedure whereby the public employer and the certified representative of the employee unit jointly attempt to establish the terms and conditions of employment. The good faith requirement places on both parties the obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground.

3. **MEET AND CONFER IN GOOD FAITH** – *Proposals - Acceptance not required*. PEERA does not compel either party to agree to a proposal or make a concession. If honest and sincere bargaining efforts fail to produce an understanding on terms of employment, nothing in PEERA makes illegal a public employer's refusal to accept the particular terms submitted to it.

4. **PROHIBITED PRACTICES** – *Refusal to Meet and Confer in Good Faith - Totality of conduct test*. When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the meet and confer process must be considered. "Totality of conduct" is the standard through which the quality of negotiations is tested.

5. **PROHIBITED PRACTICES** – *Mandatory Subjects - Absence of bad faith*. A party's refusal to negotiate a mandatory subject of bargaining is a prohibited practice pursuant to K.S.A. 75-4333(b)(5) and (c)(5), even though the party has every desire to reach agreement upon an overall memorandum of agreement, and earnestly and in all good faith bargains to that end. A prohibited practice can be found despite the absence of bad faith, and even where there is a possibility of substantive good faith.

6. **MEET AND CONFER IN GOOD FAITH** - Failure to Advance Proposals or Counterproposals - *Indicia of bad faith*. The advancement of proposals, and the submission of counterproposals by a party are factors to be considered in determining overall good faith. While the failure to make a counterproposal in response to a proposal does not constitute a *per se* failure to bargain in good faith, depending on the circumstances, failure to offer a reasonable counterproposal could be an indicator of bad faith,

7. **MEET AND CONFER IN GOOD FAITH** - *Duty to Persuade - Mutual obligation*. The duty to persuade as to the reasonableness of one's position is borne by both parties, not just the representative of the employee organization.

8. **MEET AND CONFER IN GOOD FAITH** - *Failure to Advance Proposals or Counterproposals - Duty to Explain objections to proposal*. If a party rejects the proposal offered by the other party without presenting a new counterproposal, the rejecting party has a duty to specifically explain all its objections to that proposal.

FINDINGS OF FACT[1]

1. Petitioner, the American Federation of State, County and Municipal Employee Council 64 ("AFSCME") is an *"employee organization"* as defined by K.S.A 75-4322(i). It is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for the correctional officers employed by the Department of Corrections at the Lansing Correctional Facility ("Facility").

2. Respondent, Department of Corrections ("Employer"), is an agency of the State of Kansas and therefore a *"public agency or employer"*, as defined by K.S.A. 75-4322(f).

4. Wayne A. Tadlock is the current President of Local 3371 of the American Federation of State, County and Municipal Employees. He became a member of AFSCME's negotiating team in January of 1992. (Tr.p. 28, 205, 220-21).

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[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). At 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."

5. Gary D. Reynolds is a correctional officer at the Lansing Correctional Facility. He was AFSCME Local 3371 President in 1991, and head of the negotiating team until succeeded by Wayne Tadlock. (Tr.p. 250-51, 279).

6. Wayne Weinecky was the spokesperson for AFSCME's negotiating team for the 1988-90 Memorandum of Agreement. He served in that same position during negotiations for a successor agreement, until succeeded by R.A. Caraway. (Tr.p. 251).

7. R.A. Caraway was serving as President and Executive Director of Kansas Council 64 of AFSCME, and spokesperson for the AFSCME negotiating team at the time of the hearing. (Tr.p. 26-27).

8. Leonard F. Garret is a sergeant at the Lansing Correctional Facility who was active in organizing the correctional officer unit and certifying AFSCME as the employee representative. He was a member of the AFSCME bargaining team that negotiated the 1988-90 Memorandum of Agreement, and is on the negotiating team of a successor agreement. (Tr.p. 323-34).

9. Judy Rickerson is the Director of Human Resources for the Kansas Department of Corrections, and spokesperson of the negotiating team for the Lansing Correctional Facility. (Tr.p. 354).

10. Gary Leitnaker is the Director of Labor Relations in the Department of Administration, and serves as the Secretary of Administration's designee for meet and confer pursuant to K.S.A. 75-4322(h). (Tr.p. 469-70).

Meet and Confer Process

11. AFSCME was certified as the exclusive employee representative for the correctional officer unit at the Lansing Correctional Facility following an election in August, 1986. The unit is composed of the positions of Correctional Officer I, Correctional Officer II and Correctional Specialist I. (Tr.p. 28). Following certification, AFSCME entering into negotiations with the Employer that resulted in a Memorandum of Agreement which became effective August 18, 1988 and had an expiration date of December 31, 1990. (Tr.p. 29; Ex. 1).

12. AFSCME and the Employer began the meet and confer process for a new memorandum of agreement in November, 1990. (Tr.p. 29-30). On November 20, 1990 the parties agreed upon certain

ground rules for their negotiations. Based upon those ground rules, the terms and conditions of employment for the members of the Lansing bargaining unit continue to be governed by the 1988-90 Memorandum of Agreement during the pendency of negotiations on a new agreement. (Tr.p. 39, 162, 355; Ex. TT).

13. Judy Rickerson, Director of Human Resources of Kansas Department of Corrections, was chief spokesperson for Kansas Department of Corrections. Other members of the Employer's bargaining team were Gary Leitnaker, Earl Hole and Randy Buford. (Tr.p. 89, 354-355, 354-55). AFSCME had a succession of spokespersons during the course of negotiations. Wayne Weinecke served from November, 1990 to May 28, 1991. Jim Weaver served between May, 1991 and August, 1991. R.A. Caraway served from August, 1991 to the date of the hearing. (Tr.p. 27, 30, 357, 363, 477). Other members of the AFSCME team were Wayne A. Tadlock, Gary D. Reynolds, Leonard F. Garrett and Jim Weaver. (Tr.p. 27, 220, 250, 324).

14. AFSCME and the Employer met for a total of eighteen meet and confer sessions; the last three sessions with a representative from the Federal Mediation and Conciliation Service pursuant to the impasse procedure of K.S.A. 75-4332(b). (Tr.p. 21, 30, 87, 103, 105, 162, 235, 275, 355; Ex. TT). Negotiating sessions were sometimes spaced as much as two or three months apart. The next bargaining session would be scheduled at the end of the current bargaining session. On occasions when no next session was set or a session had to be cancelled and reset, the next session would be scheduled telephonically. (Tr.p. 164, 254). The parties' last meet and confer session was February 19, 1992. (Tr.p. 107, 223). Mr. Caraway testified that about three-fourths of the outstanding issues were resolved during the meet and confer process; that two others were resolved during the three mediation sessions; and that approximately eight issues still remain to be resolved. (Tr.p. 196). During the 18 months of negotiations the parties met for 80-100 hours, (Tr.p. 166), and had tentative agreements on 35 items . (Tr.p. 97, 99, 102, 103, 104, 402).

15. The first proposals from AFSCME concerning additions or changes to the 1988 Memorandum of Agreement were submitted January 3, 1991. (Tr.p. 355; Ex. A). The Employer submitted written counterproposals and proposals for additions to or changes in the 1988 Memorandum of Agreement on January 23, 1991. (Tr.p. 163; Ex. 2). The parties declared a joint impasse in negotiations on December 5, 1991. It was the belief of the parties at that time that negotiations could proceed no further without outside assistance. (Tr.p. 103-04,

191-92, 235, 357). The parties met with the federal mediator on January 21, 1992 and again on February 5 and 19, 1992. (Tr.p. 235; Ex. TT). Rickerson expressed the belief the Mediator was doubtful that there would be any further meetings after February 19, 1992. (Tr.p. 408). Similarly, Tadlock testified the mediator indicated to him that he felt he had done about as much as he could do, and nothing more would happen unless management was willing to come forward with new proposals. (Tr.p. 239).

16. At the close of the February 19, 1992 session, the parties did not schedule another meet and confer session. According to Tadlock, AFSCME anticipated further meetings. (Tr.p. 238, 240), and Caraway was to contact the Employer later and set up the next meeting date. From subsequent conversations with Caraway, Tadlock was of the belief that Caraway had so contacted the Employer. (Tr.p. 242). Caraway testified he had a telephone conversation on March 31, 1992 with Rickerson during which she stated, since the Employer had not changed its position on any of the unresolved subjects, additional meetings would not be beneficial. (Tr.p. 107-108). In a subsequent telephone conversation between Tadlock and Rickerson, Tadlock alleges Rickerson indicated again no future meetings were necessary because she did not feel they would be productive. Rickerson does not remember that conversation. (Tr.p. 224, 232, 238, 259), but states that at no time after the February 19, 1992 session did she convey to AFSCME any indication that the Employer felt no further meetings were appropriate or necessary. (Tr.p. 361).

17. On April 1, 1992 Rickerson sent a document to Caraway, (Tr.p. 245, 248; Ex. 7), which, according to Caraway, set forth the "final" position of the Employer on the remaining unresolved subjects of the negotiations. (Tr.p. 75). The April 1, 1992 cover letter stated, in pertinent part, as follows:

> *"Dear Mr. Caraway:*
>
> *"Pursuant to our telephone conversation of March 31, 1992, I have summarized the Department of Correction's last presentation of the outstanding issues. My notes indicate that these are the areas in which we were unable to reach agreement."* (Ex. 7).

According to Rickerson, the letter was sent at the request of Caraway to put in writing a summary of the Employer's positions at the end of the February 19, 1992 session, and was

not intended to be a final statement of the Employer's positions on unresolved subjects. (Tr.p. 358-59; Ex. 7). This position appears corroborated by the testimony of Tadlock who viewed the April 1st letter as a recitation of where the parties were as of the last meeting. (Tr.p. 246-47).

18. On April 13, 1992 AFSCME filed a prohibited practice complaint alleging the Employer had refused to meet and confer in good faith as set forth in K.S.A. 75-4333(b)(b) by refusing to offer proposals on wages, health insurance, binding arbitration of grievances, and the right to union representation during investigatory interviews relative to discipline. (Petition). There is no complaint by AFSCME that the Employer was intentionally trying to slow down the negotiation process, (Tr.p. 251), or that the Employer's team did not have the authority to negotiate a memorandum of agreement. (Tr.p. 165).

Final and Binding Arbitration

19. Line stewards are the primary point of contact between employees in the bargaining unit and the management of the Lansing Correctional Facility. The employees bring problems, questions and complaints concerning management or the employee organization to the line steward who attempts a resolution, either informally or through the contractual grievance procedure. (Tr.p. 207). Union representatives are allowed to participate in all stages of the formal grievance procedure. (Tr.p. 215). The 1988 Memorandum of Agreement contained a provision for advisory arbitration as part of the grievance procedure. (Ex. 1). AFSCME's proposal submitted January 3, 1991 included amendments of Article IV, Section 9 related to arbitration, would have changed the term *"advisory"* to *"final and binding."* (Tr.p. 53, 268, 474; Ex. 2). It was the position of AFSCME that final and binding arbitration of grievances was necessary because past experience with the grievance procedure at Lansing showed that even if their grievance was found to be meritorious, the Employer would continue to do what it wanted anyway leaving the employees with no recourse. (Tr.p. 266-67). The employees in the correctional officers unit wanted a final, fair resolution of grievances by an impartial third party. (Tr.p. 139).

20. According to Mr. Caraway, there are only two forms of arbitration; *"final and binding"* and *"advisory."* There is nothing in between. *"Only black and white, no grey."* To

change positions requires acceptance of the other position. (Tr.p. 137, 138).

21. The Employer's January 23, 1991 response to AFSCME's binding arbitration proposal was *"No change"* thereby continuing the advisory arbitration procedure set forth in the 1988 Memorandum of Agreement. (Tr.p. 134; Ex. 4, B). The parties discussed the issue of advisory versus binding arbitration at a number of meet and confer sessions. Information regarding the position of each party was discussed. (Tr.p. 54-55, 134, 136, 266, 267). At the request of AFSCME, the Employer provided, on October 3, 1991, information on the type of arbitration included in memorandums of agreement covering other units of state employees. That information showed memorandums of agreement with 33 units. Seventeen units have advisory arbitration and sixteen have final and binding arbitration. Of the 33 memorandums of agreement, 11 are with AFSCME represented units, and all but one of the 11 units, the correctional officer unit, have final and binding arbitration. (Tr.p. 55, 97-98, 136, 268, 318, 475). The Employer's position from the beginning and throughout the negotiations was that there was no evidence that advisory arbitration did not work. (Tr.p. 53-55). The advisory arbitration procedure had not been utilized by AFSCME during the term of the 1988 Memorandum of Agreement. (Tr.p. 54, 135, 185, 268, 299, 301, 317, 377, 475). Reynolds agreed that the reasons set forth by the Employer for not wanting to change to final and binding arbitration were reasonable and not an unusual or outrageous position to take. (Tr.p. 318-19).

22. The reason given by AFSCME for not taking any grievances through advisory arbitration was that since the Employer had denied the grievance at the three lower stages of the grievance procedure, it did not believe the Employer would then reverse its determination based upon a non-binding opinion of an arbitrator. Therefore, it did not warrant the expenditure of time and funds required. (Tr.p. 54, 135, 185, 301, 317). Caraway admitted, that since there was no history of advisory arbitration at Lansing, AFSCME's basis for wanting final and binding arbitration was speculative, (Tr.p. 137), and while Reynolds testified that the experience of the AFSCME international union was that advisory arbitration did not work, he could not provide any evidence that it would not work at the Lansing Correctional Facility. (Tr.p. 318, 377-78).

23. Although the parties could not agree between *"advisory"* and *"final and binding"* arbitration, they were able to reach

agreement on other proposed changes to the grievance procedure. (Tr.p. 140).

Union Representation

24. The 1988 Memorandum of Agreement does not provide for AFSCME representation during investigations which would result in disciplinary action. The subject of representation was proposed by AFSCME during original negotiations but dropped, and the memorandum of agreement was ratified without union representation during investigatory interviews. (Tr.p. 502). The 1988 Memorandum of Agreement contains the following provision relative to discipline:

> *"The employer and the union agree with the tenets of progressive and corrective discipline.*
>
> *The employer agrees that all disciplinary actions shall be administered in accordance with statutes and regulations applicable thereto and policies and procedures issued by the Secretary of Corrections.*
>
> *The employer agrees to provide the union copies of all applicable statutes, regulations, policies and procedures stated above including amendments, additions, deletions and modifications of same.*
>
> *Employees shall be informed of their statutory right to representation when suspension, demotion or dismissal is proposed and shall be entitled to union representation if so requested by the employee."*

25. Tadlock testified that disciplinary meetings involving unit members occur 4-5 times per week. (Tr.p. 214-15). Presently, the employee is not entitled to union representation until a decision as to discipline has been made by the warden. At that point the employee is allowed to present such evidence and argument as is available to mitigate against the proposed discipline. (Tr.p. 58-59). The Serious Incident Review Board is also part of the disciplinary process. An employee appearing before the Board is subject to questioning, and a recommendation of discipline can result. No union representation is allowed during those Board hearings. (Tr.p. 60-61, 219, 233, 271-73, 328).

26. Union representation at investigatory interviews was an important subject to AFSCME, (Tr.p. 327), and one of the subjects AFSCME wanted to negotiate. (Tr.p. 216). AFSCME's proposal submitted January 3, 1991 sought inclusion of a new Article V on Discipline and Discharge. Pertinent to the dispute here is Section 3. Notification and Section 5. Notification and Measure of Disciplinary Action of that new article which provided:

> *"Section 3. Notification. For discipline other than oral the Employer shall notify the Union and then shall meet with the employee involved. Employees shall be informed of their rights to Union representation and shall be entitled to such, if so requested by the employee and the employee and Union representative shall be given the opportunity as the above meeting to rebut or clarify the reasons for such discipline."*
>
> *"Section 5. Notification and Measure of Disciplinary Action. In the event disciplinary action is taken against an employee, other than the issuance of an oral warning, the Employer shall promptly furnish the employee and the Union, in writing, a clear and concise statement of the disciplinary action and reasons therefore. Once the measure of discipline is determined and imposed, the Employer shall not increase it for the particular act of misconduct which arose from the same facts and circumstances. An employee shall be entitled to the presence of a Union representatives at any phase of a disciplinary action." (Ex. 2).*

27. The Employer did not deny that union representation was a negotiable subject but did indicate a belief that such representation prior to the filing of a formal grievance would be *"inappropriate"* or unnecessary. (Tr.p. 62, 217, 222, 230). The position of the Employer was that the right to union representation does not attach until the employee has been advised of the proposed discipline. (Tr.p. 62). The Employer interpreted the January 3, 1991 AFSCME proposal on representation as a request to have union representation at meetings where discipline was administered or proposed. (Tr.p. 471). The Employer's response to AFSCME's proposed new article on Discipline was given on January 23, 1991. That response was for *"No change."* (Ex. 4;B). AFSCME perceived the Employer's response that the language in the memorandum of agreement *"as is"* an indication that to so agree would result

in denying members union representation during investigatory interviews. (Tr.p. 331).

28. The subject of union representation at various disciplinary proceedings was discussed again in February, 1991. The Employer's response was that representation was controlled by the current memorandum of agreement and it did not see any need for change. The Employer sought to defer further discussions to a later time. (Tr.p. 255, 274).

29. On February 5, 1992 AFSCME offered the following amendment to Section 3 and 5 of its proposed new disciplinary article (as noted by emphasis):

> *"Section 3. Notification. For discipline other than oral the Employer shall notify the Union and then shall meet with the employee involved. Employees shall be informed of their rights to Union representation and shall be entitled to such* ***[at] hearings, boards, interviews, meetings, etc., including investigative process****, if so requested by the employee and the employee and Union representative shall be given the opportunity as the above meeting to rebut or clarify the reasons for such discipline."*
>
> *"Section 5. Notification and Measure of Disciplinary Action. In the event disciplinary action is taken against an employee, other than the issuance of an oral warning, the Employer shall promptly furnish the employee and the Union, in writing, a clear and concise statement of the disciplinary action and reasons therefore. Once the measure of discipline is determined and imposed, the Employer shall not increase it for the particular act of misconduct which arose from the same facts and circumstances. An employee shall be entitled to the presence of a Union representatives at any phase of* ***an actual or pending*** *disciplinary action."* (Ex. 3, BB).

30. AFSCME believed the language in the 1988 Memorandum of Agreement required clarification to specifically address at what point in the disciplinary process an employee was entitled to union representation. AFSCME wanted the memorandum of agreement to provide for that right to attach at the investigatory stage. The phrase *"investigatory process"* was not included in AFSCME's proposal until February 5, 1992, and

that addition was AFSCME's first attempt at preparing a written proposal clarifying what had been previously discussed. (Tr.p. 57-58, 59, 85, 116-17). According to Reynolds, the new language was added to make the proposal more detailed in hopes of obtaining some movement in the stalled negotiations. AFSCME assumed that since no counterproposal had been forthcoming from the Employer, that it did not understand what was being proposed and therefore further clarification must be needed. (284-85, 286, 287, 337, 338-39). This was apparently an accurate perception because according to Rickerson, the Employer did not understand that AFSCME's January 3, 1991 proposal included a request for representation during the investigatory stage of disciplinary action. (Tr. 379, 404; Ex. A).

31. The language of the original AFSCME proposal on representation during disciplinary proceedings appears to indicate that the right would not attach until after a decision on discipline has been made. The February 5, 1992 offer appears to broaden that right of representation to include the investigatory process. (Tr.p. 348-350). The Employer regarded the AFSCME proposal of February 5, 1992 to be inserting a new issue, investigatory representation, into the meet and confer process. (Tr.p. 474).

32. When Tadlock came away from negotiations on February 5, 1992, he had a clear understanding as to the Employer's objections to the proposed language on union representation. (Tr.p. 231, 320). Based on that understanding, Tadlock stated he was adequately able to formulate a counterproposal or make a determination that the union did not want to change its proposal. And, in fact, AFSCME did make a counterproposal. (Tr.p. 231, 320-good language).

33. At 4:55 p.m. on February 19, 1992 AFSCME submitted a counterproposal to the article on Discipline and Discharge that would have removed the new language proposed to Sections 3 and 5 on February 5, 1992 and instead add the following new section:

> *"Employees have a right to union representation during any investigatory or disciplinary meeting where the employee may have reason to believe a disciplinary action may occur to the employee because of information being provided."*

The wording of this counterproposal came from the PERB order in Service Employees Union Local 513 v. City of Hays, Case No.

75-CAE-8-1990 (April 14, 1991).[2] (Tr.p. 230, 256). The Hays decision had been discussed at earlier negotiation sessions, and a copy of the order was offered to the Employer by AFSCME. The Employer did not change its position in response to the Hays decision. (Tr.p. 257, 329, 336), and maintained that while the Hays order would be controlling on the issue, the union waived that right through the current memorandum of agreement. (Tr.p. 501). There appeared to have been some form of Employer counterproposal about grievance procedures on February 5, 1992 and February 19, 1992, but the counterproposal did not directly address the representation issue other than to say the language should remain unchanged from the 1988 Memorandum of Agreement. (Tr.p. 307-08; Ex. HH, LL). The employer did not reject AFSCME's February 19th counterproposal on representation, but there were no substantive discussions on it either. (Tr.p. 237). The Employer did request time to consider the February 19th counterproposal, and AFSCME agreed. (Tr.p. 223, 237, 376). Rickerson testified that, given the timing of the counterproposal and the absence of further negotiation sessions, she did not believe the parties had an adequate opportunity to fully discuss the counterproposal submitted on February 19, 1992. (Tr.p. 382).

Wages

34. The 1988 Memorandum of Agreement contains the following provision relative to wages and health insurance:

> *"XI. EMPLOYEE BENEFITS*
> *1. WAGES AND BENEFITS*
> *Section 1.*
> *The employee and the union agree that each employee in the appropriate unit shall be compensated in accordance with provisions of the State of Kansas Civil Service pay plan and benefit plans. The administration of the plans shall be in accordance with appropriate Kansas Civil Service Rules and Regulations and applicable statutes.*
>
> *Section 2.*

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[2] In Hays the PERB adopted the rationale of the U.S. Supreme Court in NLRB v. Weingarten, Inc., 420 US 251 (1974), to the effect that K.S.A. 75-4324 gives a public employee the right to insist on the presence of his union representative at an interview which he reasonably believes will result in disciplinary action. A denial of such a request constitutes a prohibited practice pursuant to K.S.A. 75-4333(b)(1).

> *The State of Kansas reserves the right to amend the pay plan and benefit plans from time to time as it may determine to be necessary."(Ex. 1).*

35. Wages are established by the Department of Administration as part of the pay matrix. (Tr.p. 265, 288). K.S.A. 75-2938(4) states:

> *"After consultation with the director of the budget and the secretary of administration, the director of personnel services shall prepare a pay plan which shall contain a schedule of salary and wage ranges and steps, and from time to time changes therein. When such pay plan or any change therein is approved or modified and approved as modified by the governor, the same shall become effective on a date or dates specified by the governor and any such modification (or) change of date shall be in accordance with any enactments of the legislature applicable thereto."*

36. The January 3, 1991 AFSCME proposal concerning wages and health insurance states only *"Discuss, change, and modify."* (Tr.p. 32-33, 290, 355;Ex. 2, A). The Employer's response on January 23, 1991 was that no substantive change be made in Article XI Employee Benefits 1. Wages and Benefits, Section 1 of the existing memorandum of agreement. (Tr.p. 391, 344, 477; Ex. B). No specific proposals on wages were submitted by either party during the time Wayne Weinecke was AFSCME spokesperson. (Tr.p. 293, 362, 477).

37. Until August, 1991 discussions concerning wages were in very general terms of AFSCME's desire for a specific wage increase which would be forthcoming at a future date. (Tr.p. 34). On August 12, 1991, AFSCME submitted a verbal proposal for a wage increase of 6.5% per year for each of the three years of a proposed new Memorandum of Agreement. This was the first specific proposal and discussion regarding the issues of wages. (Tr.p. 35-36, 37, 92, 132-33, 342, 362).

38. According to Lietnaker, Rickerson stated the Employer was interested in justification for AFSCME's request of a 6.5% wage increase. (Tr.p. 478). As support for its salary request AFSCME presented a wage survey conducted by AFSCME's research department and a publication prepared by the American Corrections Association. (Tr.p. 37-38, 99-100; Ex. RR, SS). Additional justification given by AFSCME for the wage increase was the increased work load that resulted from the loss of 27

correctional officers. (Tr.p. 36, 93, 296-97, 366-67). AFSCME also justified the wage increase based upon the higher inmate population. Rickerson denied such justification was given and countered that the population had in fact increased by approximately one-half. (Tr.p. 297, 366-67). The Employer took the position that the 6.5% wage increase proposed by AFSCME was not justified because: 1) the agency was not having difficulties recruiting new officers at the present wage levels; 2) there was no problem with position turnover; and 3) the present wage levels were competitive with wages paid by other states as shown by the Employer's wage survey. According to Rickerson, there was no justification for any increase in the base salary. (Tr.p. 431-32). These objections to the AFSCME wage proposal were discussed by the parties prior to the Employer submitting its proposal on November 26, 1991. (Tr.p. 368, 485).

39. The Employer's response to AFSCME's August 12, 1991 proposals was given on November 14, 1991. (Tr.p. 343-44, 369-70). It was a restatement of the language in the 1988 Memorandum of Agreement with the following counterproposal (noted by emphasis):

> *"XI. EMPLOYEE BENEFITS*
>
> *1. WAGES AND BENEFITS*
>
> *Section 1.*
>
> *The employee and the union agree that each employee in the appropriate unit shall be compensated in accordance with provisions of the State of Kansas Civil Service pay plan and benefit plans. The administration of the plans shall be in accordance with appropriate Kansas Civil Service Rules and Regulations and applicable statutes.*
>
> ***The employer agrees to survey salaries of like positions once each year and discuss findings with the union. The employer further agrees to make every effort to assure fair and equitable compensation for covered employees."*** (Ex. 4, CC).

40. At the August 19, 1991 session, there was discussion of the initial order in KAPE v. Department of Administration, case

no. 75-CAE-10/11-1990, (May 4, 1991)("Technical Unit").[3] Caraway was of the opinion that the Employer's team was familiar with that initial order. (Tr.p. 38-39). The perception of AFSCME was that after the KAPE initial order was issued, the Employer became more flexible in its positions. Caraway and Reynolds testified that initially the Employer came to the table willing to listen to a percentage wage increase proposal. (Tr.p. 45, 262). The change in position came shortly after KAPE withdrew a complaint on appeal before the PERB. (Tr.p. 263).[4] While there were no specific statements made by the Employer's team that indicated a change in negotiation posture following KAPE's withdrawal of its complaint, according to Reynolds, the nonverbal communication at the table left the impression that instead of trying to make an effort to resolve the wage dispute, the Employer would make no attempt. (Tr.p. 295, 340). Once the complaint was withdrawn, there were no further serious discussions on wages according to Caraway. He felt the Employer's team came to the table with a different attitude. (Tr.p. 148, 156, 159). According to Rickerson, the Technical Unit decision did not affect the Employer's negotiation strategy. She testified she never read the order. The Employer's position did not change once the Technical Unit complaint was withdrawn. (Tr.p. 363).

41. AFSCME maintains that in response to its request to negotiate a percentage wage increase, the Employer initially took the position that it could not negotiate wages because they were controlled by the state pay plan, and therefore beyond their control, (Tr.p. 259-60, 262, 264, 332), and that the Employer suggested AFSCME take any concern about wages to the legislature or the governor. (42, 261, 165, 289, 332, 334).

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[3] In the Technical Unit initial order, on facts similar to those here, the presiding officer decided, in finding the employer had failed to meet and confer in good faith, that where the employer is rejecting the proposal of the employee organization, the employer has the duty to come forward with justification sufficient to persuade the employee organization that its position is the more reasonable. The employer could not sit back and take the position that since it has not been convinced that the employee organization was reasonable, no further action on its part was necessary, and that no change was required because such a position is inconsistent with the intent to adjust differences and to reach an acceptable common ground that is essential to satisfy the obligation to meet and confer in good faith.

Additionally, the order took the position that the employer could not satisfy its duty to meet and confer in good faith on a mandatory subject of negotiation by taking the position that the subject is covered by statute, regulation or state pay plan and therefore out of the employer's control.

[4] The Initial Order in Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-10/11-1991, was filed May 4, 1990. A petition for review of the order by the Public Employee Relations Board was filed by the Respondent. On August 21, 1992, during consideration by the Board of whether to review the order, the Petition withdrew its complaint, the dispute became moot, and the Initial Order never became a Final Order. While the Technical Unit order may not be Board precedent, it does contain what is believed an accurate statement of the law, and can provide guidance in deciding the issues presented in this case.

According to Rickerson, she never indicated she did not have the authority to discuss wages. In fact, she believed she had the authority to negotiate an agreement on wages which, although it would not bind the state, would bind the agency to propose the wage increase to the legislature. (Tr.p. 389-92). Rickerson further testified she never referred AFSCME to the legislature or the governor to obtain wage increases; referenced any statutory or constitutional restrictions on ability to discuss wages; or indicated an unwillingness to meet and confer on wages. (Tr.p. 370-71).

42. While negotiations were underway in late 1991, the governor's recommendation for a 2.5% salary increase for all state employees became known to the Employer's team. However, the Employer still did not come forward with a percentage proposal, even though, according to Lietnaker, they probably could have done so. (Tr.p. 492-93, 500).

43. During mediation, AFSCME took the position that the parties should negotiate a percentage wage increase and, pursuant to K.S.A. 75-4330(c), submit the increase to the legislature for appropriation of required funds. (Tr.p. 48). Although wages was a part of each party's last proposal, neither made a change in its position. (Ex. KK, OO, QQ).

Health Insurance

44. AFSCME's proposal submitted on January 3, 1991 did not contain a specific proposal regarding health insurance. (Ex. A). The Employer's proposal submitted on January 23, 1991 provided for continuation of terms of the 1988 Memorandum of Agreement with respect to benefits (see Finding of Fact #39 above). (Ex. B). No specific proposals on health care were made by either party during the time Weinecke was spokesperson. (Tr.p. 362, 374, 50). AFSCME did not submit a specific proposal on health insurance until an oral proposal was made on August 12, 1991. (Tr.p. 50). AFSCME proposed that the employee contribution remain the same as currently assessed and the Employer absorb as its cost any increase in the cost of health insurance during the term of the agreement. (Tr.p. 50-51, 269). This issue was not discussed again until February 19, 1992 when management submitted a proposal suggesting a joint letter to the Health Care Commission regarding increases in health insurance costs. (Tr.p. 374-375). AFSCME's final proposal submitted on February 19, 1992 restated the proposal of August 12, 1991 with respect to health insurance. (Ex. QQ).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER THE DEPARTMENT OF CORRECTIONS HAS FAILED TO MEET AND CONFER IN GOOD FAITH WITH AFSCME/ KANSAS PUBLIC EMPLOYEE COUNCIL 64 AS REQUIRED BY K.S.A. 75-4327(b) THEREBY COMMITTING A PROHIBITED PRACTICE AS SET FORTH IN K.S.A. 75-4333(b)(5).

The background facts giving rise to this proceeding are as follows: On August 18, 1988, the Kansas Department of Corrections ("Employer") and the American Federation of State, County and Municipal Employees ("AFSCME") entered into a multi-year collective-bargaining agreement, effective until December 31, 1990. From approximately November 20, 1990 to February 19, 1992 the Employer and AFSCME meet for 18 meet and confer sessions; the last three of which were with a representative of the Federal Mediation and Conciliation Service. The sessions failed to produce a successor memorandum of agreement for the one that had expired on December 31, 1990. On April 13, 1992, AFSCME filed a prohibited practice complaint alleging the Department of Corrections had refused to meet and confer in good faith by refusing to offer proposals on wages, health insurance, final and binding arbitration of grievances, and the right to union representation during investigatory interviews relative to discipline. The prohibited practice complaint came on for formal hearing on September 21, 1992 and October 7 & 8, 1992.

Burden of Proof

[1] AFSCME is alleging the Employer has committed a prohibited practice as set forth in K.S.A. 75-4333(b)(5). Although Kansas Courts have not addressed the standard of proof necessary to establish a prohibited practice, the Kansas Public Employee Relations Board ("PERB") has adopted the federal standard under the National Labor Relations Act ("NLRA"), making it clear that the burden of proving a prohibited practice lies with the party alleging the violation. Kansas Association of Public Employee v. State of Kansas, Adjutant General's Office, Case no. 75-CAE-9-1990, at p. 9 (March 11, 1991)("Adjutant General"); Kansas Association of Public Employees v. State of Kansas, Department of Administration, 75-CAE-10/11-1990, at p. 15 (May 4, 1990)("Technical Unit")[5]. The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under PEERA, and it is incumbent upon the one alleging the violation to prove the charges by a fair preponderance of all evidence. Technical Unit, at p. 16; See Boeing Airplane Co. v. National Labor Relations Board, 140 F.2d 423, 433 (CA 10, 1944).

K.S.A. 75-4333(b)(5) provides that it is a prohibited practice for a public employer to willfully *"refuse to meet and confer in good faith with representatives of recognized organizations as*

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[5] See Footnote #4 above.

required in K.S.A. 75-4327." The statutory parameters of the duty to meet and confer under the Public Employer-Employee Relations Act ("PEERA") are found in K.S.A. 75-4327(b):

> *"Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognizing 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:

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

The Kansas Supreme Court has interpreted these statutes to mean:

> *"[T]he 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, to promote the improvement of public employer-employee relations."* Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983).

After the parties have met in good faith and bargained exhaustively over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, at p.29 (Feb. 10,

1992)("Savings Clause")[6]; City of Junction City, Kansas v. Junction City Police Officers Association, Case No. 75-CAEO-2-1992, p. 18 (July 31, 1992)("Junction City"); *See also* National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952).

"Good Faith" Obligation

[2] To meet and confer in good faith refers to a bilateral procedure whereby the public employer and the certified representative of the employee unit jointly attempt to establish terms and conditions of employment. The good faith requirement places on both parties the *"obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . ."* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (CA 9, 1943).[7] This implies both *"an open mind and a sincere desire to reach an agreement"* as well as *"a sincere effort . . . to reach a common ground."* Id.; *see also* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Herman Sausage

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[6] The Initial Order in Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, was filed February 10, 1992. A petition for judicial review of the final order of the Public Employee Relations Board was filed by the Respondent. The case is presently awaiting a decision from the Kansas Court of Appeals on the issue of timely filing of appeal. While the Savings Clause order may not be Board precedent due to the pending judicial review, it does contain what is believed an accurate statement of the law, and can provide guidance in deciding the issues presented in this case.

[7] Where there is no Kansas case law interpreting or applying a specific section of PEERA, 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 PEERA. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991; See also Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992) wherein the same conclusion has been reached under the Kansas Professional Negotiations Act.

Co., 43 LRRM 1090 (1958). The duty to meet and confer in good faith takes on more important dimensions in the public sector because employees of government are denied the right to strike. City of New Haven v. Conn. St. Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979).

The *"good faith"* concept established in K.S.A. 75-4327(b) imposes absolutely no requirement that the parties reach agreement. However, it does impose a duty to negotiate with a fair and open mind and with a sincere purpose to find a basis for agreement. The essential element is the intent to adjust differences and to reach an acceptable common ground, and the basic requirement of meeting and conferring in good faith is that the parties must negotiate with the view of trying to reach an agreement. Morris, The Developing Labor Law, Ch. 13, p. 559 (1989).

The objective the Kansas legislature hoped to achieve by the meet and confer process can be equated to that sought by the Congress in adopting the National Labor Relations Act ("NLRA") as described by the U.S. Supreme Court in H.K. Porter Co., 397 U.S. 99, 103 (1970) and cited with approval in Junction City, at p. 30, n. 3:

> *"The object of this Act [the 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."*

To meet and confer in good faith as contemplated by PEERA, therefore, is something more than the mere meeting of the public employer with the certified employee organization while maintaining an attitude of *"take it or leave it."* Specifically, good faith requires more than the proposal of a particular provision and absolute refusal to even consider modifications, Adjutant General, at p. 19; *See* General Elec. Co. & Int'l Union of Elec., Radio & Mach. Workers, N.L.R.B. 192 (1964). It presupposes a desire to reach ultimate agreement and thereby enter into a memorandum of agreement. As Justice Frankfurter explained the concept of *"good faith"* in his concurring opinion to NLRB v. Truitt Manf. Co., 351 U.S. 149, 154-55 (1956):

> *"These sections [Section 8(a), (b) & (d), 29 USC §151 (1985) of the National Labor Relations Act ("NLRA")]*[8] *obligate the parties to make an honest effort to come to terms; they are required to try to reach agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness."*

That the finder-of-fact must look beyond the fact that the employer met and entered into discussions with the employees' representative in determining whether the employer has satisfied

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[8] It should be noted that Section 8(d) of the NLRA and K.S.A. 75-4327(b) of the PEERA place upon an employer a similar duty to bargain with the certified representative about employee wages, hours and other mandatory terms and conditions of employment. The language of K.S.A. 75-4333(b)(1) & (5) is almost identical to the language of Section 8(a)(1) and (5) of the NLRA. Additionally, Section 8(b) prohibits similar activities by an employee organization that are prohibited by K.S.A. 75-4333(c).

his good faith obligation was succinctly stated in NLRB v. Big Three Industries, Inc., 497 F.2d 43, 46 (5th Cir. 1974):

> *"(M)erely meeting together or simply manifesting a willingness to talk does not discharge the federally imposed duty to bargain. (Citations omitted). . . .*
>
> * * * * *
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> *"Mechanically prodding through the forms of collective bargaining, therefore, does not suffice, for Congress has required the parties not simply to convene, but to meet and negotiate in a certain frame of mind -- to bargain in good faith. Negotiating parties are thus statutorily adjured to enter discussions with an 'open mind,' and a sincere purpose to find the basis of agreement . . . (citations omitted)."*

It is this type of *"give and take negotiations"* over terms and conditions of employment that the Kansas PERB has found to be required of the public employer under PEERA. *See* Local 1357, Service and Maintenance Unit vs. Emporia State University, 75-CAE-6-1979, p. 3 (Feb. 18, 1980)("Emporia State").

Final and Binding Arbitration

The 1988 Memorandum of Agreement contained a provision for advisory arbitration as part of the grievance procedure. Article IV, Section 9, Part 2 of the agreement states, in pertinent part:

> *". . . The arbitrator shall only have jurisdiction to determine compliance with provisions of this agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, or modify the provisions of this agreement. The decision of the arbitrator shall be advisory. . . ."* (Emphasis added).

AFSCME's proposal submitted January 3, 1991 included amendments of Article IV, Section 9 related to arbitration, to

change the term *"advisory"* to *"final and binding."* It was the position of AFSCME that final and binding arbitration of grievances was necessary, because past experience with the grievance procedure at Lansing up to the arbitration stage showed that even if their grievance was found to be meritorious, the Employer would not reverse its original action, leaving the employees with no recourse. Through final and binding arbitration, AFSCME was seeking a fair and final resolution of grievances by an impartial third party.

The Employer's January 23, 1991 response to AFSCME's binding arbitration proposal was *"No change"* thereby continuing the advisory arbitration procedure set forth in the 1988 Memorandum of Agreement. That stage of the procedure had not been utilized by AFSCME during the three year term of the 1988 agreement. The Employer's position from the beginning and throughout the negotiations was that there was no evidence the advisory arbitration procedure would not work, therefore the more reasoned approach would be to give that process a chance before categorically denouncing it unworkable and demanding change.

AFSCME asserts that the Employer has come to the table with an unyielding position, and without the necessary intent to reach a common ground. Accordingly, the refusal of the Employer to come forward with alternative proposals constitutes a failure to meet

and confer in good faith and a prohibited practice as set forth in K.S.A. 75-4333(b)(5).

[3] PEERA does not compel either party to agree to a proposal or make a concession. Throughout the negotiations process a party may decline to make concessions on positions reasonably taken. A public employer need not yield from a reasonable bargaining position if its position is based upon legitimate business interests, provided it maintains an open mind to the proposals advanced by the employee organization. *See* Vause, The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 562 (1990). If honest and sincere bargaining efforts fail to produce an understanding on terms of employment, nothing in PEERA makes illegal a public employer's refusal to accept the particular terms submitted to it. An employer's refusal to grant a particular demand or make a counter-proposal on an issue does not necessarily constitute bad-faith bargaining.

There is a difference between lawful *"hard bargaining"* and unlawful bad faith bargaining. Hard bargaining, manifested by the insistence upon one's own position without making a concession to the other party's proposal, is a legitimate bargaining technique. However, this approach should not be confused with unyielding positions and a closed mind, which is inapposite to good faith bargaining. Vause, The Good Faith Obligation in Public Sector

Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 561 (1990). Although one party to the negotiations may adhere to a position throughout the negotiations, that party must nevertheless submit the issue to negotiation and engage in full exchange of communication pertaining to its position. City of Phoenix v. Phoenix Employment Relations Bd., 699 P.2d 1323 (Ariz. 1985).

The issue of *"form of arbitration"* is unique in the field of labor relations in that there appears to be only two alternatives; *"advisory"* and *"final and binding."* As Mr. Caraway readily admitted, there is nothing in between. *"Only black and white, no grey."* Any change in position by one party would, as a natural consequence, require acceptance of the other position.

The record reveals the parties addressed the issue of *"advisory"* versus *"final and binding"* arbitration at a number of meet and confer sessions. Information regarding the position of each party was discussed, and at the request of AFSCME, the Employer provided, on October 3, 1991, information on the type of arbitration included in memorandums of agreement covering other units of state employees. There was no evidence that the Employer refused to discuss AFSCME's proposal or to provide requested information. The Employer's actions display the requisite open mind to the proposals advanced by the employee organization.

Additionally, the rationale advanced by the Employer for maintaining the advisory arbitration procedure in the 1988 Memorandum of Agreement was not shown to be unreasonable. Admittedly, the procedure had not been used nor was any evidence advanced to prove it would not work at Lansing. As Mr. Caraway conceded, since there was no history of advisory arbitration at Lansing, AFSCME's basis for wanting final and binding arbitration was *"speculative."* Also, while Mr. Reynolds testified that the experience of the AFSCME international union was that advisory arbitration did not work, he could not provide any evidence that it would not work at the Lansing Correctional Facility. The record shows that, although the parties could not agree between *"advisory"* and *"final and binding"* arbitration, they were able to reach agreement on other proposed changes to the grievance procedure.

AFSCME has failed to meet its burden of proving that the employer failed to meet and confer in good faith on the issue of final and binding arbitration. True, the Employer did not move from its first, and only, proposal. But it must be realized that there were no other proposals that could be advanced short of accepting AFSCME's proposal. If the Employer is guilty of refusing to meet and confer because it would not accept the AFSCME proposal, then AFSCME would be equally as guilty for refusing to move from its original position. While the Employer did insist upon its proposal throughout the negotiations, the evidence shows the

Employer's position is based upon legitimate business interests, the Employer maintained an open mind to the proposal advanced by AFSCME, and the Employer's actions were no different than that of AFSCME. The record is insufficient to support a finding that the Employer refused to meet and confer in good faith on the issue of final and binding arbitration.

Union Representation

The evidence relating to the issue of union representation during disciplinary investigatory interviews is both confusing and contradictory. There seems to be agreement that the 1988 Memorandum of Agreement does not provide for AFSCME representation during investigations of actions that could result in disciplinary action. A proposal requiring such representation was offered by AFSCME during negotiations for the 1988 agreement but ultimately dropped, and the resulting memorandum of agreement ratified without a provision for union representation during investigatory interviews. Presently, as a result of past practice of the parties rather than memorandum of agreement language, a unit employee is not entitled to union representation until such time as a decision on discipline has been made by the warden.[9] At that point the

[9] The Serious Incident Review Board is also part of the disciplinary process. An employee appearing before the Board is subject to questioning, and a recommendation of discipline can result. No union representation is allowed during those Board hearings.

employee is allowed to present evidence and argument which might mitigate against the proposed discipline. The employee is entitled to union representation during that presentation.

From here the picture becomes muddled. AFSCME maintains union representation at investigatory interviews was an important subject to its unit members, and therefore one of the subjects it proposed for inclusion in the successor memorandum of agreement. Believing the language in the 1988 Memorandum of Agreement required clarification to specifically address at what point in the disciplinary process an employee was entitled to union representation, AFSCME sought, as part of its January 3, 1991 proposal, inclusion of a new Article V on Discipline and Discharge. Pertinent to the dispute here is Section 3. Notification and Section 5. Notification and Measure of Disciplinary Action of that new article which provided:

> *"Section 3. Notification. For discipline other than oral the Employer shall notify the Union and then shall meet with the employee involved. Employees shall be informed of their rights to Union representation and shall be entitled to such, if so requested by the employee and the employee and Union representative shall be given the opportunity at the above meeting to rebut or clarify the reasons for such discipline."*
>
> *"Section 5. Notification and Measure of Disciplinary Action. In the event disciplinary action is taken against an employee, other than the issuance of an oral warning, the Employer shall promptly furnish the employee and the Union, in writing, a clear and concise statement of the disciplinary action and reasons therefore. Once the measure of discipline is determined and*

> *imposed, the Employer shall not increase it for the particular act of misconduct which arose from the same facts and circumstances. An employee shall be entitled to the presence of a Union representative at any phase of a disciplinary action."* (Ex. 2).

A careful reading of the above sections reveals little to support AFSCME's allegation that at this early stage in the negotiations it made its desires for union representation during investigatory interviews clear to the Employer. The issue of disciplinary investigatory interviews is not specifically addressed in the proposal, and the cited sections can reasonably be interpreted to indicate that the right to representation would not attach until after a decision to discipline has been made.[10]

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[10] Looking first to Section 3. Notification, the language specifically provides that the right to union representation does not attach until the meeting at which the employee is given the opportunity to "rebut or clarify the reasons for such discipline." Clearly, at this point a decision has been made to discipline the employee, which also would mean any investigatory interviews with the employee concerning the incident giving rise to the discipline would have been completed. Since there is no language in this section requiring notification to the union representative prior to such investigatory interviews being undertaken, it must be assumed that AFSCME did not intend to require notification, and therefore union attendance, until the prescribed disciplinary meeting.

Section 5. Notification and Measure of Disciplinary Action concludes with the sentence, "An employee shall be entitled to the presence of a union representative at any phase of a disciplinary action." However, there is not in this or any other section of the proposed new article on discipline, a definition of the phrase "phase of a disciplinary action," nor any language to indicate that investigatory interviews are to be considered a phase of that disciplinary action. AFSCME argues that this sentence was intended to include the investigatory phase. The Employer maintains it interpreted the proposal as only a request for union representation at meetings where discipline was administered or proposed. The intent of AFSCME is certainly not clear from the language of the last sentence. Consequently, to ascertain the intent of the drafter of a document it is necessary to look first to the section of the document in which the ambiguous language is included. If that does not bring the intent into focus, then the document will be viewed as a whole.

Again, Section 5 appears to address only actions which are required, "[i]n the event disciplinary action is taken against an employee." As stated above, at this point a decision has been made to discipline the employee, which also would mean any investigatory interviews with the employee concerning the incident giving rise to the discipline would have been completed. Viewing the new article as a whole, it would appear out of logical order to at this point in the proposal introduce union representation at the investigatory stage. The more reasonable interpretation from the language and the order of the sentences is that once disciplinary action is proposed or taken against an employee, the employee has the right to union representation at all successive phases. As such it could be viewed as a codification of an existing past practice which had not been specifically addressed in the 1988 Memorandum of Agreement. This apparently is the interpretation reached by the Employer.

Had AFSCME intended to propose requiring union representation at investigatory interviews in the January 3, 1991 document, it could have found a more logical location in the proposal to insert the language, e.g. Section 3. as noted above or a new section as was later submitted, or, at the least, used language less ambiguous and more succinct than that appearing in Section 5, e.g. the language of the February 19th proposal.

This is consistent with the interpretation of the Employer who viewed the January 3, 1991 AFSCME proposal as requiring union representation at meetings where discipline is administered or proposed. In its response given on January 23, 1991, the Employer proposed *"No change"* from existing language in the 1988 Memorandum of Agreement.

While there is conflicting testimony as to the number of times the parties discussed the disciplinary process, the need for union representation at investigatory interviews, and the impact of the Service Employees Union Local 513 v. City of Hays, Case No. 75-CAE-8-1990 (April 14, 1991)[11], it is clear that no new proposals were forthcoming from either party until February 5, 1992. By that time, AFSCME had assumed since no counterproposal had been forthcoming from the Employer, the Employer did not understand what was being proposed and therefore concluded further clarification must be required. This was an accurate assumption since, according to Ms. Rickerson, the Employer did not understand that AFSCME's January 3, 1991 proposal included a request for representation during the investigatory stage of disciplinary action.

The phrase *"investigatory process"* first appeared in AFSCME's proposal on February 5, 1992, and that amendment was AFSCME's first attempt at presenting a written proposal clarifying its desire for

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[11] See footnote #2, above.

investigatory interview representation. To that end, AFSCME offered the following amendment to Section 3 and 5 of its proposed new article on discipline (as noted by emphasis):

> *"Section 3. Notification. For discipline other than oral the Employer shall notify the Union and then shall meet with the employee involved. Employees shall be informed of their rights to Union representation and shall be entitled to such **[at] hearings, boards, interviews, meetings, etc., including investigative process**, if so requested by the employee and the employee and Union representative shall be given the opportunity as the above meeting to rebut or clarify the reasons for such discipline."*
>
> *"Section 5. Notification and Measure of Disciplinary Action. In the event disciplinary action is taken against an employee, other than the issuance of an oral warning, the Employer shall promptly furnish the employee and the Union, in writing, a clear and concise statement of the disciplinary action and reasons therefore. Once the measure of discipline is determined and imposed, the Employer shall not increase it for the particular act of misconduct which arose from the same facts and circumstances. An employee shall be entitled to the presence of a Union representatives at any phase of **an actual or pending** disciplinary action."* (Ex. 3, BB).

According to Mr. Reynolds, the new language was added to make the proposal more specific in hopes of obtaining some movement in the stalled negotiations. The Employer regarded AFSCME's February 5th proposal as an attempt to insert a new issue, investigatory representation, into the meet and confer process. That new proposal was the subject of discussions during the February 5 and 19, 1992 meetings, and as a result to those mediation sessions AFSCME had a clear understanding as to the Employer's objections to its proposed language on union representation, according to Mr.

Tadlock. Based on that understanding, Mr. Tadlock testified, AFSCME was adequately able to formulate a counterproposal. At 4:55 p.m. on February 19, 1992, just before the ended of the third mediation session, AFSCME submitted new proposed language to Article V on Discipline and Discharge removing the February 5, 1992 new language to Sections 3 and 5, and added the following new section:

> *"Employees have a right to union representation during any investigatory or disciplinary meeting where the employee may have reason to believe a disciplinary action may occur to the employee because of information being provided."*

The wording of this amendment came from the PERB order in Service Employees Union Local 513 v. City of Hays, Case No. 75-CAE-8-1990 (April 14, 1991).[12] The employer did not reject AFSCME's February 19th amendment on union representation at investigatory interviews, but there were no substantive discussions on it either because of the timing of the new proposal, coming at the end of the mediation session. The Employer did request time to consider the amendment, and AFSCME agreed.

AFSCME alleges that the Employer violated K.S.A. 75-4333(b)(5) by: a) refusing to come forward with any counterproposals on union representation, other than maintaining the language in the 1988 Memorandum of agreement, thereby failing to attempt to reach a

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[12] See footnote #2, above.

common ground; and b) refusing to recognize the statutory right to union representation during investigatory interviews, and to negotiate with AFSCME concerning inclusion of such right in the memorandum of agreement.

From January 3, 1991 to February 5, 1992, there clearly appears to have been a misunderstanding between the parties as to what exactly AFSCME was proposing by its new Article V on discipline. While discussions concerning representation took place during subsequent negotiation sessions, it was not until February 5, 1992 that AFSCME came forward with specific language making clear it was seeking to require union representation during disciplinary investigatory interviews. The February 5, 1992 AFSCME counterproposal certainly appears to broaden the right of representation proposed as part of the new Article V to include the investigatory process, and the mediation session on that date was the first time the parties truly negotiated the issue with the mutual understanding that it was an AFSCME proposal for inclusion in a successor memorandum of agreement. While the parties left that mediation session without an agreement on union representation, it is clear AFSCME came away from the discussions on February 5th and 19th with a clear understanding as to the Employer's objections to the proposed new language on union representation, and, based on that understanding, was adequately

able to formulate the counterproposal presented at the close of the February, 19, 1992 mediation session.

Given the relatively short time the parties actually entered into negotiations on the specific issue of union representation during disciplinary investigatory interviews, and the results of those discussions, it cannot be said that the Employer did not maintain an open mind to the proposals advanced by AFSCME or did not participate actively in the deliberations so as to indicate a present intention to find a basis for agreement as of the end of negotiations on February 19, 1992. In fact, the record is devoid of evidence of any negotiations concerning AFSCME's February 19th new language. It was the termination of negotiations resulting from the filing of the prohibited practice complaint, and not the Employer's actions at the table, that caused negotiations to cease on this issue.

AFSCME points to the Employer's alleged refusal to meet again after February 19, 1992 as evidence of an intent to frustrate any future opportunity to reach agreement. There is considerable evidence, most of it contradictory, as to whether after February 19, 1992 the Employer forestalled future mediation or negotiation sessions by stating its positions as of the end of that mediation session were its final offers on all unsettled issues. Evidence on this issue is solely the testimony of witnesses with a vested interest in the outcome, uncorroborated by other documentary or

impartial, third-party testimonial evidence. Consequently, the credibility of those witnesses becomes a crucial factor in weighing their testimony. *See* Hickory v. U.S., 115 U.S. 303 (19).

Credibility of a witness is generally a matter for determination by the hearing examiner. *See* Swezey v. State Department of Social and Rehabilitation Services, 1 Kan.App.2d 94, 98 (1977). As stated in NLRB v. Aluminum Products Co., 120 F.2d 567 (CA 7, 1941), and cited with approval in F.O.P. Lodge #4 v. City of Kansas City, Kansas, Case No. 75-CAE-4-1991, at p. 29 (November 15, 1991):

> *"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."*

From the demeanor of the witnesses, the directness and content of the responses to questions, experience of the finder of fact, as well as from the record as a whole, one finds the veracity of the Employers' and AFSCME's witnesses wanting. Given the other evidence in the record, to be forced to base a finding of a prohibited practice upon uncorroborated testimony and the questionable veracity of the witnesses on this issue would be unreasonable. AFSCME has the burden of proof, and where the testimony of neither party's witnesses is found to be more credible, that burden has not been met.

Both parties have expressed a desire to return to the table to attempt to resolve this issue through the negotiations process. Whether or not the Employer is found to have committed a prohibited practice by its actions relative to the issue of union representation during disciplinary investigatory interviews, further negotiations will be the ultimate result. The evidence in the record is insufficient to find the Employer refused to meet and confer in good faith on this issue. However, the Employer is put on notice through this order of what is expected of a party to meet its obligation to meet and confer in good faith. It is anticipated, having received this opportunity to return the table as it desired, the Employer will take full advantage of it to satisfy its *"good faith"* obligation. If nothing else, it is hoped that the parties have learned the importance, when one party believes the other has indicated an intent not to proceed with negotiations or mediation, of getting written confirmation rather than relying upon the verbal pronouncements of inividual members of the negotiating team.

It is unnecessary at this time to address at length AFSCME's argument that the Employer failed to meet and confer in good faith by refusing to recognize the statutory right to union representation during investigatory interviews, and to negotiate with AFSCME concerning inclusion of such right in the memorandum of agreement. Suffice it to say that while AFSCME is correct that

such is a mandatory subject of negotiations, the same reasoning applied above concerning the timing of the proposals is equally applicable here. In passing however, it should be noted that even if the parties are unable to reach agreement on this subject, the right to union representation during investigatory interviews having been found to be a statutory employee right under PEERA in the Hays decision, the Employer cannot by unilateral contract deprive the employees in the unit of that right, even though it may have been waived as part of the previous memorandum of agreement.

Wages and Health Insurance

Totality of Conduct

AFSCME next alleges the Employer failed to meet and confer in good faith on the issues of wage increases and contributions to the cost of health insurance by taking the position that wages and the cost of health insurance were set by third parties, i.e. the Governor, the legislature, the Department of Administration, or the Health Care Commission, and therefore out of the Employer's control. AFSCME proposed a 6.5 percent wage increase in each year of a three year contract with the Employer additionally assuming any increase in the cost of health insurance during the term of the memorandum of agreement. Based upon the position set forth above, AFSCME's argument continues, the Employer refused to provide a specific dollar or percentage increase counterproposal.

Ms. Rickerson testified the Employer's negotiating team never indicated it was without authority to negotiate wages or health insurance, or that AFSCME was ever referred to a third party for discussions concerning those subjects. Relying upon such factors as a lack of difficulty in recruiting new officers at the present pay level, low position turnover, and a wage scale competitive with surrounding states, the Employer did not believe AFSCME's proposed 6.5 percent wage increase was justified. In fact, according to Ms. Rickerson, no increase in the base salary was justified.

Instead of making a specific proposal of no increase in base salary, the Employer's November 14, 1992 proposal provided that the language in the 1988 Memorandum of Agreement continue. That language provided:

> *"XI. EMPLOYEE BENEFITS*
> *1. WAGES AND BENEFITS*
> *Section 1.*
> *The employee and the union agree that each employee in the appropriate unit shall be compensated in accordance with provisions of the State of Kansas Civil Service pay plan and benefit plans. The administration of the plans shall be in accordance with appropriate Kansas Civil Service Rules and Regulations and applicable statutes."*[13]

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13 K.S.A. 75-2938(4) states:
"After consolation with the director of the budget and the secretary of administration, the director of personnel services shall prepare a pay plan which shall contain a schedule of salary and wage ranges and steps, and from time to time changes therein. When such pay plan or any change therein is approved or modified and approved as modified by the governor, the same shall become effective on a date or dates specified by the governor and any such modification (or) change of date shall be in accordance with any enactments of the legislature applicable thereto."

The Employer's counterproposal did contain the following addition to that article:

> *"The employer agrees to survey salaries of like positions once each year and discuss findings with the union. The employer further agrees to make every effort to assure fair and equitable compensation for covered employees."*

As to AFSCME's health insurance cost proposal, the Employer's formal response came on February 19, 1992 indicating a willingness to submit a joint letter to the Health Care Commission expressing a concern over the increases in health insurance costs. According to the Employer this *"set forth a reasonable means of resolving this issue."* (Rep. Reply Brief, p. 6).

[4] When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the meet and confer process must be considered. *See* Duval County Sch. Bd. v. Florida Public Employee Relations Commission, 353 So.2d 1244 (Fla. 1978). *"Totality of conduct"* is the standard through which the *"quality"* of negotiations is tested. Technical Unit, at p. 24; See NLRB v. Virginia Elec. & Power Co., 314 U.S. 169 (1941). As Archibald Cox concluded in the Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1337, 1418 (1956), *"Although . . . state of mind may occasionally be revealed by declarations, ordinarily the proof must come by inference from external conduct."* All the relevant facts of a case are therefore studied in determining

whether the public employer or recognized employee organization is bargaining in good or bad faith. Adjutant General, at p. 11.

One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in negotiations, their frequency, progress toward agreement, and the persistence with which the employer offers opportunity for agreement. Technical Unit, at p. 25; See NLRB v. Sands Mfg. Co., 91 F.2d 721, 725 (1938). No single factor is controlling but the weight to be given any factor is within the discretion of the finder-of-fact. NLRB v. Truitt Mfg. Co., 351 US 149, 157 (J. Frankfurter, concurring, 1956)("Truitt").

State of mind is a question of fact, and PERB may infer motivation from either direct or circumstantial evidence. As Justice Frankfurter stated in his concurring opinion to NLRB v. Truitt Manf. Co., 351 U.S. 149, 154-55 (1956):

> *"A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind.*

A fact-finding body must have some power to decide which inferences to draw and which to reject. Radio Officers' Union v. NLRB, 347 U.S. 17, 50 (1953). In that case the court concluded:

> *"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.* Id. at p. 48.

According to Justice Frankfurter, "*The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes the finding of absence of good faith one for judgement of the Labor Board . . .* " NLRB v. Truitt Manf. Co., 351 U.S. 149, 154-55 (1956).

Applying the four factors set forth above to evaluate the sincerity with which this Employer undertook negotiations, one finds during the 18 months of negotiations the parties met for 80-100 hours, and reached tentative agreements on approximately 35 items; three-fourths of the issues were resolved during the meet and confer process, two others were resolved during the three mediation sessions; and approximately eight issues remained unresolved at the time the prohibited practice complaint was filed. Such evidence is consistent with an intent to come to the table with an open mind and willingness to find some common ground. The inquiry cannot stop there, for one must still look at the persistence with which the Employer offered opportunity for agreement on those unresolved subjects of wages and health insurance costs.

[5] Wages and insurance benefits are mandatory subjects of negotiations, K.S.A. 75-4322(t). A party's refusal to negotiate a mandatory subject of bargaining is a prohibited practice pursuant to K.S.A. 75-4333(b)(5) and (c)(5), even though the party has every desire to reach agreement upon an overall memorandum of agreement,

and earnestly and in all good faith bargains to that end. Junction City, at p. 19; Savings Clause, at p. 29; *See* 48 Am.Jur.2d, Labor and Labor Relations, §998 at 812. A prohibited practice can be found despite the absence of bad faith, and even where there is a possibility of substantive good faith. Junction City, at p. 19; *See* Morris, The Developing Labor Law, Ch. 13, at p. 564. As the Court concluded in NLRB v. Big Three Industries, Inc., 497 F.2d 43, 46 (5th Cir. 1974):

> *"(M)erely meeting together or simply manifesting a willingness to talk does not discharge the federally imposed duty to bargain. (Citations omitted). Indeed, to sit at a bargaining table . . . 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. (citations omitted).*

Realistically, everyone knows state employees will receive no greater wage increase than the legislature appropriates monies to fund, regardless of the amount of increase negotiated between the state agency and the employee organization. This realization is codified in K.S.A. 75-4330(c):

> *"Notwithstanding the other provisions of this section and the act of which this section is a part, when a memorandum of agreement applies to the state or to any state agency, the same shall not be effective as to any matter requiring passage of legislation or state finance council approval, until approved as provided in this subsection (c)."*

With this understanding, the legislature still included among the *"conditions of employment,"* over which the public employer is required to meet and confer pursuant to K.S.A. 75-4327(b), the term

"salaries and wages." It can only be concluded that the legislature still intended to require a state agency to meet and confer with the employee organization on the subject of *"salaries and wages,"* and to ratify, if possible, a memorandum of agreement covering what the parties mutually believe to be an appropriate increase in wages during its term. Only after that agreement is negotiated and ratified, does the State become involved. As K.S.A. 75-4330(c) provides:

> *"When executed, each memorandum of agreement shall be submitted to the state finance council. Any part or parts of a memorandum of agreement which relate to a matter which can be implemented by amendment of rules and regulations of the secretary of administration or by amending the pay plan and pay schedules of the state may be approved or rejected by the state finance council, and if approved, shall thereupon be implemented by it to become effective at such time or times as it specifies. Any part or parts of a memorandum of agreement which require passage of legislation for the implementation thereof shall be submitted to the legislature at its next regular session, and if approved by the legislature shall become effective on a date specified by the legislature."* (Emphasis added).

Clearly, the fact that there is uncertainty as to what wage increase will be legislatively funded, or whether the legislature, the governor, or the finance council will ultimately accept any wage increase agreed upon by the state agency and the employee organization, does not remove *"salaries and wages"* as mandatory subjects of negotiation, or relieve the public agency of its obligation to meet and confer in good faith with the employee

organization on those subjects. As PERB concluded in the Adjutant General case:

> *"The Employer incorrectly places the Governor's approval of a pay plan as the focal point of the meet and confer process with that decision then determining the Employer's obligation concerning negotiation of wages. To the contrary, the governor's approval of a pay plan is the last step in the negotiation process, not the first, and should have no effect on the meet and confer process until and unless the wage proposal contained in the memorandum of agreement submitted by the representative of the public agency and the recognized employee representative is rejected and returned for further negotiations pursuant to K.S.A. 75-4331."* Id. at p. 40.

The issue of failure to bargain in good faith based upon deference to decisions made by a third party was addressed by the PERB in the Adjutant General case. PERB in that case found the meet and confer posture of the employer wherein it proposed that *"Each employee shall receive a regular hourly wage as prescribed and approved by the Governor"* to be *"unacceptable,"* and would not, standing alone, meet the employer's statutory obligation to meet and confer in good faith. Id. at p. 40.

The offer of a proposal wherein an unspecified amount may be established at the discretion of a third party, or which even expresses a willingness to take the employee organization's proposal to that third party for consideration does not equate to

the *"give and take negotiations"* mandated by Emporia State.[14] Technical Unit, at p. 32. PEERA envisions a process whereby disputes as to terms and conditions of employment are resolved between the representatives of the public employer and the employee organization. For the Employer to attempt to transfer the decision making process to a third party before whom the employee representative may have no special standing other than that of any Kansas citizen or entity defeats the purpose and intent of PEERA as set forth in K.S.A. 75-4321(a)(1):

> *"The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees."*

As the U.S. Senate Committee report on the National Labor Relations Act concluded:

> *"It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement."* (S.Rep. 573, 74th Cong, 1st Session. (1935), p. 12).

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[14] The argument that a party has the opportunity to make its address its concerns to a third party as satisfaction of an obligation of the employer was made in Darling v. Kansas Water Office, 245 Kan. 45 (1989), and rejected by the court as "illogical." The court concluded that where there is a specific statutory protection or right created to protect public employees, being required instead to seek redress in the legislative or regulatory process is not a viable alternative. Appearing before a legislative or regulatory hearing is analogous to participating in the pure meet and confer process. The hearing provides the employee organization only the opportunity to present recommendations. There is no opportunity to "enter into good faith give and take negotiations over these subjects in an effort to reach agreement with a recognized employee organization" as required under period, Emporia State, nor an opportunity to submit the issues to impasse resolution procedures provided in PEERA. The legislative committee or public employer retains the final say over adoption. "Obviously, [such an alternative as allegedly proposed by the Employer] is not sufficient to meet its obligations or protect the employee rights established by PEERA. Savings Clause, at p. 43-44.

Not only is it a delusion, but to allow an employer to evade its obligation to meet and confer on mandatory subjects of negotiate because the ultimate decision on appropriations to fund the agreement is controlled by a third party, or because the subject is covered by statute and regulation is also inconsistent with an intent to adjust differences and to reach an acceptable common ground. And as should be apparent from the filing of the prohibited practice complaint in this case and in the Adjutant General and Technical Unit cases, such a negotiations posture certainly does not encourage the *"development of harmonious and cooperative relationships between government and its employees."*

Whether the Employer maintained such a negotiation position, as alleged by AFSCME, becomes the focus of the inquiry to determine if the Employer offered opportunity for agreement on the unresolved subjects of wages and health insurance costs. Again the evidence is reduced to the contradictory testimony of interested witnesses on both sides whose questionable credibility has already been commented on above. *"Who is to be believed?"* becomes the crucial question which must be answered.

On this subject, unlike the subject of union representation, an added element helps to clarify the muddled credibility issue thereby allowing it to become a factor in the finding of a prohibited practice rather than a basis for refusing to make such

a finding. In his concurring opinion in Radio Officers', Justice Frankfurter explained:

> *"One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to the 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 p. 48-49.

The proposal of the Employer and the alleged statements contributed to its negotiating team concerning referral to the governor, the legislature or other third party to obtain an increase in wages or benefits, is consistent with the position and statements of the public employer in the Adjutant General and Technical Unit cases; all three having an employer negotiating team headed by Gary Leitnaker as the Secretary of Administrations' designee pursuant to K.S.A. 75-4322(h), the same Secretary whose department is responsible for preparation of the pay plan.

The Employer would have one believe that while deference to a 3rd party may have been the position taken by the employer teams during past negotiations, such a proposal in this case was not intended to evade the Employer's obligation to negotiate wages and insurance benefits. In fact, the Employer's witnesses, categorically denied making any statements referring AFSCME to the governor, legislature, or third party to address its concerns relative to wage increases and insurance benefits.

It is within the province of the finder-of-fact to resolve conflicts and inconsistencies in testimony of different witnesses, and to determine what should be accepted as true and rejected as untrue. 30 Am.Jur.2d, Evidence, § 1082. Accordingly, in weighing the credibility of the Employer's witnesses against the witnesses for AFSCME on the issue of wages and health insurance costs, the witnesses for AFSCME must be found more credible. One cannot, given the plain language of the Employer's proposals, testimony of AFSCME's witness on this subject, experience from other similar prohibited practice cases, and the dictates of common sense, accept the Employer's position that it did not attempt to defer the setting of terms and conditions of employment, i.e. wages and insurance benefits, to decisions made by third parties. Consequently, the PERB's decision in the Adjutant General case is controlling of this issue.

Advancement of Proposals

[6] Were the positions assumed by the Employer on the issues of wages and insurance benefits indicative of a party with an open mind and a sincere desire to reach an agreement making a sincere effort to reach a common ground? The advancement of proposals, and the submission of counterproposals by a party are factors to be considered in determining overall good faith. *See* Hondo Drilling Co., 87 LRRM 1760 (1974), aff'd 525 F.2d 864 (CA 5, 1976); Midas International Corp, 58 LRRM 1108 (1964). While the failure to make

a counterproposal in response to a proposal does not constitute a *per se* failure to bargain in good faith, Vause, The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 557 (1990), depending on the circumstances, failure to offer a reasonable counterproposal could be an indicium of bad faith, Pasco County School Bd. v. Florida PERC, 353 So.2d 108, 124 (1977). The granting or withholding of concessions may be of vital importance in defending against charges of refusal to bargain in good faith. The historic language in NLRB v. Reed and Prince Mfg. Co., 205 F.2d 131, 134-35 (1951) bears this out:

> *"[W]hile the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union if §8(a)(5) is to read as imposing any substantial obligation at all."*

Thus, even though Section 8(a) of the NLRA does not require the making of a concession, courts and NLRB definitions of *"good faith"* suggest that willingness to compromise is an important, if not an essential, ingredient. For this reason, Professor Cox concluded *"that the conventional definition of good faith bargaining as a sincere effort to reach an agreement goes beyond the statute."* Cox, the Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1337, 1414 (1956). Such a reading of the *"good faith"* requirement appears equally applicable to PEERA. Labor relations acts are remedial enactments and as such should be liberally

construed in order to accomplish their objectives. *See* Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979). The Kansas Public Employer-Employee Relations Act was designed to accomplish the salutary purpose of promoting harmony between public employers and their employees by allowing meaningful employee participation in establishing their terms and conditions of employment.

The advancement of proposals by the Employer will be considered a factor in determining overall good faith. The fact that a proposal is *"predictably unacceptable"* will not justify an inference of bad faith unless it is so harsh or patently unreasonable as to frustrate agreement or forecloses future negotiations, NLRB v. Crockett-Bradley, Inc., 598 F.2d 971, 975-77 (CA 5, 1979). Moreover, the fact that a proposal merely embodies existing practices or advances less desirable working conditions, is not, in itself, supportive of a finding of bad faith. Such facts may nonetheless be a consideration in evaluating the totality of bargaining conduct.

Here the Employer's proposal on wages was little more than an offer to continue an existing practice that appeared in the 1988 Memorandum of Agreement. There is nothing unreasonable in the Employer making such an initial proposal since AFSCME has agreed to such language in the existing memorandum of agreement. The problem develops when, after the Employer's proposal was rejected and

AFSCME repeatedly indicated its intent only to negotiate a set percentage increase for inclusion in the successor memorandum of agreement, the Employer refused to come forth with any proposal containing a specific percentage figure.

It may be beneficial to compare the Employer's proposal, which called for the unit employees to be compensated in accordance with provisions of the State of Kansas Civil Service pay plan and benefit plans, with AFSCME's 6.5 percent pay increase and future health insurance cost increases to be borne by the Employer proposal. From the Employer's point of view, it can take the 6.5 percent figure and calculate what the fiscal impact will be for each year of the agreement. The Employer can use that figure to compare it with its own and AFSCME's salary surveys to determine whether there is support for such rate of increase. Again, using those salary schedules, the Employer can determine what effect the 6.5 percent increase will have on the state's competitiveness with surrounding states for correctional officers. The Employer, knowing the specific requested percentage increase, is in a position to make requests from AFSCME for additional information determined needed to evaluate the proposal. Finally, the Employer knows by accepting the 6.5 percent proposal exactly what it is committing itself to pay as a result of the agreement.

From AFSCME's point of view, the Employer's proposal provides nothing to assist it in continuing negotiations. AFSCME has no way

of knowing, from the language of the proposal, what, if any, salary increase is being offered. What information could AFSCME request from the Employer to determine if the Employer's offer is justified, and is the Employer really to party who would be in the position to provide such information? How can AFSCME use that proposal to determine if the wages proposed by the Employer will be competitive with other states according to the wage surveys? Without knowing what percentage of wage increase is believed justified by the Employer, how can AFSCME review its own proposal to determine what changes are required for the parties to reach agreement? Finally, if AFSCME were to accept the Employer's proposal how would AFSCME know, or be able to explain to the unit employees, what they can expect in the way of a negotiated wage increase during the term of the agreement?

Certainly, by the end of the February 19, 1992 mediation session the Employer should have known that its position on wages was predictably unacceptable to AFSCME, and additionally should have been aware that the consequence of continued adherence to such a proposal would most likely be no agreement. The problems with the Employer's position on wages, as set forth above, may be sufficient in and of themselves to justify a determination that by February 19th, it was so patently unreasonable as to frustrate any future agreement other than on the Employer's own terms. However,

additional evidence to support this conclusion can be found in the record.

Ms. Rickerson testified she believed she had the authority to negotiate an agreement containing a specific wage increase. Further, the Employer had made a determination that no increase in the base salary of unit employees was justified. Even though it had made that determination, no specific proposal for even a zero percent increase was forthcoming. Additionally, there is no question that Mr. Leitnaker was aware that the Employer could negotiate a wage figure without knowing what the Governor would ultimately recommend.[15] (*See* testimony in Technical Unit transcript p. 168), but even after the Governor announced her proposed 2.5 percent wage increase for all state employees, instead of coming forth with that percentage increase as a counter to AFSCME's 6.5 percent wage increase, the Employer continued to offer the nebulous *"whatever is in the pay plan"* proposal. In both instances, when the Employer was in a position to make a specific percentage wage increase proposal that would have satisfied AFSCME's request for a specific proposal and remedied the objections to the original Employer proposal noted above, thereby

[15] Additionally, Rhyne and Drummer in The Law of Municipal Labor Relations, 1979, at p. 89, cites Pasco Co. Sch. Bd. v. Fla. PERC, 353 So.2d 108 (Fla. 1977) for the proposition that a public employer cannot use financial uncertainty as an excuse for failing to make a wage proposal. In that case the Florida District Court of Appeals affirmed a Florida PERC finding that a school board had failed to bargain in good faith where the board refused to make any counter-offer to union wage proposals because of budget uncertainties.

offering at least the opportunity for agreement, the employer steadfastly adhered to its original proposal.

AFSCME also offered testimony that following issuance of the initial order in the Technical Unit case, its negotiating team sensed a change in attitude in the Employer's team toward negotiating a specific percentage wage increase. However, when that complaint was withdrawn and the initial order did not become the final order of PERB, the Employer returned to its former negotiating stance. Witnesses for the Employer denied any such change in attitude attributable to the Technical Unit actions. According to Ms. Rickerson, she had not even read that initial order.

The Employer's protestations are not persuasive. The inference apparently sought to be drawn from Ms. Rickerson's denial of having read the Technical Unit initial order is that the Employer's team was not familiar with its facts or decision. However, Mr. Leitnaker, a member of the Employer's negotiating team, was a prominent character in the Technical Unit case, received a copy of the initial order, and attended the PERB meetings where the case was discuss and ultimately withdrawn. It would be hard to believe that, given the importance of that case and its similarity to the case here, that it was not, at least, discussed with the Employer's negotiating team. Further, it was not unreasonable to expect an employer, who becomes aware that an

initial order has been issued finding a negotiating posture, similar to that it was taking in pending negotiations, to be a prohibited practice, to take steps to alter its posture in an attempt to circumvent a similar prohibited practice complaint being filed against it, especially where the Employer knows the employee organization is also aware of the initial order and had brought it to the Employer team's attention. Nor is it inconceivable, following the withdrawal of the complaint in the Technical Unit case, that the Employer would return to its original negotiating posture on wages.

A brief examination of AFSCME's proposal on health insurance costs reveals a specific request that the Employer assume all increases in premium costs during the term of the agreement. Nothing in the proposal indicates a concern for keeping the costs down, or in who sets the benefits or premiums. The proposal, simply stated, is regardless of the costs, the Employer, not the employees in the unit, will assume them. The Employer's counterproposal that a joint letter be drafted to the Health Care Commission expressing a concern about increases in health insurance costs was totally unresponsive to the proposal that the Employer assume any such increases.

As the NLRB concluded in Bethleham Shipbuilding Corp., 11 NLRB 105, 147 (1939):

> *"[The fact that the employer] offered no suggestion of changes acceptable to them convinces us that the*

> *respondent only sought to give the appearance of obedience to the Act without ever entering into genuine collective bargaining, looking toward the consummation of a collective agreement."*

Archibald Cox in an article for the Harvard Law Review, Good Faith Bargaining, 71 Harv.l.Rev. 1401, 1418-19 (1958), provides a summary of the *"totality of conduct"* test:

> *"In every case, the basic question is whether the employer acted like a man with a mind closed against agreement with the union. The Board can only judge his subjective state of mind only by asking whether a normal employer, willing to agree with a labor union, would have followed the same course of action."*

Viewing the totality of the Employer's conduct, the answer here must be *"No."* AFSCME has provided sufficient evidence to show that the Employer did not come to negotiations on the issues of wages and health benefits with an open mind and sincere desire to reach an agreement, nor made a sincere effort to reach a common ground. Conversely, the Employer produced no credible evidence of its persistence in offering opportunity for agreement on those subjects. Viewing the totality of the Employer's conduct relative to negotiations on wages and insurance benefits, it must be concluded that the Employer willfully refused to meet and confer in good faith with AFSCME, thereby committing a prohibited practice as set forth in K.S.A. 75-4333(b)(5).

Duty to Persuade

As in the Technical Unit case, the Employer here is asserting the failure of the employee organization to sufficiently justify

its wage proposal to convince the Employer's representative of the need to include it in the memorandum of agreement as a defense to its failure to come forward with counterproposals. Exception is not taken with the Employer's assertion that AFSCME should be required to justify its proposal. As stated in the Adjutant General order:

> *"Good faith negotiations necessarily require that proposals presented or claims made by either party should be honest. If such proposal or claim is important enough to present in the give and take negotiations required by the meet and confer process, it is important enough to require some sort of proof of its accuracy."* Truitt, 351 US at p. 151-52.

This requirement is based upon the principle that the parties need sufficient information to enable them to understand and intelligently discuss the issue raised during negotiations, and in the structuring of economic proposals.

Exception is taken here to the apparent inference that the duty to meet and confer in good faith places no obligation upon the Employer other than to receive proposals and information from AFSCME, review same, and then provide a response as to its acceptability. To accept the Employer's *"need to be persuaded"* approach would change the mutual obligation to make an honest effort to find a basis for agreement into a unilateral duty on the part of the employee organization. Such an approach reveals an interpretation of PEERA as a *"pure meet and confer"* statute, in

which the public employer sits in judgment on the proposals brought to it by the employees.

According to Professor Raymond Goetz in his law review article, The Kansas Public Employer-Employee Relations Law, 28 Kan.L.Rev. 243, at 1283, Emporia State establishes that under PEERA the public employer and the recognized employee organization meet and confer *"as equals for something more than an exchange of views followed by unilateral action . . ."* This interpretation of PEERA was affirmed by the PERB in the Adjutant General case, at p. 17-18. The *"need to be persuaded"* approach advocated by the Employer does not treat AFSCME as *"an equal"* at the negotiations table. Instead, it relegates the employee organization to function *"essentially as an information gatherer or supplicant."*

While the *"need to be persuaded"* approach may satisfy the requirement to *"meet and confer,"* it does not address the obligation to *"enter into discussions, with an affirmative willingness to resolve disputes"* required by Pittsburg State University v. The Kansas-National Education Association, 233 Kan. 801 (1983)("Pittsburg State"), and ignores the obligation *"to engage in good faith give and take negotiations"* set forth in Emporia State." Such an interpretation of the Kansas Professional Negotiations Act was rejected by the Kansas Supreme Court in National Education Ass'n v. Board of Ed., 212 Kan. 714 (1973), and

of PEERA in Pittsburg State, and must also be rejected here. *See* Technical Unit, at p. 22.

[7] The duty to persuade as to the reasonableness of one's position is borne by both parties, not just the representative of the employee organization. Technical Unit, at p. 22. As stated in Neon Sign, 95 LRRM 1161, 1162 (19):

> *"Nor are we convinced that the Administrative Law Judge correctly interprets the statute when he concludes that Respondent's inaction was justified since the Union had the initial burden of coming up with a counteroffer satisfactory to Respondent in order to entice them to move, and failed to do so. As we view Section 8(a)(5), it imposes the obligation to bargain in good faith on both parties equally. This obligation extends beyond a mere pro forma appearance at the bargaining table. At the minimum, the Act requires that the parties possess a good-faith intention to reach an agreement."The employer cannot sit back and take the position that since it has not been convinced that the employee organization's proposal is reasonable, no change is required.*

The employer cannot sit back and take the position that since it has not been convinced that the employee organization's proposal is reasonable, no change is required. As the court noted in NLRB v. Montgomery Ward, 133 F.2d 676, 687 (CA 1, 1943):

> *"While the Act places upon the employees the burden of instituting the bargaining proceedings and no burden in this respect upon the employer, it is not incumbent upon the employees continually to present new contracts until ultimately one meets the approval of the company."*

Since this is the third prohibited practice in as many years raising the issue of failure to provide proposals or counterproposal as indicia of bad faith, apparently direction from PERB is required to assist and to put the parties on notice of the

minimum action required to satisfy their obligation to meet and confer in good faith. To meet and confer in good faith demands a certain amount of exchange of relevant information to insure intelligent negotiation. N.L.R.B. v. Frontier Homes Corp., 371 F.2d 978 (8th Cir. 1967). As the U.S. Supreme Court observed in NLRB v. Insurance Agents' Int'l Union, 366 U.S. 477, 489 (1960):

> *"Discussions conducted under the standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."*

Where the employer is rejecting the proposal of the employee organization, it has the duty to come forward with justification sufficient to persuade the other that its position is the more reasonable, even when that position is simply maintenance of the status quo. The duty to provide an explanation as to the specifics of a proposal found objectionable and the basis for that objection, where no counterproposal is offered, is analogous to a party's duty to provide information.[16] The duty to negotiate in good faith

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[16] The duty to negotiate in good faith found in K.S.A. 72-5413(g) encompasses the duty to furnish information. Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992, p. 52 (Dec. 11, 1992); see also NLRB v. Western Wirebound Wirebox Co., 356 F.2d 88 (CA 9, 1966); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (CA 6, 1963). It demands instead a certain amount of exchange of relevant information to insure intelligent negotiation. N.L.R.B. v. Frontier Homes Corp., 371 F.2d 978 (8th Cir. 1967).

The professional negotiations process requires that the bargaining parties have adequate information about the immediate subjects at issue in negotiations, otherwise the process cannot function properly. This requirement is based upon the principle that the parties need sufficient information to enable them to understand and intelligently discuss the issue raised during negotiations. It is reasoned that such information may be essential in structuring economic proposals. Disclosure of relevant information encourages mutual respect between the negotiators, and promotes cooperation and open exchange. See Steelworkers v. Warrior & Gulf Navigation Co., 353 U.S. 574 (1960). As the U.S. Supreme Court observed in NLRB v. Insurance Agents' Int'l Union, 366 U.S. 477, 489 (1960):

> "Discussions conducted under the standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement

(continued...)

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[16](...continued)
through give and take."

A refusal to honor a legitimate request for information can foreclose further meaningful bargaining. Relying on Truitt and other decisions requiring disclosure of bargaining information, the court in General Electric Co., 418 F.2d 736, 750 (CA 2, 1969) concluded:

> "If the purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema."

Additionally, the employer's duty to furnish information is based upon the premise that without such information the employee representative would be unable to perform its duties properly as negotiating agent. See Aluminum Ore Co. v. NLRB, 131 F.2d 485 (CA 7, 1942). As the Fourth Circuit court noted, certified employee representatives cannot be expected to represent unit employees in an effective manner where they do not possess information which "is necessary to the proper discharge of the duties of the bargaining agent." NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, 1954). Thus an employer is required to furnish the representative of the employees relevant information needed to enable the latter effectively to negotiate for the employees, and a refusal to do so may constitute a refusal to negotiate in good faith. See NLRB v. Acme Industrial Co., 385 U.S. 432 (1966); International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (CA 3, 1967); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (CA 6, 1963); NLRB v. United Brass Works, Inc., 287 F.2d 689 (CA 4, 1961); NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (CA 2, 1968).

The failure to provide requested information has been found to constitute evidence of a refusal to bargain in good faith both on the part of the employer, N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956), and the employee organization, Detroit Newspaper Printing and Graphic Communications Local 13, 598 F.2d 267 (1979); See also Oakley, at 59; Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (CA 1, 1966); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965). The employer's refusal to supply information has been found to be as much a violation of the duty to bargain as if it had failed to meet and confer with the union in good faith. See Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965); Livingston Shipbuilding Co. v. NLRB, 102 LRRM 1127 (1979). In NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, 1954), the Fourth Circuit court concluded it was:

> "[W]ell settled that it is an unfair labor practice within the meaning of Section 8(a)(5) of the NLRA for an employer to refuse to furnish a bargaining union [such information as] is necessary to the proper discharge of the duties of the bargaining agent."

This duty to furnish the employee representative relevant information was given explicit approval by the Supreme Court in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

Once a good-faith demand is made for relevant information, the board of education must make a diligent effort to obtain or provide the information in a reasonably prompt manner. See Quaker Oats Co., 114 LRRM 1277 (1983). In general, a board of education must furnish information notwithstanding its availability from the professional employees themselves. See NLRB v. Twin City Lines, Inc., 425 F.2d 164 (CA 8, 1970). Even though a board of education has not expressly refused to furnish the information, its failure to make a diligent effort to obtain or to provide the information "reasonably promptly" may be equated with a flat refusal. Oakley, supra at p. 17; see NLRB v. John S. Swift Co., 44 LRRM 1388 (1959), (the court stated that the "company's inaction spoke louder than its words.").

Generally, a public employer's duty to supply the bargaining representative with information does not arise until the employee organization makes a request or a demand that the information be furnished. *See* NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (CA 1, 1954); Westinghouse Elec. Supply Co. v. NLRB, 196 F.2d 1012 (CA 3, 1969). A public employer is not guilty of an unfair labor practice by failing to furnish information to the certified employee representative unless the representative has demanded the information. See Curtis-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965).

[8] An exception to this general rule was adopted by the Secretary of Human Resources in interpreting the Kansas Professional Negotiations Act when confronted this same problem involving a party's response to a negotiation proposal. In Hays-NEA v. U.S.D. 489, Case No. 72-CAE-1-1993 (May 7, 1993), the Secretary held, as a matter of course, that if one party rejects the proposal offered by the other party without presenting a new counterproposal, the rejecting party has a duty to specifically explain all its objections to the proposal. The Secretary reasoned:

> *"Surely there can be no more valuable piece of information to a party during negotiations than an explanation of why the other party finds a proposal objectionable. By being fully advised of the extent and basis for each area of objection to the proposal, a party can intelligently review its proposal and formulate any modifications which could conceivably address the proffered objections and hopefully make the proposal*

> *acceptable. No formal request for such explanation following announcement of the rejection is required to impose this duty. The request for such information, should the proposal be rejected, is implicit in the proffering of the proposal. To hold otherwise would leave the party in the position of having to speculate as to what aspect of its proposal is objectionable and why. Such hinders the negotiation process. A party could conceivably be required to make a formal request for an explanation following a rejection, as the Board appears to advocate, but such adds nothing but an extra, time-consuming step in the negotiating process. The better policy is to require the detailed explanation to accompany the rejection. To require an explanation at the time of rejection should expedite and facilitate professional negotiations.*

Such an interpretation and rationale finds equal application under PEERA.[17]

ORDER

IT IS HEREBY ADJUDGED that the Department of Corrections has, for the reasons set forth above, committed a prohibited practice as set forth in K.S.A. 75-4333(b)(5) relative to the subjects of wages and health insurance costs.

IT IS THEREFORE ORDERED that the Department of Corrections shall cease and desist in those actions found to constitute a failure to meet and confer in good faith, and, pursuant to K.S.A. 75-4323(d)(1) the parties are to resume either independent negotiations or mediation, as the parties can agree, at the earliest available date.

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[17] It would appear to be equally helpful to the parties if in rejecting a parties proposal and offering a counterproposal the party were to provide a specific explanation of its objections to the original proposal which lead it to decide a counterproposal was necessary.

IT IS FURTHER ORDERED that the Employer shall post a copy of this order in a conspicuous place at all locations where members of the negotiating unit are employed.

Dated this 30th day of December, 1993.

Monty R. Bertelli, Presiding Officer
Executive Director
Public Employee Relations Board
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the 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. 77-531, 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 the 18th day of January, 1994 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

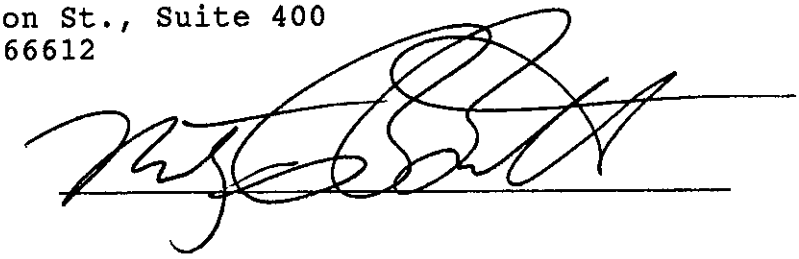
CERTIFICATE OF SERVICE

The undersigned employee of the Kansas Department of Human Resources, hereby certifies that on the 30th day of December, 1993, a true and correct copy of the above and foregoing Order was served upon each of he parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Petitioner: Donald R. Hoffman
Tilton & Hoffman
1324 SW Topeka Blvd.
Topeka, Kansas 66612-1817

Jessie Cornejo
AFSCME\Kansas Council 64
4125 S.W. Gage Ctr. Dr., Suite 200
Topeka, Kansas 66604

Respondent: Charles E. Simmons
Chief Legal Counsel
Department of Corrections
900 SW Jackson St., Suite 400
Topeka, KS 66612



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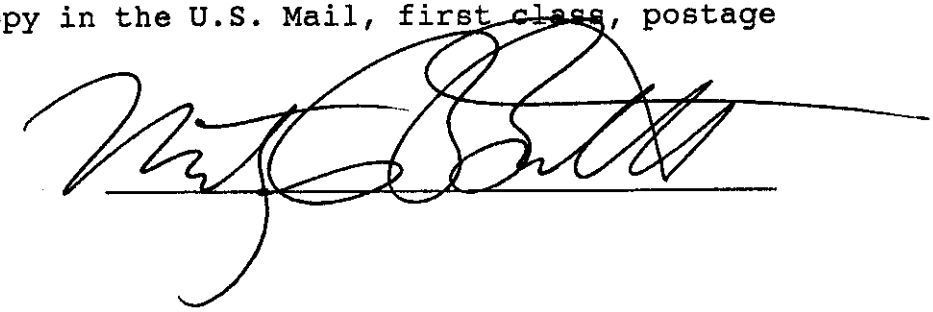
The undersigned employee of the Kansas Department of Human Resources, further hereby certifies that on the 4th day of January, 1994, a true and correct copy of the above and foregoing Order was served upon each of members of the PERB in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid.