

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Kansas State Troopers Association)
 Petitioner,)
)
 v.) Case No: 75-CAE-10-2002
)
Kansas Highway Patrol,)
 Respondent.)

**ORDER ON RESPONDENT'S AMENDED MOTION FOR A PROTECTIVE
ORDER AND MOTION FOR PARTIAL SUMMARY JUDGEMENT AND ON
PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

NOW on this 23rd day of September, 2002, the Respondent's Amended Motion for a Protective Order and Motion for Partial Summary Judgement and the Petitioner's Motion to Compel Production of Documents in the above-captioned matter come on for consideration before Douglas A. Hager, Presiding Officer and Designee of the Public Employee Relations Board, pursuant to K.S.A. 77-514(a) and K.S.A. 75-4323(e)(2).

On January 14, 2002, the Kansas State Troopers Association, (hereinafter "Petitioner" or "Employee Organization"), filed a prohibited practice complaint against the Kansas Highway Patrol, (hereinafter "Employer"), on a special form provided by the Public Employee Relations Board, (hereinafter "PERB"), for that purpose. The complaint alleged that the Employer had engaged in prohibited practices within the meaning of K.S.A. 75-4333(b)(1), (3), (5), (6), and (7). More specifically, the complaint alleged that the Employer had violated its statutory obligation to bargain in good faith with the Employee Organization over terms and conditions of employment by (1) refusing to negotiate following receipt of a fact finder's report, (2) attempting to unilaterally implement a contract without the statutory authority to do so, and (3) by bypassing the exclusive bargaining representative and attempting to individually bargain with members of the bargaining unit over terms and conditions of employment.

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The Employer filed its answer on February 1, 2002, generally denying the Petitioner's complaints. ". . . The public employer has not refused to meet and confer in good faith with the representatives of the recognized employee organization as required under K.S.A. 75-4327. . . ." Answer of Respondent Employer State of Kansas, Kansas Highway Patrol, February 1, 2002, p. 2.

The parties met with the presiding officer by telephone for a prehearing conference on March 13, 2002. After hearing a summary of Petitioner's complaints and the Employer's response, the presiding officer encouraged the parties to discuss the possibility of stipulating to the facts, and submitting the matter on stipulated facts with subsequent written legal arguments. The parties advised the presiding officer that they did not contemplate the filing of any dispositive motions. Deadlines were set for the completion of discovery, and for the submission of stipulations and written legal argument. Dates for a formal hearing were also reserved, in the event the parties were unable to stipulate to a complete factual record.

On April 12, 2002, Petitioner served upon Respondent a Request for Production of Documents. Respondent objected to the request for production and on May 10, 2002, Respondent filed its Motion for a Protective Order and Motion for Partial Summary Judgment.

On May 23, 2002, the presiding officer held a second conference call with the parties. In response to concerns expressed by Respondent that the Petitioner's complaint should be limited to the legal question whether failure to meet and confer following receipt of a fact-finder's report violated the statutory obligation to meet and confer in good faith, the presiding officer requested that the Employee Organization amend its Petition to provide a more detailed statement of the facts alleged to have comprised the complained-of prohibited practices.

Petitioner filed, as requested, an amended complaint against employer on May 28, 2002. In its amended form, Petitioner's complaint contends that the totality of the Employer's conduct throughout the history of the parties' then most-recent bargaining efforts evidences a failure to negotiate in good faith, by delaying negotiations, by failing to reschedule canceled negotiation sessions timely, by failing to submit proposals timely,

and "by generally engaging in 'surface bargaining'". See Attachment, Amended Complaint Against Employer, May 28, 2002.

Respondent filed an Amended Motion for a Protective Order and Motion for Partial Summary Judgment on May 28, 2002. Petitioner filed its Motion to Compel Production of Documents on May 31, 2002. Subsequently, on June 21, 2002, the Employer filed Respondent's Motion for a Protective Order and Motion for Partial Summary Judgment largely repeating arguments made in its Amended Motion for a Protective Order and Motion for Partial Summary Judgment. In addition, Respondent urges in its June 21 Motion that prohibited practices alleged in Petitioner's amended complaint based upon acts occurring prior to November 28, 2001 are barred by the six-month statute of limitations contained at K.S.A. 75-4334(a). Although its caption and the introductory paragraph of this Order may seem incomplete in that they fail to list each of the motions herein addressed, the purpose of this Order is to address and rule upon the legal issues raised by way of each of the aforementioned motions, specifically those of May 10, 2002, May 28, 2002, May 31, 2002 and June 21, 2002.

RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGEMENT

As noted by Respondent in its June 21, 2002 Motion for a Protective Order and Motion for Partial Summary Judgment, the standard in Kansas for addressing a motion for summary judgment is as follows:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case."

Jackson v. Thomas, 28 Kan. App. 2d 734, 735 (2001).

Respondent urges that because Petitioner's original complaint alleges that Respondent failed in its duty to meet and confer in good faith by refusing to meet and confer following receipt of a fact-finders report, the question whether this action constitutes a prohibited practice can be determined on stipulated facts, thus eliminating the need for discovery. "[B]ecause it has no duty to meet and confer before unilateral implementation following fact-finding . . . this matter is ripe for summary judgment." Respondent's Amended Motion for a Protective Order and Motion for Summary Judgment, May 28, 2002, p. 2.

Respondent's argument represents an oversimplification of Kansas law. Under Kansas law, where a party has been charged, as in the present case, with failure to meet and confer in good faith, the overall conduct of the parties throughout the course of the meet and confer process must be considered. *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, 75-CAE-9-1990, p. 11. While Respondent's failure to meet and confer following receipt of a fact-finder's report may well have been the final action which prompted Petitioner to file this complaint, in conducting a "failure to bargain in good faith" prohibited practice hearing, the presiding officer cannot sever and examine that single action in isolation from Respondent's other conduct throughout the course of the meet and confer process.

Although Respondent has evidenced its willingness to stipulate to facts surrounding its December 20, 2001 cancellation of a scheduled December 21, 2001 meeting with Petitioner to discuss the fact-finding report, the ultimate conclusion whether Respondent committed the prohibited practice with which it is charged, i.e., failure to meet and confer in good faith, will be based upon Respondent's overall conduct throughout the course of the meet and confer process which began on or about July 1, 2000.

As noted above, Respondent also urges that because Petitioner's original complaint alleged that Respondent failed in its duty to meet and confer in good faith by canceling a post fact-finding report meeting and did not contain a general allegation of bad faith throughout the meet and confer process, Petitioner's complaint must be dismissed because Petitioner's May 28, 2002 amended complaint was filed more than six months after the

parties' last meet and confer session. Respondent's Motion for a Protective Order and Motion for Partial Summary Judgement, June 21, 2002, p. 7.

Respondent's arguments misconstrue the statutory structure of the meet and confer process and the statutory requirement of good faith. The process for parties to fulfill the statute's obligation to meet and confer in good faith does not end when impasse is reached and mediation or fact-finding occurs. Mediation and fact-finding are component parts of the meet and confer process and are subject to its good faith obligation. *See* K.S.A. 75-4333(a)(7)(stating that deliberately and intentionally avoiding mediation and fact-finding shall constitute evidence of bad faith in meet and confer proceedings). Should parties conclude the meet and confer process by reaching agreement, that conclusion may occur at a point prior to reaching impasse, or at a point thereafter, e.g., following receipt of the fact-finder's report.

Had the parties in this matter successfully concluded a memorandum of agreement following receipt of the November 28, 2001 fact-finding report, then any suspicions of bad faith potentially harbored at that time by Petitioner would have been proven untrue, or at least moot. However, cancellation of the scheduled December 21, 2001 meeting and the subsequent unilateral implementation by the Employer of a memorandum of agreement may have confirmed suspicions held by the Petitioner, suspicions which Petitioner was reluctant to act upon prior to that time in the hope that an agreement might be reached in a meet and confer session following receipt of the fact-finder's report.

In its original complaint, Petitioner alleged that Respondent committed acts constituting failure to meet and confer in good faith. "Totality of conduct" is the standard by which Petitioner's complaint, "failure to meet and confer in good faith", must be tested.

Petitioner's complaint was timely as it was commenced within six months of acts within the totality of Respondent's conduct in the meet and confer process, a process which, as noted above, includes mediation and fact-finding. Respondent's various motions for partial summary judgement are denied.

RESPONDENT'S MOTIONS FOR A PROTECTIVE ORDER

Respondent's motions for protective order sought the stay of Petitioner's discovery requests pending the presiding officer's ruling on its motions for partial summary judgement. In view that Respondent's motions for partial summary judgement have been denied, Respondent's motions for a protective order are moot.

PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

In its Motion to Compel Production of Documents, Petitioner notes that in Respondent's response to its April 14, 2002 Request for Production of Documents Respondent objected to production of any of the requested documents on grounds of relevance and various privileges. [Petitioner's] Motion to Compel Production of Documents, May 31, 2002, p. 2. Respondent has indicated that its original relevancy objection to Petitioner's request for documents has been rendered moot by the filing of Petitioner's Amended Complaint. Respondent's Response to Plaintiff's Motion to Compel Production of Documents, June 21, 2002, p. 4. Consequently, this order will be limited to an analysis of Respondent's privilege claims.

Respondent asserts that Petitioner is entitled to only those documents sought that are not privileged. *Id.*, p. 5. Respondent also correctly notes that relevant information may be withheld if a privilege exists. *Id.* As a means of facilitating the presiding officer's evaluation of its claims of privilege, Respondent has created and provided the presiding officer with a "Privilege Log" listing each of the documents and its alleged privilege. *Id.*; Privilege Log of Respondent, June 21, 2002. Respondent contends that the Privilege Log provides a description of each document, "explain[s] why the document is privileged and set[s] for[th] reasons for preserving the privilege." Respondent's Response to Plaintiff's Motion to Compel Production of Documents, at 5. Each of the documents sought by Petitioner, urges Respondent, "falls into either attorney work-product privilege or the Governmental Deliberative Process Privilege." *Id.*

Respondent urges that all documents prepared at the direction of legal counsel for the parties' fact-finding hearing meet requirements for the attorney work-product privilege. *Id.* Further, "[a]ll documents not exchanged through the meet and confer, mediation and fact-finding processes that are in the possession of the Respondent fall squarely into the Government[al] Deliberative Process privilege." *Id.*, p. 6.

While Respondent correctly notes that privileges are designed to protect legitimate competing interests, Respondent's Privilege Log does not provide the information necessary to evaluate whether the interests it seeks to protect outweigh those sought to be advanced by Petitioner. A privilege index should include an explanation of the role played by each document in the agency's deliberative process and a demonstration of why disclosure would be harmful. *See* Russell L. Weaver and James T. R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 302 (1989). Respondent's Privilege Log includes neither. Further, Respondent's Privilege Log does not include an assertion of the privilege by agency head following personal consideration, required by many courts to properly invoke the privilege. *Id.*, pp. 306-312.

Petitioner suggests that these failings mean Respondent has waived the privilege. Petitioner's Reply to Respondent's Brief in Opposition to Motion to Compel Discovery, July 1, 2002, p. 18. The presiding officer would be inclined to agree were it not for the sheer volume of documents involved, and the lack of prior notice by this officer that a party claiming privilege should do so by providing the detailed explanations which would allow for a meaningful determination without resort to *in camera* inspection. However, given the number of documents at issue, the importance of the competing interests at stake and the time constraints of all those involved, rather than giving Respondent an opportunity to cure the defect by submission of an amended Privilege Log, it is the order of the presiding officer that the documents sought and identified by Respondent's Privilege Log be produced to the Office of Labor Relations for *in camera* review.

The parties are directed to contact this office within five business days of receipt of this order to arrange a mutually acceptable time for this review. The presiding officer further directs that Respondent and Petitioner each designate one representative to be present while *in camera* review is taking place, in the event that the presiding officer

needs additional information or argument regarding the applicability of privilege to specific documents. This process will be conducted in such a manner that the documents themselves will not be subject to examination by Petitioner, absent Respondent's consent and/or an order by the presiding officer.

IT IS SO ORDERED.

DATED, this 23rd day of September, 2002.



Douglas A. Hager, Presiding Officer
Labor Relations Section
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Topeka, KS 66612-1853


CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager for Labor Relations, Kansas Department of Human Resources, hereby certify that on the 23rd day of September, 2002, a true and correct copy of the above and foregoing Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

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