

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS**

PSU/KNEA

Petitioner

v.

Kansas Board of Regents/  
Pittsburgh State University

Respondents

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Case No. 75-CAE-23-1998

**INITIAL ORDER ON REMAND**

NOW ON this 9th day of February, 2007, the above-captioned matter comes on for determination before Presiding Officer Douglas A. Hager, pursuant to an Order to remand issued by the Shawnee County District Court. The district court remanded the matter to the Public Employee Relations Board ("PERB") in accordance with an order by the Kansas Supreme Court. Specifically, the Court ordered the matter remanded to PERB "for additional findings regarding whether ownership of intellectual property is a condition of employment and whether the exception of K.S.A. 75-4330(a)(3)(public employer rights as defined by K.S.A. 75-4326) applies." See *Pittsburgh State Univ. Chap. of KNEA vs. Kansas Bd. of Regents*, 280 Kan. 408, 429 (2005)(hereinafter *PSU v. KBR*).

Following receipt of the record from the Courts and having received written legal briefs from the parties, culminating in Petitioner's November 9, 2006 Reply Brief, the presiding officer considers this matter to be fully submitted and issues this determination.

### ISSUE PRESENTED FOR DETERMINATION

The issue for resolution is whether, under the facts and circumstances of this matter, Respondent committed a prohibited practice under Kansas law by willfully refusing to meet and confer in good faith with Petitioner with regard to the topic of intellectual property. To resolve this question, PERB must address additional issues, including those raised by the Kansas Supreme Court in the above-referenced decision.

### FINDINGS OF FACT

The Presiding Officer adopts the following findings of fact as set forth in the December 21, 1999 Initial Order of PERB:

1. The Kansas Board of Regents ("KBR") is a constitutional agency of the state of Kansas with authority to supervise and control state institutions of higher education.
2. Pittsburgh State University ("PSU") is a member institution of the KBR.
3. KBR/PSU is the employer of college professors at PSU. (Transcript, p. 196).
4. Professors at PSU have three major responsibilities: teaching, scholarship and creative endeavor and service. (Transcript, p. 199).
5. PSU provides its professors with office space, equipment, research facilities, supplies and secretarial help. (Tr., pp. 7, 18, 20, 100).
6. Among other responsibilities, PSU professors conduct research, write and publish scholarly articles, create songs, artwork and other intellectual property. (Tr., pp. 39, 196-7).
7. Professors who publish scholarly works receive better performance evaluations and a higher level of compensation from the employer. (Tr., pp. 39-40).

8. Professors' promotions are based on production of books and articles and on presentation of information at conferences. (Tr., pp. 95-96).

In considering this matter on remand, the Presiding Officer adopts additional findings of fact, set forth below:

1. In 1997, KBR proposed an intellectual property policy to the Council of Academic Officers. This policy would have dictated that ownership and control of the property "shall be retained and managed by the Institution on behalf of the" KBR.

2. Petitioner, Pittsburg State University Chapter of the Kansas National Education Association ("KNEA"), rejected the proposed policy. Further, KNEA expressed its desire to *meet and confer* about the issue of intellectual property on the basis that it was a mandatorily negotiable item and a condition of employment.

3. The KBR's General Counsel, Joseph A. Barron, Jr., wrote a letter to the President of Pittsburgh State University where he advised that

"the formulation of the intellectual property policy is not a condition of employment subject to the meet and confer process. The determination of the ownership of intellectual property has been preempted by Federal and State law. Additionally, the establishment of policy is a management prerogative and any attempt to negotiate policy will unduly interfere with the rights of management."

4. In March 1998, KNEA filed a prohibited practice complaint with PERB. The complaint alleged that "complainant's employer has failed and refused to collectively bargain and negotiate the topic of "intellectual property." KBR countered that the complaint was baseless because it had not refused to *discuss* the topic.

5. During its November 19, 1998 meeting, the KBR formally adopted an intellectual property policy. This was done without meeting and conferring with the KNEA.

Furthermore, the KBR stated it would *discuss* implementation of the policy “as a permissive subject outside the scope of ‘conditions of employment’ as that term is defined by law”, but would not *meet and confer* regarding the policy.

6. KNEA amended its complaint with PERB to allege that the KBR’s November, 1998 unilateral adoption of an intellectual property policy was also a prohibited practice.

7. “Performance Appraisal Guidelines and Procedures”, outlined in a Memoranda of Agreement between PSU/KNEA and KBOR/PSU, dictate that 20% to 40% of a PSU/KNEA member’s salary increase is based on “scholarly activity.” Scholarly activity consists of research, scholarship, and creative endeavor. Additional “Components Used to Determine Merit Increases”, include teaching (70%) and community service (10%).

### CONCLUSIONS OF LAW/DISCUSSION

In the prior Initial Order in this “scope of negotiations”<sup>1</sup> determination, this presiding officer outlined the legal framework for determining whether intellectual property is a condition of employment, and thus subject to the meet and confer provisions of PEERA.<sup>2</sup> However, the ultimate determination whether the subject of intellectual property was mandatorily negotiable was not reached. Concluding that the topic of intellectual property was pre-empted from mandatory negotiability by operation of state and federal law, the Initial Order didn’t address subsidiary elements for determining

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<sup>1</sup> In labor relations, “scope of negotiations” denotes a dispute over whether a proposed bargaining subject is mandatorily negotiable. The PERB and Kansas Courts apply the *Borg-Warner* doctrine, *see N.L.R.B. v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 42 LRRM 2034, *remanded*, 260 F.2d 785, 43 LRRM 2116 (6th Ct.App., 1958), which divides bargaining subjects into three categories: mandatory, permissive and illegal. *See State Department of Administration v. Public Employees Relations Bd.*, 257 Kan. 275 (1995).

<sup>2</sup> In the context of this matter, the Kansas Board of Regents “is required to meet and confer with [the] recognized employee organization[] only if ownership of intellectual property is a condition of employment”. *PSU/KNEA v. KBR*, 280 Kan. at 412-413.

whether a topic is mandatorily negotiable under PEERA. Kansas' Supreme Court reversed regarding the issue of state and federal pre-emption, and remanded, directing the Board to address the remaining factors for making the ultimate determination regarding mandatory negotiability:

“(1) whether the subject of intellectual property rights is a condition of employment and, therefore, mandatorily negotiable under PEERA and (2) whether the subject of ownership of intellectual property falls within the management prerogative exception of K.S.A. 75-4330(a)(3) and, therefore, is not mandatorily negotiable under PEERA.”

See *PSU/KNEA v. KBR*, 280 Kan. at 409-410.

#### DETERMINATION OF NEGOTIABILITY

The state is different from a private employer due to its unique responsibility to make and implement public policy. Accordingly, the scope of negotiations in the public sector is more limited than in the private sector. The role of the Board in a scope of negotiations case is to determine, in light of the competing interests of the state and its public employees, whether an issue is appropriately decided by the political process or by collective negotiations. In *IFPTE Local 195*, the New Jersey Supreme Court opined that:

*"Matters of public policy are properly decided, not by negotiations and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration. We have stated that the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiations. Our democratic system demands that governmental bodies retain their accountability to the citizens."* 443 A.2d at 191.

K.S.A. 75-4333(b)(5) of PEERA prohibits an employer from willfully refusing to meet and confer with the exclusive representative of employees in a bargaining unit over

mandatory subjects of negotiations, that is, over “conditions of employment.” PEERA defines “conditions of employment” as:

“Salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state.”

K.S.A. 75-4322(t). In interpreting this statute, both PERB and Kansas courts have consistently ruled that the list contained at K.S.A. 75-4322(t) is not an exclusive list of the issues subject to mandatory negotiability. The Kansas Supreme Court, in an earlier dispute between these parties, held that:

“Viewing the entire Act, with its broad statement of purpose, we conclude that the legislature did not intend that the laundry list of conditions of employment as set forth in K.S.A. 75-4322(t) be viewed narrowly with the object of limiting and restricting the subjects for discussion between employer and employee. To the contrary, the legislature targets all subjects *relating to* conditions of employment.”

*Kansas Board of Regents and Pittsburg State University v. Pittsburgh State Univ. Chap. of K-NEA*, 233 Kan. at 818-819 (1983)(emphasis in original).

In determining whether a subject not expressly set forth in the “laundry list” of conditions set out at K.S.A. 75-4322(t) is mandatorily negotiability, PERB has developed a balancing test. In its original Initial Order, PERB spoke of the dilemma that necessitates use of the balancing test in question. This dilemma derives from the fact that although K.S.A. 75-43237(b) grants public employees the right to meet and confer with respect to conditions of employment, K.S.A. 75-4326<sup>3</sup> stipulates that the right does not extend to matters of

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<sup>3</sup>K.S.A. 75-4326. **Existing rights of public employer not affected.** “Nothing in this act is intended to circumscribe or modify the existing right of a public employer to”

(a) Direct the work of its employees;

inherent managerial prerogative or policy.<sup>4</sup>

The central issue to be resolved by PERB in a scope of negotiations determination is whether a topic proposed by a party to be subject to meeting and conferring is mandatorily negotiable. To determine mandatory negotiability, the Board must balance the competing interests of employer and employees by considering the extent to which the meet and confer process will impair the determination of governmental policy. For many years, PERB has used a three-prong test to provide a meaningful standard for determining claims of mandatory negotiability. *See, e.g., Kansas Association of Public Employees v. State of Kansas, Adjutant General*, Case No. 75-CAE-9-1990 (March 11, 1991); *Service Employees Union Local 513 v. City of Hutchinson, Kansas*, Case No. 75-CAE-21-1993 (Jan. 28, 1994); *International Association of Fire Fighters, Local 3309 v. City of Junction City, Kansas*, Case No. 75-CAE-4-1994 (July 29, 1994). This same three-prong test is used by the Department of Labor's Office of Labor Relations for determining mandatory negotiability of topics under the Kansas Professional Negotiations Act, (PNA), K.S.A. 72-5413 *et seq.* *See Brewster-NEA v. U.S.D. 314*, Case No. 72-CAE-2-1991 (Jan. 29, 1991).

Under both the PEERA and the PNA, these three criteria are used in balancing the relative interests of employers and employees:

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- (b) Hire, promote, demote, transfer, assign or retain employees in positions within the public agency;
  - (c) Suspend or discharge employees for proper cause;
  - (d) Maintain the efficiency of governmental operation;
  - (e) Relieve employees from duties because of lack of work or for other legitimate reasons;
  - (f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and
  - (g) Determine the methods, means and personnel by which operations are to be carried out."

<sup>4</sup> A term commonly used in the labor relations field, "inherent managerial prerogatives" encompasses those subjects the control of which is reserved by law to the public employer. *See* K.S.A. 75-4326.

- (1) A subject is mandatorily negotiable only if it intimately and directly affects the work and welfare of public employees.
- (2) A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
- (3) A subject that affects the work and welfare of public employees is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.

In applying the balancing test, it is necessary to distinguish between subjects which, while central to the employer's interest in preserving its legitimate managerial prerogatives, affect employees only minimally, and those which, though not essential to an employer's freedom to conduct its enterprise, do significantly impact the employees. Moreover, when there is a conflict between an employer's freedom to manage in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck which will take into account the relative importance of the proposed actions to the two parties. *Service Employees Union, Local 513 v. City of Hutchinson, Kansas*, Case No. 75-CAE-21-1993 (Jan. 28, 1994). *See also Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550 (DCCC 1980).

The first question to address is whether a proposed topic *intimately and directly* affects the work and welfare of public employees. Examples of such topics are employee input into salary generation portions of a budget preparation process, salary allocation among unit members, the criteria, procedures and methods for screening candidates for summer employment, out-of-state travel, the criteria, procedures and methods for identifying candidates for promotion, tenure and retrenchment procedures and employee

access to personnel files.<sup>5</sup> A subject which does not satisfy this part of the test is not mandatorily negotiable.

Second, an item is not mandatorily negotiable if it has been preempted by state or federal law which sets or controls a particular term or condition of employment. This requirement needs no further discussion here.

Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which a negotiated agreement would not *significantly* interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. As noted previously, this prong of the test rests on the assumption that most decisions of the public employer affect the work and welfare of public employees to some extent, and that negotiation will always impinge to some extent on the determination of public policy. The two conflicting interests cannot be reconciled by focusing solely upon the impact or effect of managerial decisions but instead the nature of the terms and conditions of employment must be considered in relation to the extent of their interference with management rights as set forth in K.S.A. 75-4326.

The requirement that the interference be "*significant*" is designed to effect a balance between the interest of public employees and the requirements of democratic decision making. A weighing or balancing must be made. Where the employer's management prerogative is dominant, there is no obligation to negotiate even though the subject may ultimately affect or impact upon public employee conditions of employment.

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<sup>5</sup> These mandatorily negotiable topics for meet and confer, as the reader no doubt already recognizes, were discussed at length in *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 822-826 (1983).

The basic inquiry therefore, must be whether the dominant concern involves an employer's managerial prerogative or the work and welfare of the public employee. The dominant concern must prevail. Since the line which divides these competing positions are often indistinct, it must be drawn on a case by case basis.

### **APPLICATION OF BALANCING TEST**

#### **1) Does the Subject Intimately and Directly Affect the Work and Welfare of Employees?**

In its previous decision in this matter, PERB's Initial Order stated that "this determination will proceed on the assumption that the subject of intellectual property rights intimately and directly affects the work and welfare of the public employees at issue here." On remand, PERB will not proceed on assumption, and instead makes the affirmative determination that the topic of intellectual property "intimately and directly affects the work and welfare of" the public employees in question.

This determination is reached only after completing an extensive review of the factual record. The findings of fact clearly illustrate that a professor's production of intellectual property has a direct and significant impact on the salary he or she earns. In an attempt to rebut this contention, Respondent relies in part on a combined mathematical/dictionary-based argument that attempts to demonstrate that even if intellectual property is related to salary, it is not "significantly" related. Though Respondent asserts its argument ardently, it is without merit. Respondent's own assertions are revealing:

“[t]he implementation of the Intellectual Property Policy would have resulted in the possibility of the Petitioners being paid twice for the creation of intellectual property. The first *by the increase in salary and wages which results from the creation of intellectual property by the Petitioners as directed by the Respondents.*” (emphasis added.)

The creation of intellectual property intimately and directly affects the work and welfare of unit members. For further examination of this issue the Presiding Officer would refer the parties to the previous decision issued by the Shawnee County District Court. The Kansas Supreme Court remanded the matter back to PERB in part because the District Court overreached in making this same determination. Nonetheless, the Supreme Court’s ruling does not negate the sound reasoning espoused by Judge Andrews in regard to the issue of intellectual property meeting the first of the three criteria, that is, that the subject of intellectual property rights intimately and directly affects the work and welfare of public employees. A restatement in this Order, beyond an express concurrence with that portion of the District Court’s legal analysis, would be duplicative and unnecessary.

## **2) Is the Subject Pre-empted by State or Federal Law?**

Determining that intellectual property “intimately and directly affects the work and welfare of public employees” is only the first of three criteria examined by PERB in applying the previously-referenced balancing test. The second criterion is an analysis of whether the subject in question is pre-empted by statute or constitution. A determination that the subject of intellectual property was pre-empted by both state and federal law was the basis for the original Initial Order issued in this matter. However, the ultimate determination by the Kansas Supreme Court that the subject is not pre-empted has rendered any further discussion of this issue moot. Therefore, the final determination on

whether the subject of intellectual property is mandatorily negotiable under the PEERA, will proceed to an examination of whether a negotiated agreement would “significantly interfere with the exercise of inherent managerial prerogatives.”

**3) Would a Negotiated Agreement Significantly Interfere with The Exercise of Inherent Managerial Prerogatives?**

This issue was not addressed by PERB in its Initial Order due to its original finding of pre-emption. However, the question is also this matter’s most easily-resolved issue. An examination of K.S.A. 75-4326 fails to reveal any “inherent managerial prerogative” that would suffer significant interference by negotiating in regard to intellectual property rights. Respondent argues that to require KBR/PSU to meet and confer on the subject of intellectual property would interfere with its right to “direct the work of its employees.” At issue in this case, however, is not Respondent’s right to direct the work of its employees. What is at issue are the rights of Petitioner’s members at Pittsburg State University regarding intellectual property after it has been created. Meeting and conferring with Petitioner over its members’ intellectual property rights would not significantly interfere with any managerial prerogatives. K.S.A. 75-4326 does not preclude the subject of intellectual property from PEERA’s meet and confer process.

**DID RESPONDENT WILLFULLY REFUSE TO MEET AND CONFER WITH PETITIONER REGARDING INTELLECTUAL PROPERTY RIGHTS?**

Recall that PEERA mandates that “where an employee organization has been certified by the Board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the

appropriate employer *shall* meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act”. K.S.A. 75-4327 (emphasis added). To make “some provision for [the] enforcement” of the aforesaid rights, Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980), the Kansas PEERA provides that it is a “prohibited practice for a public employer or its designated representative *willfully* to:

(1) Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;

....

(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required under K.S.A. 75-4327;

(6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328. . . .”

K.S.A. 75-4333(b)(emphasis added).

The Kansas Supreme Court has not addressed whether PERB, in a scope of negotiations determination, must expressly find that a prohibited practice was willfully committed. *See State Dept. of Administration v. Public Employees Relations Bd.*, 257 Kan. 275, 293 (1995). Both the adjective “willful” and the adverb “willfully” are derivations of the root word “will”. “Will” is defined to mean “the mental faculty by which one deliberately chooses or decides upon a course of action; volition”. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Edition 1976), p. 1465. The same source defines “willful” to mean “[s]aid or done in accordance with one’s will; deliberate”

and provides a second meaning, “inclined to impose one’s will; unreasoningly obstinate”.

*Id.*, p. 1466. BLACK’S LAW DICTIONARY defines the term “willful” as follows:

“Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

An act or omission is ‘willfully’ done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context.

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In civil actions, the word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act.”

BLACK'S LAW DICTIONARY (Abridged 6th Ed. 1991, p. 1103).

Under the Kansas Wage Payment Act, K.S.A. 44-313 *et seq.*, use of the term “willfully” denotes an element or condition which, if present, mandates imposition by this agency of a statutory penalty for failure to pay wages. *See* K.S.A. 33-315(b). Under the Kansas Wage Payment Act (“KWPA”), K.S.A. 44-313 *et seq.*, an employer is required to pay an employee earned wages when due, that is on regular paydays designated in advance and “at least once during each calendar month”. K.S.A. 44-314(a). Upon separation from employment, an employer must pay an employee’s earned wages “not later than the next regular payday upon which he or she would have been paid if still employed.” K.S.A. 44-

315(a). In recognition of the important public policy of ensuring that Kansas workers receive compensation due them, the Kansas Legislature enacted the penalty provision to deter employers from failing to pay wages when due. This provision for a statutory penalty mandates that where an employer “willfully” fails to pay earned wages when due, the employer “shall” be liable for payment of damages pursuant to a statutory formula that effectively equates the penalty to the amount<sup>6</sup> of the unpaid wages.

In *A. O. Smith Corporation v. Kansas Department of Human Resources and Greg A. Allen, et al.*, 144 P.3d 760, Ks.Ct.App., (2005)(hereinafter *A. O. Smith*), the Kansas Court of Appeals reaffirmed long-standing Kansas judicial decisions holding that the term “willful act”, in the context of the Kansas Wage Payment Act, K.S.A. 413 *et seq.*, means an act “indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another.” Under the KWPA, Kansas courts have consistently construed the term “willfully” to require a significant element of blameworthiness, proof of a wrongful state of mind or of intent to injure, before the mandatory and substantial monetary penalty will be imposed. See *A. O. Smith, supra*; *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406 (1978); *Weinzirl v. The Wells Group, Inc.*, 234 Kan. 1016 (1984).

An identical formulation of willfulness is used when imposing penalties under other Kansas laws. See, e.g., *Dold v. Sherow*, 220 Kan. 350, 354-355 (1976)(in action to recover damages for breach of express and implied warranties arising out of sale of cattle, if Plaintiff

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<sup>6</sup> K.S.A. 44-315(b) provides that this statutory penalty shall be assessed “in the fixed amount of 1% of the unpaid wages” per day, except Sundays and legal holidays, after expiration of an eight-day grace period “or in an amount equal to 100% of the unpaid wages, whichever is less.” This presiding officer is readily familiar with requirements of the KWPA, having heard and decided numerous appeals thereunder and having supervised the staff of the Labor Department’s wage payment unit in years past. It is not uncommon that in a disputed administrative claim for wages if the evidence demonstrates that an employer’s failure to pay earned wages when due was willful, the mandatory statutory imposition of penalty will be in an amount equal to the wages found due and owing.

was entitled to recover actual damages and act of defendant was willful, that is, defendant's act was "one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another", Plaintiff can be awarded punitive damages to punish defendant and to deter others from like conduct); *Anderson v. White*, 210 Kan. 18, 19 (1972)(plaintiff in personal injury case was entitled to recover monetary damages only upon a showing that injury was result of willful or wanton misconduct by defendant, willful conduct defined to be "action indicating a design, purpose or intent on the part of a person to do wrong or to cause an injury to another."); *Burdick v. Southwestern Bell Telephone Co.*, 9 K.A.2d 182 (1984)(general exchange tariff filed by telephone company limits its liability, precluding plaintiff's recovery of damages for company's alleged negligence resulting in plaintiff's loss of business unless conduct of company was more than merely "willful" in the sense that it was "intentional"; for plaintiff to prevail, defendant's conduct must be shown to be "wanton and willful" in which context, willful means "action indicating a design, purpose or intent on the part of a person to do or cause injury to another."). However, such a formulation of willfulness is not appropriate in a scope of negotiations determination under PEERA.

In a scope of negotiations case, the consequences of and purposes to be served by a finding of willfulness is manifestly different than it is in the wage payment, personal injury, negligence or breach of contract arenas. As noted by BLACK'S LAW DICTIONARY in the passages set out above, willful "is a word of many meanings, with its construction often influenced by its context". "Willfully", as used in labor relations laws, should be neither administratively nor judicially construed to be identical in meaning to the term "willfully" where that term signifies a prerequisite or condition for imposing punitive damages or other forms of penalty or punishment. Instead, the relative differing purposes of the laws, the

consequences of a finding of willfulness, and the contexts in which the terms are used should serve as guideposts for their differentiation. In a labor relations setting, with regard to a charge of failure to bargain in good faith in a scope of negotiations dispute, i.e., whether a given topic is mandatorily negotiable, the purposes for which the law was enacted are ill-served by the necessity of finding that a party “willfully” refused to meet and confer, when that term is construed to require proof of an intent to cause injury or do wrong. The purposes for which the Kansas Legislature enacted the Public Employer-Employee Relations Act are expressly articulated in the Act itself:

“it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of the law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies.”

In its decision regarding an earlier labor relations dispute between the instant parties, the Kansas Supreme Court noted that the Act is neither a strict “meet and confer” act, nor a “collective negotiations” act but a hybrid containing some characteristics of each. The Court then observed that:

“However it be designated, the important thing is that the Act imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations.”

*Kansas Bd. Of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, 804-805 (1983). If, as the statutory text states and the Court has affirmed, the purpose of the Act is to

obligate both employers and employees, acting through their respective representatives, to meet and confer in good faith with affirmative willingness to resolve grievances and to negotiate conditions of employment, the necessity, for administrative enforcement of the law, of establishing that a party willfully, that is, with intent to cause the other party injury, refused to meet and confer is starkly inconsistent with the plain, express purposes of the law. That is to say, if the goal of the Act is to obligate parties to meet and confer over conditions of employment and grievances in an effort to promote labor-management harmony, why should it be necessary to establish anything more than that a party refused intentionally, voluntarily or deliberately to meet and confer regarding an appropriate topic in order that they be directed back to the negotiating table?

Further, in a refusal to negotiate complaint, where the scope of negotiations is in dispute, the consequence of a finding of willfulness is markedly different from the penalties that may follow a finding of willfulness in other settings. The consequence of a finding that a party willfully refused to meet and confer in good faith is typically an order that the parties resume bargaining and perhaps an order to post a copy of PERB's decision for review by the affected employees.<sup>7</sup> As noted earlier, a finding of willfulness in a wage payment act claim is a mandatory monetary penalty that may effectively double the amount owed. *See, e.g., A. O. Smith, supra*, 144 P.3d 760, Ks.Ct.App., (2005)(wages found due in amount of \$370,798.43, penalty assessed in amount of \$366,552.28, difference in amounts was result of one claimant's failure to file within statutory limitations period for penalty). A finding of willfulness in the context of personal injury litigation may subject a defendant to an award of damages. *Anderson v. White*, 210 Kan. 18 (1972). A finding of willfulness in a breach of

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<sup>7</sup> Petitioner did not, however, make the customary request for posting in this matter.

contract suit may lead to punitive damages. *Dold v. Sherow*, 220 Kan. 350 (1976). A finding of willfulness in a nursing license administrative action may subject the licenseholder to license suspension or even revocation. *See Kansas State Board of Nursing v. Burkman*, 216 Kan. 187 (1975)(in judicial review of Board of Nursing proceeding to suspend nursing license, where registered nurse continued to practice nursing after negligently failing to apply for license renewal upon its expiration, courts reinstated license, finding that such negligence did not rise to generally accepted concept of willful conduct: “While willful has been said to be a word of many meanings depending on the context in which it is used, it generally connotes proceeding from a conscious motion of the will—an act as being designed or intentional as opposed to one accidental or involuntary.”). *See also, Golay v. Kansas State Board of Nursing*, 15 K.A.2d 648 (1991)(in administrative licensing disciplinary proceeding, Board has authority, in furtherance of its duty to protect public by regulating nursing licensing, to initiate investigations on its own motions; finding of willful violation of Kansas Nurse Practice Act sufficient grounds for denial, revocation or suspension of license). While it is understandable that the threshold of “willfulness” for granting punitive monetary damages, or for stripping someone of a license to practice their profession, would be set high enough to reflect a significant element of blameworthiness, to ensure that the punishment was commensurate with the offense, when the consequence is that of being told to resume negotiations there is no need to find substantially blameworthy intent or to find that actions were motivated by a wrongful purpose or an intent to cause injury.

Moreover, a plain reading of the law reveals that a finding of willfulness is necessary to sustain a prohibited practice charge, including that of refusal to meet and confer in good

faith. K.S.A. 75-4333. If the element of willfulness is absent, then it logically follows that PERB cannot conclude that the Act was violated, and is without authority to take remedial action. In the absence of willfulness, and thus absent the conclusion that PEERA was violated, the PERB is without authority to order restoration of the *status quo ante* or to direct the parties back to negotiations. In this context, and in light of such consequences, one cannot discount the possibility that the legislative conception of “willfulness” in labor relations envisioned a lesser degree of culpability compared with that term’s usage in the context of punitive damages. In the scope of negotiations context with which we are here concerned, construing “willfully” to require proof of a wrongful state of mind or of an intent to injure is inconsistent with the purposes motivating PEERA’s enactment.

Given that the legislature is presumed to know the meaning, or multiplicity of meanings, of the words it chooses for use in the statutes, one must conclude that the legislature was aware of the many variations and gradations of meaning for the term “willfully”. We cannot presume, in the context of a scope of negotiations dispute, where a finding that a party “willfully” refused to negotiate over a condition of employment is a necessary prerequisite to ordering the party back to negotiations, or for ordering any other relief, that the legislature intended for “willfully” to be construed in a manner inconsistent with the statute’s salutary purpose of promoting labor harmony and stability, through bargaining, in the public employment sector work force. In point of fact, it is a fundamental rule of statutory construction that “[t]he several provisions of an act, *in pari materia*, must be construed together with a view of reconciling and bringing them into workable harmony and giving effect to the entire statute if it is reasonably possible to do so.” *Guardian Title Co. v. Bell*, 248 Kan. 146, 151, 805 P.2d 33 (1991). Further,

“[e]ffect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.”

*Todd v. Kelly*, 251 Kan. 512, 516, 837 P.2d 381 (1992). In order to give effect to the entire Act, and to reconcile PEERA's different provisions to make them consistent, harmonious and sensible, the purpose of promoting labor harmony through meet and confer will be served by construing “willfully”, in the context of a scope of negotiations determination, to mean that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, or that it was undertaken with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent.<sup>8</sup>

After careful review of the record, it is the presiding officer's conclusion that both Respondent's unilateral 1998 adoption of an intellectual property policy and its refusal to meet and confer with Petitioner regarding the topic of intellectual property rights constituted a prohibited practice as set out at K.S.A. 75-4333(b)(5), refusal to meet and confer in good faith, as required in K.S.A. 75-4327 and a prohibited practice as set out at K.S.A. 75-4333(b)(6), by denying Petitioner the rights accompanying certification granted in K.S.A. 75-4328. The record supports a finding that Respondent's actions were willful as construed above. KBR/PSU's refusal to meet and confer and its unilateral

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<sup>8</sup> Other states have construed the meaning of “willfully” in their states' labor relations laws provisions regarding prohibited practices in a similar fashion. See, e.g., *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters v. Iowa Public Employment Relations Board*, 522 N.W.2d 840, Iowa (1994)(“[w]illful refusal to negotiate' within meaning of public employee bargaining statute means that party either knew or showed reckless disregard for matter whether its action amounted to a refusal to negotiate in good faith with respect to scope of negotiations; action relied on to establish prohibited practice complaint based on such willful refusal must be so significant in its scope and done with such knowledge or reckless disregard for the facts as to effectively thwart negotiating proceedings”.)

implementation<sup>9</sup> of an intellectual property policy without first meeting and conferring in good faith with regard to same was done voluntarily, deliberately or intentionally, with reckless indifference or disregard for the natural consequences thereof, or was done with wrongful intent. These actions constituted prohibited practices, in violation of K.S.A. 75-4333(b)(5) and 75-4333(b)(6).

### CONCLUSION

Based upon the foregoing discussion, the Presiding Officer finds that KBR/PSU committed prohibited practices when it willfully refused to meet and confer with KNEA on the subject of intellectual property, a mandatory topic for bargaining, and when it unilaterally implemented an intellectual property policy without meeting and conferring with Petitioner in regard to same.

**IT IS THEREFORE ADJUDGED**, that Respondent, for the reasons set forth above, by its offer to permissively discuss the topic of intellectual property rights, and its concomitant refusal to meet and confer regarding same, willfully refused to meet and confer in good faith with Petitioner as required by K.S.A. 75-4327, thereby committing a prohibited practice. *See* K.S.A. 75-4333(b)(5).

**IT IS FURTHER ADJUDGED**, that Respondent, for the reasons set forth above, by unilaterally implementing an intellectual property policy, willfully refused to meet and confer in good faith with Petitioner as required by K.S.A. 75-4327, thereby committing a prohibited practice. *See* K.S.A. 75-4333(b)(5).

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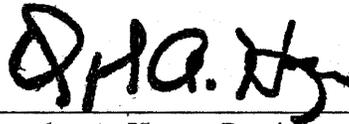
<sup>9</sup>An employer's unilateral change to a condition of employment, without bargaining in good faith, is a *prima facie* violation of its employees' collective right to meet and confer. *See City of Junction City v. Junction City Police Officers' Association*, 75-CAEO-2-1992 (July 31, 1992); *Kansas Association of Public Employees v. Kansas Department of Corrections*, 75-CAE-17-1993 (December 15, 1994).

**IT IS THEREFORE ORDERED**, that Respondent cease and desist from its unilateral implementation of policy, and from refusing to meet and confer in good faith with Petitioner, in regards to intellectual property rights.

**IT IS FURTHER ORDERED**, that Respondent meet and confer in good faith with Petitioner on the subject of intellectual property rights.

**IT IS SO ORDERED.**

**DATED**, this 9th day of February, 2007.



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Douglas A. Hager, Presiding Officer  
Office of Labor Relations  
427 SW Topeka Boulevard  
Topeka, KS 66603-3182

#### **NOTICE OF RIGHT TO REVIEW**

This Initial Order on Remand is your official notice of the presiding officer's decision in this case. This 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 review of this order will expire eighteen (18) days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be **received** no later than 5:00 p.m., March 2<sup>nd</sup>, 2007, addressed to: Public Employee Relations Board & Labor Relations, 427 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

**CERTIFICATE OF MAILING**

I, Sharon L. Tunstall, Office Manager, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 12<sup>th</sup> day of February, 2007, a true and correct copy of the above and foregoing Initial Order on Remand was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

John G. Mazurek, Attorney at Law  
Menghini, Menghini & Mazurek, LLC  
101 E. 4th St.  
316 National Bank Building  
Pittsburg, KS 66762

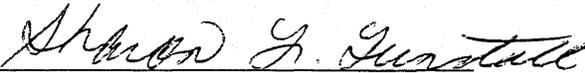
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And to the members of the PERB on \_\_\_\_\_, 2007

  
Sharon L. Tunstall, Office Administrator