

State of Kansas
Before The
PUBLIC EMPLOYEE RELATIONS BOARD

In The Matter Of: *
*
SERVICE EMPLOYEES' UNION LOCAL 513 - *
UNFAIR LABOR PRACTICE COMPLAINT - *
*
Complainant, *
*
and *
*
CITY OF WICHITA *
Respondent. *

CASE NO. CAE1-1975

O R D E R

Now on this 17th day of April, 1975, being a regular meeting day of the Public Employee Relations Board, the above matter comes on for consideration.

After being fully advised in the premises, the Board determines that the Special Hearing Officer's Findings of Fact and Conclusions of Law Submitted to the Public Employees' Relations Board, as well as the Recommendations of Mr. Franklin R. Theis, duly appointed hearing officer on February 10, 1975, should be adopted in full as the Order of the Board. The executive director is ordered to incorporate this Order into the records of this case.

IT IS SO ORDERED.

Date: 4-28-75 Eldon V. Danenhauer
Eldon V. Danenhauer, Chairman

Date: 4/28/75 William McCormick
William McCormick, Member

Date: 4/28/75 Nathan W. Thatcher
Nathan W. Thatcher, Member

Jerry Powell
Jerry Powell, Executive Director
Public Employee Relations Board

CAE-1-1975

BEFORE THE SPECIAL HEARING OFFICER
of the
KANSAS PUBLIC EMPLOYEES' RELATIONS BOARD
of the
STATE OF KANSAS

In the matter of:

SERVICE EMPLOYEES' UNION
LOCAL 513,

Complainant,

and

CITY OF WICHITA,

Respondent.

APR 11 1975

No. CAE1-1975

SPECIAL HEARING OFFICER'S FINDINGS
OF FACT AND CONCLUSIONS OF LAW
SUBMITTED TO THE PUBLIC EMPLOYEES' RELATIONS BOARD

On the 15th day of January, 1975, a prohibited practice complaint was filed pursuant to K.S.A. 75-4333 against the City of Wichita, Kansas, by Harry D. Helser, Representative AFL-CIO, for and on behalf of Service Employees' Union Local 513. In response to this complaint the City of Wichita, through one of its attorneys, Richard A. Shull, did cause to be made, filed, and served, an Answer to said complaint denying that the City of Wichita had committed a prohibited practice and praying that the Public Employees' Relations Board dismiss the complaint, and by way of prayer in the form of a cross-complaint requested that the Public Employees' Relations Board find that Service Employees' Union Local 513 was guilty of a prohibited practice.

Service Employees' Union Local 513 complaint alleged that the City of Wichita, Kansas,

". . .by its officers and agents has refused to meet and confer in good faith with representatives of Service Employees' Union Local 513 by unilaterally initiating an 8 per cent increase to the salaries of all employees in the bargaining unit and refusing to meet and confer in good faith as to the distribution and applications of the amount of wage increases."

The City of Wichita, in its Answer, denied it committed a prohibited practice as alleged for the essential reasons here paraphrased, that:

- "a. That it is the position of the city that there is no obligation under the act to discuss 1974 or 1975 budget items because the budget process had been held and the budget passed before the city was obligated to recognize the Employee Organization. That such meet and confer sessions must take place prior to the budget process.
- b. That K.S.A. 75-4327(g) declares the intent of the act (K.S.A. 75-4321, et seq.) is that matters affecting finances shall be conducted at such time as to permit any resultant memorandum of agreement to be duly implemented in the budget preparator and adoption process."

Additionally, the City of Wichita alleged that Local 513, as early as July 25, 1974, was informed of the City's position and thereafter, essentially, by its silence, acquiesced in the City's position until December 20, 1974, when the union again demanded that the allocation of budgeted wage increases be the subject of meet and confer for inclusion in any possible memorandum of agreement between the parties; and that essentially the reinterjection of this issue at this date constituted evidence of Local 513's failure to meet and confer in good faith.

Finally, the City objected to the participation of an officer of Local 513 in the proceedings to determine said complaints in his capacity as a duly appointed member of the Kansas Public Employee Relations Board.

On the 29th day of January, 1975, the Kansas Public Employee Relations Board notified the parties that a hearing pursuant to K.S.A. 75-4333 would be held to adjudicate said complaint or complaints on the 14th day of February, 1975, at 10:30 a.m. in Room 612, Century Plaza Building, Wichita, Kansas. By separate letter of the same date, the City of Wichita, Kansas, was advised that the member in accordance with the policy of the Board, would not participate in the determination of the complaints. Similarly, by letter of February 3, 1975, the member formally removed himself

from any participation and consideration in these proceedings.

After objection was raised to a previously selected hearing officer, the Board appointed instead, Franklin R. Theis, an Attorney at Law, to conduct the hearing scheduled for February 14, 1975, with full authority to make such orders and to take such actions as would be necessary to bring said complaints to a point of lawful conclusion and to present to the Board his findings of fact and conclusions of law derived from the hearing and the procedures incident thereto.

At the hearing held on February 14, 1975, the parties agreed that the proceedings were properly before the Board and that the Board otherwise had jurisdiction of the matter, and that neither had objections to this hearing officer acting to fully hear and determine the matter. Further, the parties indicated to the hearing officer that they believed that some or all of the facts could be agreed to, if given sufficient time to discuss among themselves and each other; and thereafter, a recess being held, the parties requested this hearing officer to approve a continuance in order that they might settle upon a complete stipulation of facts upon which a determination of the controversies might be made. Whereupon, the parties were granted a continuance to submit a complete stipulation of facts, or, in the alternative to advise of their inability to so agree, in which case, the evidentiary hearing would be reconvened. If a complete stipulation of facts was filed, the parties were to submit briefs on the questions of law raised by the stipulated facts. The parties agreed that if a complete stipulation of facts was submitted then this hearing officer could proceed to consider the stipulations and the briefs latter submitted as the full and complete basis upon which the issues would be determined. On the 24th day of February, 1975, a joint stipulation of facts was received in the office of the Board, and thereafter the briefs of the parties were received in the office of the Board on March 14, 1975.

Now after fully considering the joint stipulation of the parties including the exhibits thereto, and the written briefs of the parties, the hearing officer makes the following findings of fact and conclusions of law in the above entitled matter:

FINDINGS OF FACT

1. That the Kansas Public Employee Relations Board has jurisdiction of the subject matter and of the parties, and that, otherwise, the complaints are properly before the Board and the Board has the power and obligation to finally decide them;

2. That the joint stipulation of facts including the exhibits thereto as submitted by the parties, are the complete facts upon which these controversies will be decided, and said joint stipulation of facts should be, and is hereby adopted by the hearing officer, as and for his findings of fact, which joint stipulation is hereby incorporated by reference as if set out in full, including the exhibits therein referred. The stipulation is attached hereto as an appendix.

CONCLUSIONS OF LAW

1. The City of Wichita, Kansas, did not commit a prohibited practice within the meaning of K.S.A. 75-4333(b) 5.

2. Service Employees' Union Local 513, did not commit a prohibited practice within the meaning of K.S.A. 75-4333(c) 3.

3. From and after October 11, 1974, an impasse existed between the City of Wichita, Kansas, and Service Employees' Union Local 513 upon the question of the proper allocation of budgeted wage increases for the budget year 1975, and said impasse continues to this date.

MEMORANDUM DECISION

The basis for the hearing officer's conclusions of law and this memorandum of decision should be read against the background of the joint stipulation of facts and the briefs submitted by the parties. The conclusions reached essentially rise from the

resolution of four issues raised by the pleadings, the facts, and the arguments of counsel.

First, could, or to what extent could, negotiators for the City of Wichita lawfully avoid discussion of conditions of employment for employees of the bargaining unit duly represented by Local 513 when the conditions of employment sought to be made the subject of meet and confer proceedings by Local 513 were alleged to affect the distribution and allocation of budgeted and appropriated funds (moneys) within the duly adopted budget of the City of Wichita for the ensuing budget year and when it is conceded (1) that the employee organization neither requested nor sought to increase the tax levy or budgetary limitations established pursuant to law, or (2) sought to increase the total moneys appropriated to the budget item(s) subject of proposed discussion by augmentation of the budget item(s) via transfer of moneys from other budget items within the duly appropriated and budgeted funds of the City or (3) otherwise sought to require the moneys within a budgeted item to be used not in accordance with law?

Second, may a declaration of bargaining position as to the scope of items subject to meet and confer under the act, timely made, with the advice of counsel, and otherwise reasonable, and not, under the facts and circumstances shown to be frivolously made, or for the purpose of frustrating the purpose of the Act, alone constitute a prohibited practice within the meaning of K.S.A. 4333(b) 5?

Third, when, and to what extent, may a public employer proceed to unilaterally act in furtherance of a governmental policy previously expressed, when, subsequently, and after implementing the policy, the declared governmental policy may become a proper and lawful subject item of an agenda in meet and confer proceedings?

Fourth, upon which party's shoulders falls the burden of initiating procedures for the resolution of disputes incurred in the course of duly authorized meet and confer proceedings, and what procedures should be followed? Does delay in initiating

authorized procedures itself constitute a prohibited practice?

As to the first issue raised, the City of Wichita has, at least since the October 11th meet and confer session, (the agreed session at which essentially substantive matters in terms of subjects for possible inclusion in a memorandum of agreement were first discussed) maintained that K.S.A. 75-4327(g) precluded it from being required to discuss during the course of their otherwise recognized and legally mandated meet and confer obligations with Local 513, any conditions of employment which had, in their opinion, a potential financial affect upon their 1975 budget. Particularly, the City refused to discuss an issue, apparently orally raised, concerning how a duly budgeted allowance for wage increases to city employees in the budget year 1975 in a total sum based on 8% of 1974 salaries of employees would be distributed. Local 513 wished to discuss a method of allocation of such total budgeted wage increase funds to assure that the wage increases would be based on the rise in the cost of living in terms of the effect of the rise in cost of living as measured against the particular salary level of an employee or group of employees. The City's primary position was a position of law, and that was that the subject matter of this issue fell within the ambit of K.S.A. 75-4327(g) and therefore they elected not to discuss the question of the mode of distribution. Secondly, and as a matter of adopted City policy via the completed budgetary process, the total moneys budgeted in each fund for the single budget item in each fund intended for the payment of salaries had been based on an 8% general increase for each employee calculated by applying 8% times his 1974 salary and the City had, by ordinances, amended its salary schedules and pay plans accordingly. In other words, Local 513 favored a selective approach to distributing the budgeted wage increase while the City favored, and implemented, an across the board approach.

The City's primary position requires the Board, in the first instance, to construe the meaning, purpose, and intent of K.S.A.

75-4327(g). This section provides, as follows:

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

It is the opinion of the hearing officer that the City has improperly interpreted K.S.A. 75-4327(g) in the belief that if the City's interpretation were to prevail it would frustrate, and be contrary to, not only the overall purposes of the Public Employer-Employee Relations Act, but indeed, give and imply to the statutorily mandated budget law (K.S.A. 79-2925 et seq.) and the City's budget resulting therefrom, rigidity, which in the ordinary and accepted conduct of City business, and in terms of the legal consequence of the exercise of municipal power over the budgeting and expenditure of funds, does not exist in law. To rationally uphold the City's contention as to the interpretation to be given to K.S.A. 75-4327(g) under these stipulated facts, it would necessarily have to be found that the City possessed no discretion as to the method or manner of how to distribute and allocate moneys within the total amount of a single budget item of a fund or funds, once the City's budget has been duly adopted in accordance with K.S.A. 79-2925 et seq., as amended. And, as well, the method of allocation of, not the total budgeted amount of, budgeted moneys in a single budget item of a fund or funds was a matter required by law to be ". . . . duly implemented in the budget preparation and adoption process." Such a conclusion however is specious. In the least, how money in a single budget item of a fund or funds is actually distributed, if otherwise expended for a lawful purpose of a fund, and additionally, as here, the proposed expenditure is completely consonant with the purpose of the single budgeted item of the fund, is discretionary with the City and does not violate

the budget law. Although the City's contention might have once been sustained, e.g., Shouse v. Cherokee County Commissioners, 151 Kan. 458, 99 P. 2d 779 (1940); School District v. Clark County Commissioners, 155 Kan. 636, 127 P. 2d 418 (1942), rehearing, 156 Kan. 221, 132 P. 2d 401 (1943), such a hyper-technical contention would not seem to be any longer sustainable due to the clarification of the word "fund" as used in the budget laws, e.g., L. 1941, ch. 377, 9, now K.S.A. 1974 Supp. 79-2925(2); see also State ex. rel., v. Board of County Commissioners, 173 Kan. 544, 549, 250 P. 2d 556 (1952); and City of Wichita v. Wyman, 158 Kan. 709, 712, 703, 150 P. 2d 154 (1944). Hence, the method of allocation of these budgeted funds was not a matter which was required to be ". . . duly implemented in the budget preparation and adoption process." within the meaning of K.S.A. 75-4327(g). An interpretation, as urged by the City, allowing legal avoidance by the City of its obligation to meet and confer in good faith upon conditions of employment over which the City has complete and continuing discretion bespeaks of a penalty, and promotes the avoidance of discussion, the very antithesis of the clear purposes of the Public Employer-Employee Relations Act.

In consequence, the hearing officer is of the opinion that there should not be read into K.S.A. 75-4327(g) greater prohibitions than exist within the cited budget laws, if it is to be given the meaning intended. This view is supported when K.S.A. 75-4327(g) additionally is read, as it must be, in the context of the Public Employer-Employee Relations Act as a whole. There can be no question but that an issue concerning the distribution of funds budgeted for a wage increase falls within, and is, a "condition of employment" as that term is defined in K.S.A. 75-4322(t). Agreement on such an issue, being a condition of employment, could be included in a memorandum of agreement since the subject matter of the condition of employment is not one which is prohibited from being included in a memorandum of agreement by K.S.A. 75-4330 unless the allocation of the moneys within a single budget item of a fund was not

discretionary with the City, but rather was frozen as a matter of state law. If the latter were true, which here we have found it not to be, K.S.A. 75-4330(a)(1), prohibiting discussion on matters preempted by state law, would control in any manner. K.S.A. 4327(g) would simply be the statutory device to assure the issue was preempted by state law by assuring the timing of initial meet and confer proceedings could not take place until the budget, hence law, was final. In the instant case, K.S.A. 75-4327(g) has no application since its application would not place the item of discussion here within the prohibition of K.S.A. 75-4330(a)(1) for the reason the item of discussion is not susceptible of being given the force of law through the budget preparation and adoption process. K.S.A. 75-4327(g) cannot be interpreted to assure the status of law to some matter of discussion not previously susceptible to being made law without regard to K.S.A. 75-4327(g).

Another significant factor in further consideration of K.S.A. 75-4327(g) is that the Kansas Public Employer-Employee Relations Act is a "meet and confer" act, not a "collective bargaining" act. The Supreme Court of Kansas has by comparison so held. (See Liberal NEA v. Board of Education, 211 K. 219; and National Educational Association v. Board of Education, 212 K. 741)

A "meet and confer" act unlike a collective bargaining act, mandates none to agree, but only to meet and confer in good faith. The Kansas meet and confer act, short of agreements between the parties to the contrary, only provides for impasse procedures or advisory arbitration, or in the extreme, proceedings to determine prohibited practices during meet and confer. None of these procedures mandate agreement, but only reasonable good faith efforts to agree. The sanctions inherent in the procedures of impasse, etc. are quasi political in that the ultimate scrutiny of the reasonableness of a position causing failure of agreement is a public one. The only penalty for a good faith failing to agree is to be judged by your peers and the people. An added penalty, for failing to act in good faith in meet and confer, is to be enjoined to meet

and confer in good faith, and for failure to comply, a citation of contempt. Directly mandating parties to agree is not a remedy under our meet and confer act, albeit the practical hazards of disagreement, public scrutiny, or judicially compelled "meeting and conferring" is, or should be, of significance to all public servants. Accordingly, since good faith open discussion is all that is required, K.S.A. 75-4327(g) should not be interposed or interpreted to exclude discussion any more than is necessary to assure orderly government and the protection of the public.

Accordingly, the hearing officer finds that K.S.A. 75-4327(g) serves two purposes. It is a reasonable limitation that may be invoked by a city to secure the smooth and uninterrupted operation of the statutorily required budget process as a taxing subdivision, free from the threat of the invocation of procedures in the Public Employer-Employee Relations Act such as the impasse or prohibited practice procedures which could otherwise, if available, threaten the integrity and timing of the statutory budget process. ^{if needed} Otherwise,/
it acts as a statutory device to ^{additionally} assure that the resulting tax levy and budget limitations are sacrosanct. Such a construction gives a city the right to assure that the orderly and timely processes of government are observed, and maintains the public right to have an input through public hearings and discussions while assuring they are not made meaningless by allowing tax and budgetary limitations to be raised collaterally, ^{diverted} or/ subsequently, through the vehicle of a memorandum of agreement, without direct public input.

If K.S.A. 4327(g) is given an interpretation in harmony with the budget law and the whole of the Public Employer-Employee Relations Act of which it is only a part, as has here been done, neither may the power to enter into memorandum agreements be abused to the detriment of the taxpaying public nor to disrupt the orderly processes of government, nor on the other hand may K.S.A. 75-4327(g) be used to shield a public employer from his legal duty to meet and confer in good faith on the conditions of employment over which it lawfully has, and always has had, the continuing power, and discretion, to alter, amend, or change at will if it chose to do so.

This construction merely recognizes K.S.A. 75-4327(g) as a permissive moratorium on the beginning of initial meet and confer sessions for the reasons heretofore stated rather than construing it as a penalty for late blooming organization by giving the public employer an absolute option to ignore all substantive concerns of meet and confer proceedings, as in this instance, it would, by relieving the City by expenditure of funds until January 1, 1976, from any duty to implement/any agreements having any financial impact on the City.

Wherefore, it must be held that K.S.A. 75-4327(g) has no application in this case since the subject matter of the item proposed for meet and confer discussion was not required to be ". . . duly implemented in the (statutory) budget preparation and adoption process.", and hence, the City could not refuse to meet and confer on the issue, but only refuse, after consideration of it, not to agree to the proposal. The employee organization's insistence on agreement to its proposal and the City's refusal to agree equals here an impasse within the meaning of K.S.A. 75-4332.

As to the second issue raised, a review of the joint stipulation by the parties, and a consideration of the substantive legal issues involved, preclude any finding by the hearing officer that there was any willful refusal on the part of the City of Wichita to "meet and confer in good faith" in the sense that the negotiators of the City possessed any ill motive in taking their position or took their legal position without justifiable excuse or upon a patently frivolous basis. The legal issue raised as the basis for refusing to meet and confer on the allocation of the pay raise is one of precedent before the Kansas Public Employer-Employee Relations Board, involving direct interpretation of the very law it administers.

It would little behoove the Public Employee Relations Board in its duty to further the amicable resolution of disputes, to find that a bargaining position based upon a bonified question of law, though later found not correct, constitutes per se a prohibited practice; much less, where no evidence exists, by execution of the

stipulation, to impute ill motive to the presentation of an otherwise bonified legal position. Here then, the hearing officer finds that the alleged refusal to meet and confer in good faith by the City of Wichita was not willful in the sense the refusal was not without justifiable excuse or taken or timed for the purpose of frustrating and making meaningless the rights of the city employees to meet and confer on their conditions of employment.

The third issue, inherently more difficult than the second, is raised from the fact that the City of Wichita amended their salary schedules and pay plans by ordinances in late September implementing salary increases of 8% across the board to all city employees effective upon the first full payday after December 28, 1974. A review has been made of the joint stipulation including the exhibits identified therein. Although there appears to be within the stipulation and exhibits some conflict and omissions as to whether all city employees received an 8% pay raise, the City specifically admits in its brief that prior to October 11, 1974, it passed ordinances giving all city employees the pay raise above stated. It should be noted that nothing in the record would indicate that the issue or the manner of allocation of budgeted wage increases was directly placed before the City by the employee organization until October 11, 1974, after the ordinances were adopted. An analysis of Exhibit #5, the initial position of the employee organization as to the terms desired in any memorandum of agreement, which was submitted September 11, and prior to the adoption of the ordinances, does not include any specific reference to the manner of how the employee organization desired 1975 budget year budgeted wage increases to be distributed. In fact Exhibit #5 does not set forth a specific general pay raise whatsoever for 1975, or any other year. Admittedly desires to insert a flat percentage cost of living escalator clause into the pay plan which, in form itself, is an across the board raise (see page 35), some longevity pay, and shift differential type pay, etc. (e.g., pp. 33, 41, etc.), are expressed but correspondingly no allegation has been made nor evidence presented to indicate that these items were in companion with, in substitution for, or in addition to, any unexpressed desire for a pay increase, general or

selective, or in fact, could, or could not, be budgetarily accomplished regardless of the City's publicly adopted budget intention of implementing, a general 8% across the board wage increase to all employees. Importantly, although Exhibit #5, page 41, makes reference to a pay plan attached as Appendix A, the parties did not see fit to include it as part of the exhibit. Considering the wording of the employee organization's complaint presently before the board, it must be inferred that it would not support the complaint.

Essentially then the hearing officer must find that the employee organization's position as to the specific question of the allocation of budgeted pay increases had not been presented to the City by the employee organization prior to the time the City adopted the salary ordinances, one of the acts which the employee organization alleges constitutes evidence of the City's failure to meet and confer in good faith. As such, in terms of the complaint, there is a failure of evidence to support a finding that the City knew or should have known, that enacting the ordinances in question would constitute per se unilateral action inconsistent with a properly expressed employee organization subject of agenda.

A reading of the brief indicates that the employee organization, however, may be relying, as the, or a, basis for its charge that the City's failure to meet and confer in good faith arose from the fact it allowed the questioned ordinances to go into effect on December 28, 1974, as opposed to the actual acts of adopting the ordinances initially. In otherwords, the failure to withdraw, repeal, or amend these ordinances was the act of bad faith. The hearing officer specifically rejects this position. The City's action in passing the ordinances had to be in bad faith "ab initio." The mere fact that the City allowed a previously adopted policy to stand, i.e., go into effect, rather than act positively to withdraw it, as was in their power, is a spurious argument. The date of implementation of the pay plan for the 1975 budget year was when the ordinances were passed and published in September, 1974. Merely allowing a previously adopted policy, if adopted in good faith, to stand in the face of a demand to change it is not a prohibited practice, but a failure of agreement, a potential impasse. The prohibited practice

must lie either in the nature and timing of the action to implement a policy, or in the character of the refusal to agree or discuss, or both, not in the mere lack of action to reverse a policy.

Accordingly, and notwithstanding the above considerations and findings, the question still exists as to whether the fact the City acted on the salary increases during a period when the City was under, as a matter of legal time, the obligation to meet and confer in good faith upon the conditions of employment with Local 513 constituted per se a prohibited practice under these circumstances.

The hearing officer is of the opinion that it did not because the City of Wichita in so far as the record indicates was not placed upon sufficient, if at all any, notice that Local 513 wished to raise issues contrary to, and not in consonance with the action taken by the City of Wichita. Serious questions of good faith might be raised if the employee organization had not been advised of the City's intentions, given the City's haste in adopting the salary ordinances (they were adopted in September, yet they were not to be effective in terms of actual expenditures until the first complete pay period after December 28, 1974, otherwise in the 1975 budget year beginning January 1, 1975). However, here the City's commissioners expressed their intent to give across the board percentage salary increases by publicly adopting during the course of their budget process funds to implement this across the board salary increase policy. That this was, in fact done, is established by Exhibit #1, and there is no allegation expressed, nor factual basis to imply that the employee organization was unaware of what the City's intentions were in regard to the amount, manner, or method of 1975 budget year wage increases prior to the adoption of the ordinances. On the contrary, but not necessary to this conclusion, Exhibit #1, a public document, has been adopted by the parties and as a public document it must be assumed to correctly reflect the City's purpose and intent in adopting the budget it did.

The factual situation, here present, is, in substance and sequence, analogous, to the factual situation offered by the plaintiff, National Educational Association, to support lack of good faith in its dealings with Shawnee Mission U.S.D. 512, as reported in National Education Association v. Board of Education, 212 Kan. 741

(1973), beginning at page 755. After reviewing the facts recited and the ruling of the trial court, the Kansas Supreme Court stated as follows, at page 756:

"NEA doesn't challenge the facts recited in this finding, but argues that the Board's conduct evidences bad faith per se. The act, unlike the N. L. R. A. and our Public Employer-Employee Relations Act, contains no list of unfair practices or per se violations. It commands only that the parties negotiate 'in good faith.' As illustrated by the authorities cited, there are a variety of unilateral actions which may conclusively demonstrate an employer's lack of good faith, in the sense that his conduct is utterly inconsistent with a sincere desire to reach an agreement. Where such conduct occurs no amount of protestations of good faith will avail the employer -- his actions belie his words. That is not the situation here.

Here, the trial court found that the Board had no intent to subvert the negotiations, but was instead carrying out legitimate school purpose formulated long before negotiations were undertaken. The timing of the distribution perhaps demonstrated a lack of sensitivity to the delicacy of the situation, but we cannot for that reason alone overturn the trial court's finding. The new handbooks were in looseleaf form, so that new policies resulting from the current negotiations could easily be inserted, and that was proposed to be done. . ."

There, in essence, the Board of Education distributed looseleaf policy booklets while negotiations were in process, and when changes in such policies were directly in issue as an agenda item at the bargaining table. Additionally, the Board did not notify the NEA that such booklets were in the process of being prepared until some two months after the NEA proposal to change these policies was placed before the Board, and the booklets were then subsequently distributed approximately thirty days later. The decision to prepare the booklets was found to have been made and began some four to six months prior. Although there the trial court found the policies were only intended to apply to the current school year in which they were distributed, the changes, if any, agreed upon for the next school year, the year to which all negotiations were directed, could easily be made.

In the case here, the City's budget process began on March 11, 1974, and was completed on August 5, 1974. (see Exhibit #4) After a procedural meeting on July 25, 1974, the employee organization submitted its substantive proposals on September 11, 1974, which as heretofore discussed did not raise the disputed wage distribution issue per se, but did indicate matters that could effect the

City's salary plan at some point in time. Thereafter the City, after September 11, 1974, and before October 11, 1974, admits it passed the salary and pay plan ordinances required to put the 8% across the board pay plan into effect. (It should be noted however that Ordinance No. 33-494 submitted as a supporting exhibit to the admission in the stipulation as to the passage of one of the ordinances does not correctly reflect the particular admission in question) On October 11, 1974, the parties met and delineated the non-negotiable items, one of which was the method of allocating the wage increase in a different fashion than was done by the ordinance to implement the adopted budget plan. The stipulation does not indicate how the issue arose. The parties' positions were stated as heretofore expressed.

In comparison then, the City's position here seems stronger than was the Board of Education's in the case cited, principally because the passage of the ordinances alleged as constituting evidence of failure to meet and confer in good faith came prior to the time the City was put on notice by the employee organization that it wished to negotiate a selective pay increase plan as opposed to an across the board plan. The passage of the ordinances was consonant with the budget publicly adopted and naturally followed from its adoption. The acts came almost six weeks after meet and confer could have substantively began but had not. The acts were in retrospect, consonant with the City's legal position. Finally and importantly, no evidence was presented, other than the fact that the ordinances were passed, which would demonstrate bad faith or an intent to frustrate the purposes of the act. Lastly, it should be noted that Section (b), Subsection 5 of K.S.A. 75-4333 is, in terms of its specificity, substantially similar to the charge considered in National Educational Association, supra, and in that regard is, in terms of proof of what constitutes, not one of the "per se" violations of the Public Employer-Employee Relations Act referred to by the Court in the section of its opinion previously quoted.

Accordingly, the hearing officer must find, based on the evidence presented that the City of Wichita did not, by adopting the ordinances discussed, commit a prohibited practice within the meaning of K.S.A. 75-4333(b) 5 for the reasons previously stated. The hearing officer however has no hesitation in saying that the decision is a close one and if a fact or two were changed, added, or omitted, the decision could well be the reverse. Nor can there be dispute that passage of the ordinances during this time frame certainly put the employee organization in an anomalous bargaining position. However, the hearing officer by agreement of the parties feels bound, and is committed, to the stipulation of facts and the context of the exhibits submitted. As such his power of independent inquiry has been, and is lawfully, limited. Additionally, the City was not bound, in its ability to act on any governmental matters, to wait before acting, here some six weeks, while the employee organization decided what it wanted to discuss.

Finally, a fourth issue has been raised from the pleadings and the proceedings, and it essentially arises from the timing of the prohibited practice complaint by the employee organization. In this regard, the City of Wichita had prayed in its answer that the Board find the employee organization guilty of a prohibited practice based on the allegation that the employee organization continued to meet and confer with the City from the time that the City announced its legal position in mid-October as to what was negotiable until late December without again raising the issue of the method of allocating 1975 pay raises. Although it is questionable whether under the rules of the Public Employer-Employee Relations Board the cross-complaint was properly made, a review of the stipulation offers no evidence to support the cross complaint in any fashion, and the hearing officer so finds. However, these whole proceedings including the timing of the initial complaint, though well within the six month statute of limitations, raises a significant issue concerning who has the burden to proceed in public employer-public employee disputes and what procedure should be followed. In this

case the hearing officer has found that the City's decision to not negotiate certain items as a matter of legal right, though not correct, was justifiable, given the issue involved, and the time at which it was announced. In other words, it was not willful in terms of K.S.A. 75-4333 and accordingly, this declaration of legal position could not support a prohibited practice complaint by itself. Coupled with the other facts presented in the record, there is, of course, no basis to say the employee organization was not actually and legitimately convinced that the City's refusal to meet and confer was willful, particularly in conjunction with other grounds for complaint. The point here is that an ample and workable procedure exists, other than through the legal vehicle of filing a prohibited practice complaint, by way of the impasse procedure established by K.S.A. 75-4332(a) or (b) to challenge essentially a legal argument presented by either side for refusing to discuss or refusing to agree to a position arising within the context of meet and confer proceedings. If here, the employee organization had, instead, believed the legal argument was made in good faith but they believed it incorrect, the impasse procedure could have been used, initiated by them, to test the legal position. That such a procedural alternative is entirely workable in circumstances where a complaint pursuant to K.S.A. 75-4333(b) (5) is the only other alternative is the fact that the Board must first determine the existence of an impasse prior to ordering in mediators, or thereafter initiating other subsequent procedures if the impasse persists. Determining whether or not an impasse exists in the first instance requires the Board to investigate, possibly by hearing, whether the parties are at impasse. Accordingly, if the Board received a request for the declaration of an impasse, and upon subsequent hearing found that the legal position by the party opposing the finding of impasse in the meet and confer proceedings was accordingly correct in law, then inherently an impasse, in its true sense, could not exist since the law per se, cannot be mediated unless it was within the immediate powers of the

parties to change. If, on the other hand, the legal position advanced were found not to be correct in law, the finding itself, depending on its breadth, would or could break the alleged impasse, and leave room for further voluntary action or, if necessary, mediation, fact-finding, etc. In this sense then, the Public Employer-Employee Relations Act becomes complete in itself to resolve disputes whether they are based on fact, policy, or law, or a combination thereof. If for example, the employee organization had opted for a declaration of impasse after the October 11, 1974 meeting, based on the City's legal position, meaningful policy discussions might have been held prior to the time the ordinances in question became effective since essentially the decision derived here from the prohibited practice complaint filed in this case is, in effect, and in relief, essentially what could have been secured earlier through using the impasse procedures. Of course, the issues involved here did not present a clear cut choice as to the remedy to seek, but as evidenced here they are neither mutually exclusive nor, in essence, that different in the relief provided except as to whether the relief sought will be voluntary in nature or compelled. Given the intent and purpose of the act for amicable and voluntary solutions, a prohibited practice complaint should be a remedy of last resort, not to be employed if doubt exists as to whether the character of a refusal to meet and confer is willful or not.

RECOMMENDATIONS

1. That the Public Employee Relations Board order that the complaint of Local 513 be dismissed in its entirety with prejudice;
2. That the denominated "cross-complaint" of the City of Wichita be dismissed with prejudice;
3. That the Public Employee Relations Board find that the nature of the dispute between Local 513 and the City of Wichita over the allocation of budgeted wage increases in budget year 1975 for employees in the bargaining unit represented by Local 513 be considered as one requiring the Public Employee Relations

Board to determine, on its own motion, whether an impasse existed pursuant to K.S.A. 75-4332;

4. That the Public Employee Relations Board find, on its own motion, that an impasse does exist between Local 513 and the City of Wichita and that it determine that this proceeding and determination of the prohibited practice complaint(s) be considered to also be conclusive of a finding of impasse pursuant to K.S.A. 75-4332;

5. That the Public Employee Relations Board retain jurisdiction of the matter via K.S.A. 75-4332 to, if requested by the parties, or either of them, after good faith meeting and conferring, or the Public Employee Relations Board on its own motion, order in mediators or consider further fact finding if necessary;

6. That the Public Employee Relations Board declare that the failure of the City of Wichita to forthwith abandon its legal position that the allocation of budgeted wage increases for budget year 1975 for employees of the bargaining unit represented by Local 513 is not a proper subject for good faith meeting and conferring by the parties would in its opinion constitute a per se prohibited practice within the meaning of K.S.A. 75-4333(b)(5) if a proper complaint would be subsequently presented to the Public Employee Relations Board alleging such failure;

7. That the Public Employee Relations Board declare that nothing herein be construed as mandating the parties to agree upon the allocation of budget year 1975 budgeted wage increases for employees of the bargaining unit represented by Local 513, but only to require each party to in good faith, meet and confer on the issue, if still desired by Local 513, in order to attempt to reach an agreement on the issue, if possible; and

8. That the Public Employee Relations Board in respect of the fact that the stipulation of facts including exhibits was submitted by agreement of the parties as a complete stipulation of facts each mutually agreed relevant to their position and by agreement left any conclusions or inferences to be drawn therefrom to be determined by the hearing officer, after the parties had opportunity to comment

upon by briefs, which were submitted, the Public Employee Relations Board determine that the record is closed and deny motions, if any, to broaden, change, or otherwise alter the record or make further explanation thereof.

Respectfully submitted this 11th day of April, 1975.

Franklin R. Theis
Special Hearing Officer