

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fraternal Order of Police)
Lodge #5,)
Petitioner,)
)
vs.)
)
City of Wichita, Kansas)
Police Department)
Respondent.)
)
)
)

Case No. 75-CAE-11-1998

INITIAL ORDER

The prohibited practice complaint was heard by presiding officer, Katharine O'Keefe on September 21, 1999.

The Petitioner, Fraternal Order of Police Lodge #5 (hereinafter referred to as the "FOP") appeared by and through counsel, Lawrence G. Rebman. Witnesses on behalf of the Petitioner were Kevan Lager, Carl Enterkin and Aaron Harrison. The Respondent, City of Wichita, Police Department (hereinafter referred to as the "City" and "Department" respectively) appeared by and through counsel, Kelly J. Rundell. Verl Niedens appeared as a witness for the Respondent.

ISSUES PRESENTED

1. Whether or not the City committed a prohibited practice in violation of K.S.A. 75-4333(b)(1) or (5) by eliminating the policy which allowed members of the Department's motorcycle unit to use department-issued motorcycles to travel to and from work?

A. Is the use of Department issued motorcycles to travel to and from work a term and condition of employment and therefore, a mandatory topic of negotiations?

2. If it is found that the City did commit a prohibited practice in violation of K.S.A. 4333(b)(1) and/or (5), should additional compensation be given to those officers who were precluded from driving their motorcycles to and from work after the policy change?

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3. Whether or not the City committed a prohibited practice in violation of K.S.A. 75-4333(b)(1) and (5) when it refused the F.O.P.'s request for a formal grievance hearing before the Grievance Board established in the parties' Memorandum of Agreement?

FINDINGS OF FACT

1. The relevant Agreement for this cause is the December 27, 1997 through December 22, 2000 Memorandum of Agreement between the City of Wichita and the F.O.P. (Pet. Ex. #7).

2. The F.O.P. is the exclusive collective bargaining representative for police officers in the Department categorized in the following classifications: Traffic Safety Officer, Station Clerk, Police Recruit, Police Officer, Police Detective, Crime Scene Investigator and Police Sergeant. The F.O.P. has the exclusive authority to negotiate with the City with respect to wages, hours, benefits and other terms and conditions of employment for all members of the bargaining unit. The following in part appears in Section 1 under the heading of "Recognition of Employee Organization" in the Memorandum of Agreement:

"The City recognizes the F.O.P. as the sole and exclusive representative for the purposes of negotiating collectively with the City pursuant to the Public Employer-Employee Relations Act of the State of Kansas, with respect to wages, hours, benefits and other terms and conditions of employment for all members of the bargaining unit." (Pet. Ex. #7).

3. Under the heading "Management Rights and Responsibilities", the Memorandum of Agreement between the F.O.P. and the City states:

"Section 1. The F.O.P. acknowledges that the City and its management have certain exclusive statutory rights and responsibilities which they may not surrender. Except as expressly provided otherwise by this Agreement or by law, the City shall retain its rights to make, amend and execute decisions and policies that are necessary to operate and maintain the City and its programs and to otherwise carry out its lawful rights and responsibilities.

Sections 2. Except as expressly provided otherwise by this Agreement or by law nothing contained in this Agreement shall circumscribe or modify the statutory right of the City to:

- (1) Direct the work of its employees;
- (2) Hire, promote, demote, transfer, assign and retain employees in positions within the Wichita Police Department;
- (3) Suspend or discharge employees for proper cause;
- (4) Maintain the efficiency of governmental operation;
- (5) Relieve employees from duties because of lack of work or other legitimate reasons;
- (6) Take actions as may be necessary to carry out the mission of the department in emergencies; and
- (7) Determine the method, means and personnel by which operations are to be carried on." (Tr. at 26-27; Pet. Ex. #7, p. 1 and 2)."

4. Article XIV entitled "Grievance Procedure" in the Memorandum of Agreement states in part:

"A grievance is defined as any dispute involving the application or alleged violation of any provision of this Agreement." (Pet. Ex. #7 p. 24).

5. The above grievance procedure mandates the following procedural steps be taken: A written complaint be filed with the employee's Division Chief. If no satisfaction is obtained, the F.O.P./employee can take the grievance to the Department Director. If no resolution is obtained, the F.O.P./employee may appeal to the Employee Relations Officer. If after receiving the Employee Relations Officers decision the F.O.P. employee is still dissatisfied, the F.O.P./employee may request a hearing before the Grievance Board. The Grievance Board consists of two F.O.P. representatives, two persons appointed by the City and a fifth person who is selected by both parties from a 10 person list with each party submitting five of the ten names. (Pet. Ex. #7, p. 24 and 25).

6. The Memorandum of Agreement states that anything not in the contract is "governed, controlled and interpreted by reference to the City charter, ordinances and regulations. (Trans. at 32; Pet. Ex. #7, p. 27, sec. 3).

7. City Administrative Regulations are drafted and promulgated by the city manager. (Watson Depo. Ex. #4, p. 47 and 48).

8. Administrative Regulation 43, dated January 1, 1996, applies to all City of Wichita employees. Under the heading "Travel to Residence" the Regulation states:

"With the written approval of the City Manager, Department Heads may authorize certain individuals to use a City vehicle for travel to and from his or her residence. Except for occasional and infrequent situations, only specifically authorized individuals may drive a City vehicle to his or her residence. Division heads may authorize such occasional use, but only when such use is necessary to respond to requirements of the job. Example: expected night call out." (Resp. Ex. A, pg. 3; Watson Depo. at 46, 51 and 52; Trans. at 30).

9. Department Policy 805.08 in the Department's "policy manual" states:

"Certain positions require those members of the Department assigned to them to be called out on critical incidents. The Chief of Police will determine those positions, and authorize take-home vehicles for the members who are assigned to them. When members are transferred from these positions, the vehicles will be transferred to the members who assume the positions. Take-home vehicles will be included in the responsible Bureau Commander's monthly inspection report." (Resp. Ex. B).

10. All police officers have access to the City's regulations and the Department's policy manual.

11. The motorcycle unit of the Department was created in 1982. (Watson Depo. Ex. 4, p. 10).

12. The motorcycle unit was created to reduce the number of traffic fatalities in the City of Wichita. (Trans. p. 49).

13. The motorcycle unit is an inherently risky assignment due to the nature of the vehicle. (Trans. p. 73, 106; Landen Depo. Ex. 1, p. 18; Moses Depo. Ex. 2, p. 47 and 48; Watson Depo. Ex. 4, p. 10 and 11).

14. With limited exceptions, from 1982 through 1997, motorcycle unit officers were allowed to take their vehicles to and from work if they 1) lived within the city limits; and 2) had a locked secured facility in which to store the vehicle. (Trans. p. 51-54, 94, 97; Pet. Ex. 2,3,4, p. 5,6,7; Landen Depo. Ex. #1, p. 20, 33, 25; Moses Depo. Ex. 2, p. 51; Moore Depo. Ex. #3, p. 10; Watson Depo. Ex. 4, p. 30-31).

15. At the time the motorcycle unit was created in 1982, the unit officers underwent riding and maintenance training at the Department's direction and at the Department's cost.

16. Because storage space was limited when the motorcycle unit was created, the then chief of police allowed the unit officers to ride their motorcycles to and from work. (Trans. p. 52 and 53).

17. Sometime in 1989 or the early 1990's, the unit's motorcycles were stored in a city owned garage. However the garage collapsed and space was compromised. Consequently, officers were directed to take their motorcycles home after work each night. (Landen Depo. Ex. #1, p. 22).

18. When a motorcycle unit officer was riding to and from work, it was the Department's general policy that the officer was "off duty". However if an officer viewed an emergency situation that required immediate attention i.e. an obvious DUI or an accident, then the officer, at his own discretion, could take appropriate official action to alleviate the critical circumstances. (Moses Depo. Ex. #2, p. 26 and 27, Landen Depo. Ex. #1, p. 16 and 17).

19. Ordinarily, motorcycle unit officers who were injured while driving to and from work but not performing official business were not covered by worker compensation insurance. (Trans. p. 121).

20. Since the creation of the motorcycle unit, several officers have been hurt riding their motorcycles while on duty during normal working hours. Officers have also been hurt riding to and from work and home.

21. Several officers in the motorcycle unit consider the take-home status as a "perk" or "benefit" of being in the motorcycle unit. (Landen Depo. Ex. #1, p. 20).

22. Between 1982 and 1997, department heads and/or supervisors over the motorcycle unit have used the take-home status as an "incentive" when talking to other officers about joining the motorcycle unit. (Trans. p. 56, 57 and 58).

23. The Department does not have an official "recruit" policy for positions. Open positions are posted and applications are accepted. (Moses Depo. Ex. #2, p. 46).

24. No police officer has ever been specifically told that he or she would always be able to ride a Department motorcycle to and from work. (Transcript and Depositions)

25. In addition to motorcycles, the Department issues take-home cars to various personnel.

26. Take-home cars are routinely assigned and taken away from assigned recipients for various reasons. (Watson Depo. Ex. #4, p. 44 and 45).

27. Every two to three years, the Department is asked to write a "justification" for the take-home status of vehicles and motorcycles. Every year, department heads are asked to justify their department budgets. (Watson Depo. Ex. #4, p. 15; Pet. Ex. #5).

28. Over a five year period, Lt. Carl Enterkin wrote six to eight memorandums justifying the take-home status of motorcycles. (Trans. at 71).

29. In October of 1996, a Captain Hammond wrote a justification for the take-home status of motorcycles. (Pet. Ex. #3; Trans. at 60; Watson Depo. Ex. #4 at 15).

30. In 1996 or 1997, the City's fiscal department asked the Department to investigate whether it would be economically advantageous to eliminate the policy of allowing officers to take their motorcycles to and from home during off hours. (Resp. Ex. C).

31. In September of 1997, a Wichita police officer was injured by a negligent driver while riding his motorcycle to work. As a result of the accident, the officer was required to have one of his legs amputated.

32. Because of the accident, Chief of Police Watson terminated the practice of allowing motorcycle officers to take their vehicles to and from work in October of 1997. (Pet. Ex. 2, p. 33-35; Watson Depo. Ex. #4, p. 8).

33. Chief Watson cited safety as the reason for terminating the above practice. (Landen Depo. Ex. #1 at 34; Moses Depo. Ex. #2 at 13, 22; Watson Depo. Ex. #4 at 8).

34. Chief Watson considers the decision a management right. (Watson Depo. Ex. #4 at 29).

35. Chief Watson made arrangements for all Department motorcycles to be stored at a City owned garage Rounds and Porter. (Watson Depo. Ex. #4).

36. The Police Chief, the Deputy Chief and the head of the motorcycle unit believe that take-home vehicles are of monetary benefit to officers. (Tr. p. 58, 99; Landen Depo. Ex. 1, p. 20; Moses Depo. Ex. 2, pg. 39 and 40; Watson Depo. Ex. 4, p. 20).

37. On October 22, 1997, F.O.P. Lodge Officer Lenny Rose filed a formal grievance with Terri Moses, Deputy Chief of Police. Deputy Chief Moses denied the Lodge's formal grievance stating whether to allow take-home vehicles was a management right and was not a "term and condition of employment". (Pet. Ex. #1).

38. On November 11, 1997, the F.O.P filed a grievance with the Employee Relations Officer. The Employee Relations Officer denied the grievance stating that it did not have an obligation to bargain the matter and thus, the issue was not subject to further appeal. (Pet. Ex. #8).

39. On December 5, 1997, the F.O.P. requested the establishment of a grievance board to hear the take home motorcycle vehicle policy issue. On December 15, 1997, the Employee Relations Officer denied the request stating that the issue was not grievable. (Pet. Ex. #9).

40. On December 30, 1997, the F.O.P. filed a prohibited practice complaint with the Public Employee Relations Board alleging the City violated K.S.A. 75-4333(b)(1)(5) by unilaterally eliminating the policy of allowing motorcycle unit officers to drive their motorcycles to and from work and home if they so desired. In their prohibited practice complaint, the F.O.P. further alleges that the City violated K.S.A. 75-4333(b)(1) and (5) by failing to comply with the contractual grievance procedure outlined in the parties' Memorandum of Agreement.

CONCLUSIONS OF LAW

The Public Employer-Employee Relations Act (PEERA) requires that the employer and the bargaining unit are to negotiate about conditions of employment. K.S.A. 75-4327(b). Statutorily, conditions of employment include salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, wearing apparel, premium pay for overtime,

shift differential pay, jury duty and grievance procedures. K.S.A. 75-4322(t). Case law has expanded the definition of "conditions of employment" to include items significantly related to those items listed in the statute. *Kansas Board of Regents v. Pittsburg State University Chapter of K-NEA* 233 Kan. 801, 819, 667 P. 2d 306(1983).

There is no dispute between the parties that allowing the officers to ride their motorcycles to and from work resulted in a monetary benefits for the officers. In fact, Chief Watson himself testified he believes the practice resulted in a monetary benefit for the officers. The F.O.P. argues that because the take-home policy resulted in a monetary benefits for the officers, it is an ancillary "term and condition" of employment and therefore is subject to negotiation and grievable.

However PEERA mandates that employers are guaranteed "certain management rights" including the right to direct the work of its employees, the right to maintain the efficiency of its governmental operations, the right *to determine the methods, means and personnel by which operations are to be carried on*. K.S.A. 75-4326(a), (d), and (g) (Emphasis added). When the unit was created in 1982, the Department gave training courses to the officers including how to maintain the vehicle, how to adjust the handle bars etc. The employer in effect, was using its managerial discretion to obtain some control over how the motorcycles were ridden, who was going to ride them and how they were to be maintained. In other words, the Department was using its own methods, means and personnel to maintain efficient operations.

Applying the same reasoning, it should be noted that the Department did place two conditions on the motorcycle unit officers when they allowed the officers to drive their motorcycles to and from work. If an officer was going to take a motorcycle home, he 1) must live within the city

limits and 2) must store the vehicle in a secured facility. The two restrictions again reflect that the City, as was their discretion, controlled and dictated to the officers how and where the motorcycles could be ridden after hours.

Officers were initially allowed to take home their motorcycles only because the Department did not have sufficient space in which to store everyone's motorcycle. Again, the Department, in its discretion, allowed the officers to drive their motorcycles home. Unarguably, the policy resulted in a monetary benefit for the officers. However the benefit at no time was guaranteed. The benefit *resulted* because the Department was ill equipped to store the vehicles. At no time did the Department ever actively set in policy, either formally or informally, that if an officer was assigned a motorcycle, he would be guaranteed to ride the motorcycle to and from home. In other words, the benefit accrued only because the Department had inadequate storage. The Department's inadequacies resulting in a monetary benefit for the unit's officers does not equate to a "term and condition of employment". Once Chief Watson found adequate storage, he had the discretion to change the policy and keep the motorcycles in a central location.

The F.O.P. argues in the alternative that because officers were allowed to ride their motorcycles to and from work from 1982 through 1997, the practice became a "continued past practice of employment" and therefore, was an term and condition of employment.

For a past practice to be binding, it must be unequivocal, clearly enunciated and acted upon and readily ascertainable. (Pet. Ex. #10, p. 11, citing *Arizona Aluminum Co.*, 78 L.A. 766 (Sass 1982).

Captain Landen and Chief Watson both testified that sometime in 1989 or early 1990, the

Department issued a mandate that disallowed the take-home use of motorcycles and the motorcycles were housed in a central locality. Thus, at one point, the right to drive one's motorcycle home at night was eliminated. The practice in fact, was interrupted and was not "clear" at all times.

Although in the past, supervisors over the motorcycle unit may have used the take-home policy as an "incentive" when trying to obtain quality officers for the motorcycle unit, the supervisor(s) had no authority to do so. Chief Watson testified that at no time was he aware that potential motorcycle unit officers were being promised take-home status if they joined the unit. Thus, if promises were made by random supervisor(s), such promises were not authorized by the Department. To enunciate is to "state definitively". Merriam-Webster Concise Office Dictionary p. 172-173 (1991). It cannot be construed that the practice was "enunciated" simply because a supervisor used it as the proverbial "carrot" when interviewing potential unit members. Moreover, there is no dispute among the parties that positions are "posted" and anyone may apply for a particular position. If recruitment was done by guaranteeing that the applicant would be able to take home his or her motorcycle each night, it was done on an informal basis and without authority. No documentary or testimonial evidence was presented to indicate that the Department ever "enunciated" the policy to the unit's officers.

Police Chief Watson testified that each year, the department head was asked to justify the policy to fiscal management. The justification was often relayed to officers in the department. Thus, officers knew or should have known that the practice was under scrutiny and could have been removed at any time. Again, the policy was not "enunciated".

The Petitioner presented only hearsay evidence that an officer had left the unit because the policy was changed. The evidence is insufficient to establish that officers "relied" on the take home policy when applying for or accepting a motorcycle unit position.

Third, there is no dispute between the parties that the Department, for various reasons, removes assigned take home cars from officers for a variety of reasons. As evidenced by City Regulation 803, the City has the discretion as to which employee receives a take-home vehicle and which employee does not. Other than the "eliteness" of the motorcycle unit, the Petitioner produced no evidence to indicate that the take home status of cars was any different than the take-home status of motorcycles. Cars are routinely assigned to officers who may have to be "called out". Thus, the particular officers also are in a somewhat "elite" ranking because they have more responsibility. It does not reason that the Department would have the discretion as to when and to whom to assign cars for take home duty but did not have the same discretion to direct similar operations of the motorcycle unit.

Finally and most persuasively, the Memorandum of Agreement specifically states that items not covered in the agreement will be governed and interpreted by the City's rules and regulations. The policy concerning take-home vehicles and motorcycles are not covered or mentioned in the parties' Memorandum of Agreement. Thus, by virtue of the Agreement itself, the City's Regulation 43 governs the matter. Section 43 specifically states that department heads will have the sole discretion as to whether to assign vehicles or to allow officers to take home vehicles home at night.

Unarguably, allowing officers to drive their motorcycles to and from home and work was a monetary benefit to the officers. The officers neither had to pay for gas, compensate for wear and

tear on their personal vehicles or be responsible for maintenance costs on the same. However allowing officers to ride their motorcycles to and from work was a benefit or a "perk". The take home policy was not a recognized "term and condition of employment". The City committed no prohibited practice by unilaterally changing the policy that allowed officers to drive their motorcycles to and from work.

In conclusion, it is irrelevant whether Chief Watson changed the take-home policy because of safety concerns or because he wanted to warehouse the motorcycles in one location or because the City thought it was fiscally prudent to disallow officers from riding the motorcycles to and from work. According to the parties own Memorandum of Agreement and PEERA, the policy falls under "managerial right or discretion" and the City was not obligated to meet and confer on the issue before changing the policy.

ISSUE TWO

As no prohibited practice was found and the Department had the authority to unilaterally change the take-home policy, the officers are not entitled to compensation or "back pay" or additional compensation after the policy was changed in 1997.

ISSUE THREE

A grievance is defined by the Memorandum of Agreement as "any dispute involving the application or alleged violation of any provision of this Agreement". The issue of take-home vehicles is not referenced at all in the Memorandum of Agreement. Thus, there is no "violation of any provision of the Agreement". In other words, in order for an issue to be grievable, the issue must be specifically referenced in the parties' Memorandum of Agreement. Accordingly, the City

is not obligated to notice up a formal grievance hearing before the grievance board. The City committed no prohibited practice in violation of K.S.A 75-4333(b)(1) or (5).

ORDER

IT IS THEREFORE ADJUDGED AND DECREED

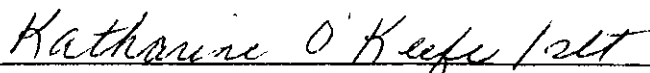
(1) The City did not engage in a prohibited practice pursuant to K.S.A. 75-4333(b)(1) or (5). The take-home status of the City's motorcycles was not a recognized condition of employment and therefore, the City, under management discretion, had the authority to change the policy.

(2) Because the City committed no prohibited practice, the F.O.P.'s request for compensation to officers who were no longer allowed to ride their motorcycles to and from home after the policy change is denied.

(3) The City did not commit a prohibited practice in violation of K.S.A. 75-4333(b)(1) or (5) when it refused the F.O.P.'s request for a formal grievance hearing before the Grievance Board established in the parties' Memorandum of Agreement.

IT IS SO ORDERED.

Dated this 14th day of June, 2000.



Katharine O'Keefe, Presiding Officer
Public Employee Relations Board
1430 SW Topeka Blvd. - 3rd Fl.
Topeka, KS 66612-1853
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(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. on July 3, 2000** addressed to: Public Employee Relations Board & Labor Relations, 1430 SW Topeka Blvd., Topeka, KS 66612-1853.

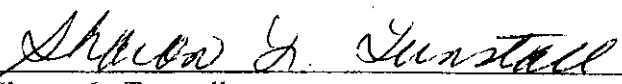
CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Office Manager, Public Employee Relations Board, of the Kansas Department of Human Resources, hereby certify that on the **15th** day of **June, 2000**, a true and correct copy of the above and foregoing Initial Order 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:

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Sharon L. Tunstall

And to the member of the PERB on 3rd, July, 2000.



Sharon L. Tunstall