

STATE OF KANSAS
PUBLIC EMPLOYEE RELATIONS BOARD
DEPARTMENT OF HUMAN RESOURCES

Local 1357, Service and Maintenance Unit,
American Federation of State, County and
Municipal Employees, AFL-CIO

vs.

Emporia State University, Department of
Administration, State of Kansas

CASE NO: 75-CAE-6-1979

O R D E R

Comes now this 18th day of February, 1980 the above captioned complaint against employer for determination. The hearing having been conducted by Jerry Powell, the duly appointed hearing examiner for the Public Employee Relations Board.

Complainant appears by and through its counsel, Mr. Terry Watson,
Attorney at Law.

Respondent appears by and through its counsel, Mr. John Martin,
Attorney at Law.

PROCEEDINGS BEFORE THE BOARD

1. A complaint against employer was filed on or about May 29, 1979 by Roger Siegal, International Representative of the American Federation of State, County and Municipal Employees (AFSCME) against Emporia State University alleging a violation of K.S.A. 75-4333 (5).
2. Answer received June 11, 1979 from Emporia State University.
3. The original complaint was amended July 23, 1979 by AFSCME.
4. Emporia State University filed their answer to the amended complaint with the Public Employee Relations Board on August 10, 1979.
5. All parties being first properly notified, the hearing was conducted before Jerry Powell on August 21, 1979 in the conference room of the Department of Human Resources, 610 W. 10th Street, Topeka, Kansas.
6. Memorandum in support of complaint filed by AFSCME counsel with the Public Employee Relations Board on September 7, 1979.
7. Memorandum of response filed by Emporia State University Counsel with the Public Employee Relations Board on September 19, 1979.
8. Reply memorandum in support of complaint filed by AFSCME counsel with the Public Employee Relations Board on October 2, 1979.

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FINDING OF FACTS

1. That Local 1357 AFSCME was certified by the Public Employee Relations Board as the exclusive representative for the Service and Maintenance unit at Emporia State University on September 26, 1973.

2. That bargaining sessions between the parties were held on February 15th, February 28th, and March 29th.

3. That the parties did "discuss" grievance procedure, pay differential, and overtime proposals to some limited extent during the three bargaining sessions. (Complainant's Exhibit A, B, C, D, E, F, G)

4. That the Secretary of Administration or his or her designee serves as the head of a team of persons designated to serve as a representative of the public agency in meet and confer sessions. (K.S.A. 75-4322 (h) and T-66)

5. That Mr. Darrell Hoffman serves as the designee of the Secretary of Administration for meet and confer purposes. (T-66)

6. That Mr. Hoffman was present at the meet and confer sessions between complainant and respondent except for the session conducted on February 15th. (T-66)

7. That Mr. Hoffman acting as designee of the Secretary does not believe it appropriate to make recommendations to the Secretary as a result of meet and confer proceedings since he (Mr. Hoffman) represents the Secretary in such meet and confer proceedings. (T-71)

8. That respondent believes that the meet and confer process is not a vehicle for bringing about changes in statutory or regulation matters. (T-67)

9. That respondent believes to utilize any memorandum of agreement resulting from the meet and confer process to recommend a change in statute or a regulation would constitute bad faith. (T-77)

10. That a proposal concerning the grievance procedure was presented to the state team by the union committee. (T-23) (Complainant's Exhibit C and D)

11. That proposals concerning overtime and pay differential were presented to the state team by the union committee. (Complainant's Exhibit C and D)

12. That the state team will only negotiate subjects covered by the statute or administrative rule and regulation to the extent the statute or rule and regulation leaves discretion as to how it applies to a particular agency. (T-97)

13. That of the 15 mandatory subjects set out at K.S.A. 75-4322 (t) the state team will only negotiate on wearing apparel and grievance procedure in terms of putting such items in the memorandum of agreement. (T-98)

14. That the designee of the Secretary of Administration concedes that subjects governed by administrative rule and regulation could be placed in a memorandum of agreement. (T-78)

15. That there are approximately 54 appropriate units of state classified employees in Kansas. (T-69)

16. That there are approximately 29 appropriate units of classified state employees that have organized. (T-69 and 71)

17. That there are regulations adopted by the Secretary of Administration governing overtime. (T-70-71)

18. That there are regulations adopted by the Secretary of Administration governing out-of-classified pay. (T-69-70)

19. That the regulations referred to in finding numbers 17 and 18 deal uniformly with all classified employees. (T-70)

20. That the designee of the Secretary of the Department of Administration is not aware of any administrative rules or regulations that deal specifically with employees of a single unit. (T-70)

CONCLUSIONS - DISCUSSIONS - RECOMMENDATIONS

The instant case raises two basic questions:

1. What are the employers obligations to meet and confer with recognized or certified employee organizations?

2. What may be included within a memorandum of agreement?

Once these questions are answered we can analyze respondent's behavior in the Emporia case to determine good faith or the lack thereof.

The Public Employee Relations Board has previously found that an employer is bound by statute to engage in good faith, give and take negotiation over terms and conditions of employment. (See CAE 1-1978 Topeka Printing Pressmen) We must now consider an employer's obligation to meet and confer over terms and conditions of employment set by statute or by administrative rule and regulation. This obligation as noted above can be separated into two categories including:

- a. Obligation of the representative of public agency
- b. Obligation of the governing body

That is, the statute provides for certain actions by the representative of the public agency and certain actions by the governing body. It is essential then that we clearly understand who the actors are and how they are statutorially instructed to act.

Throughout the act (K.S.A. 75-4321 et. seq.) one finds references to the "public employer", "public agency", "governing body", "representative of the public agency", "legislature", and "state agency". These terms are all defined at K.S.A. 75-4322, as:

"(f) "Public agency" or "public employer" means every governmental subdivision, including any county, township, city, school district,

special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies.

(g) "Governing Body" means the legislative body, policy board or other authority of the public employer possessing legislative or policymaking responsibilities pursuant to the constitution or laws of this state.

(h) "Representative of the public agency" means... In the case of the state of Kansas and its state agencies, "representative of the public employer means a team of persons, the head of which shall be a person designated by the secretary of administration and the heads of the state agency or state agencies involved or one person designated by each such state agency head.

(w) "Legislature" means the legislature of the state of Kansas".

One must keep in mind this difference between the governing body and the representative of the public agency. The legislature was very careful to identify each and to specify certain actions for each. Now that we have set the stage by identifying the actors let us turn our attention to the legislative directives to each.

What is the employers "meet and confer in good faith obligation" with regard to subjects which are set by statute or by administrative rule and regulation?

There are numerous sections of the Public Employer-Employee Relations Act that are germane to this question. Each section must be considered in light of all other sections. Consider first complainant's allegations of a violation of K.S.A. 75-4333

(b) (5). That statute states:

"It shall be prohibited practice for a public employer or its designated representative willfully to:

(5) Refuse to meet and confer in good faith with representative of recognized employee organizations as required in section 7 (75-4327) of this act;"

Meet and confer in good faith is defined at K.S.A. 75-4322 (m) as:

"Meet and confer in good faith" is the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment."

One must note that the representative of the public employer incurs the obligation to meet and confer in good faith. Keeping in mind the definition of representative

of a public agency consider the definition of conditions of employment as set out at K.S.A. 75-4322 (t):

"Conditions of employment" means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance 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.

A list of subjects for negotiations set out by statute are known as mandatory subjects of negotiation. Both employers and employee organizations are required to meet and confer in good faith over mandatory subjects in the event one party or the other requests such sessions. A majority of the subjects listed in the above definition are governed by statute or by administrative rule and regulations. Did the legislature then err in listing such subjects or did the legislature recognize potential problems in regard to these items and provide a procedure or "vehicle" for resolving any problems?

Since this definition in and of itself does not clearly state the legislative intent with regard to the State's obligation to meet and confer over subjects set by law or administrative rule and regulation one must look to other sections of the act. The obligation referred to in K.S.A. 75-4333 (b) (5) is also set out at K.S.A. 75-4327 (b):

"Where an employee organization has been certified by the Board as representing a majority of the employees in an appropriate unit, or 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, and may enter into a memorandum of agreement with such recognized employee organization."

Since this section refers to the appropriate employer one must go back to the definition of meet and confer in good faith in order to determine just who on behalf of the appropriate employer is obligated to meet and confer with the recognized employee organization. As cited earlier at K.S.A. 75-4322 (m) the representative of the public agency incurs that obligation. K.S.A. 75-4327 (b) provides that the representative of the public employer and the recognized employee organization may enter into an agreement. That is, nothing in the act requires that the parties agree or enter into a memorandum of agreement. K.S.A. 75-4322 (n) defines memorandum

of agreement as:

(n) "Memorandum of agreement" means a written memorandum of understanding arrived at by the representative of the public agency and a recognized employee organization which may be presented to the governing body of the public employer or its statutory representative and to the membership of such organization for appropriate action."

It is important to consider for a moment the use of the term "memorandum of agreement". The use of this term "agreement" seems to connote some binding document. One must once again keep in mind the party incurring the obligation to attempt to arrive at a memorandum of agreement. By definition the representative of the public agency cannot bind the agency. With this thought in mind please note the definition of "memorandum of agreement". The definition states a memorandum of agreement is "a written memorandum of understanding". The examiner believes that the use of the term understanding was an attempt by the legislature to indicate to the parties that agreement at this point was not binding. In fact K.S.A. 75-4330 (c) provides a procedure for making such memorandums of understanding binding on the state of Kansas. Perhaps the process could more easily be understood had the term memorandum of understanding been utilized throughout the act until such time as the governing body acts to bind a public agency. At that point the memorandum of understanding would become a memorandum of agreement. The memorandum of understanding presented to the governing body simply contains various recommendations, if you will, arrived at by the representatives of the public agency and the employee organization. The memorandum of understanding allows for agency input with regard to conditions of employment as well as input from the employees themselves.

If the representatives of the public agency and the recognized employee organization reach agreement they may present such agreement to the governing body. The use of the word may seems to indicate that no obligation is incurred to present the agreement to the governing body. Logic and K.S.A. 75-4330 (c) dictates, however, that if the representatives of the public agency and the recognized organization do reach agreement some action is required to make the agreement binding. Since the representatives of the public agency cannot bind a public agency the governing body must act before the provisions of the memorandum of understanding become effective. For the sake of argument let us assume that the representative of the public agency reaches agreement with an organization but refuses to submit such agreement to the governing body. As a result of this inaction many of the provisions of the agreement would never become effective. Is this not bad faith? It appears that the legislature

was aware of such a possibility arising, therefore, K.S.A. 75-4331 states in part:

"If agreement is reached by the representatives of the public agency and the recognized employee organization, they jointly shall prepare a memorandum of understanding and, within fourteen (14) days, present it to the appropriate governing body or authority for determination."

Again note the use of the term "memorandum of understanding". The examiner then interprets the language in K.S.A. 75-4327 (b) as obligating the representative of public agencies to meet and confer in good faith but does not require such representatives to reach agreement and in the event they do not agree they obviously do not enter into a memorandum of agreement. K.S.A. 75-4331, however, does require such representative of the public agency to enter into a written memorandum of agreement in the event the parties do reach agreement. The written memorandum of understanding must then be presented to the appropriate governing body for determination. One must now consider what the legislature intended by the language "present it to the appropriate governing body or authority for determination". Please note the use of the term "governing body" at this particular point in the process. The legislative intent with regard to the obligation of the governing body is found at K.S.A. 75-4331 which states in part:

"If a settlement is reached with an employee organization and the governing body or authority, the governing body or authority shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum, the matter shall be returned to the parties for further deliberation.

The language contemplates that agreement may be reached by the representatives of the public agency and the recognized employee organization and, if so, that the governing body may approve or reject such agreement. If the governing body approves the agreement they are then directed to take appropriate action to implement the agreement by passing a law or promulgating a rule or regulation. The legislature intended to obligate state agencies to meet and confer over subjects requiring legislation or changes in administrative rules and regulations or such language would not be included within the act. This reasoning is further borne out by the language found at K.S.A. 75-4330 (c) which states:

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

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

It would appear then that the legislature was very much aware that many of the subjects enumerated at K.S.A. 75-4322 (t) would require passage of legislation or changes in existing administrative rules and regulations for implementation, therefore they provided an orderly means to do so. The legislature set out a procedure whereby recognized employee organizations could be assured of a forum, via and meet and confer process, to present their ideas, recommendations, or proposals to the governing body without violating the provisions of K.S.A. 75-4333 (d).

The representative of the public agency has the obligation to meet and confer or to engage in good faith give and take negotiation over all subjects defined at K.S.A. 75-4322 (t) regardless of administrative rules and regulations. Such representative must recognize that they are not authorized to change statutes, only to endeavor to reach agreement regarding terms and conditions which are not specifically precluded by state statute. Mandatory subjects requiring legislation may be included so long as such required legislation is not in conflict with existing legislation. The governing body, that is the Governor, Secretary of Administration, the Legislature, or other authority possessing legislative responsibilities, then must act before such provisions become effective. Any provisions in a memorandum of agreement requiring legislation or an administrative rule and regulation change is meaningless unless the appropriate governing body grants its approval.

Now let us consider the question of what may be included within a memorandum of agreement. K.S.A. 75-4330 states in part:

"The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to (1) any subject preempted by federal or state law..."

There is a conspicuous absence of any mention of matters set by administrative rule and regulations in this subsection. Rather subsection (c) of this section sets out a procedure whereby any matter set by rules and regulations of the Secretary of Administration or the state pay plan itself can be amended and become effective

with the approval of the State Finance Council. The examiner is aware of recent litigation which perhaps removes the Finance Council from the procedure, however, either the Governor or the Secretary of Administration must now have the authority to take such action. Subsection (c) further provides for legislative action on matters which require such action prior to these matters being implemented. Therefore it is the examiner's opinion that any matter relating to a condition of employment may, if agreement is reached between the parties, be included within a memorandum of agreement unless such matter is specifically pre-empted by state or federal law.

By way of example let us consider the subjects of salaries and wages. K.S.A. 75-4322 (t) lists salaries and wages as a mandatory subject of negotiations but K.S.A. 75-4330 states that the memorandum of agreement cannot contain any matter pre-empted by state law. K.S.A. 75-2938 (4) states:

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

State law has then pre-empted any negotiations over who establishes the pay plan but is silent with regard to the provisions of said plan. Therefore, a memorandum of agreement may legally contain amendments to the pay plan as agreed upon between the representative of the public agency and the employee organization.

The memorandum of agreement, containing such amendments, would then be presented to the director of personnel services for adoption, modification or rejection after consultation with the secretary of administration and the director of the budget. If adopted, the resulting amendments are still subject to final approval of the Governor. The representative of the public agency, through this process, is not altering matters set by statute but rather recommending changes in the provisions of the pay plan based upon the mutual recognition of the need for such changes arrived at during the meet and confer process.

Overtime provisions and out of class pay are considered by this examiner to fall within the categories of wages, salaries, and hours, thus they are mandatory subjects of negotiation. That is, the representatives of the public agency are required

to enter into good faith give and take negotiations over these subjects in an effort to reach agreement with a recognized employee organization. To refuse such negotiations because the subjects are governed by rule and regulation is to commit an act of bad faith. Certainly nothing in the act requires the representatives of the public agency to reach agreement. Rather the obligation is that the representatives of the public agency personally meet and confer to freely exchange information, opinions and proposals. In the event agreement is not reached an impasse then exists. K.S.A. 75-4332 provides procedures for resolving such an impasse. In the event the representative of the public agency and the recognized employee organization cannot resolve the impasse after mediation and fact finding the employee organization is at least assured that the governing body will be made aware of its position.

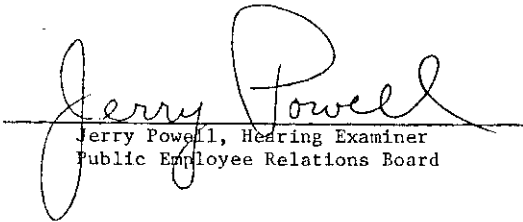
Grievance procedure is listed at K.S.A. 75-4322 (t) as a mandatory subject of negotiation. Respondent contends that demotions, dismissals, and suspensions must be handled in accordance with civil service rules and regulations and in accordance with state statute. Thus, respondent contends, the state team is precluded from negotiating changes in procedures regarding demotion, suspension or dismissal. The examiner has previously stated that the existence of administrative rules and regulations does not preclude good faith negotiations over mandatory subjects. State statute does, however, preclude such negotiations if the subject is specifically pre-empted by the statute. K.S.A. 75-2949 mandates certain actions to an appointing authority concerning demotion, suspension or dismissal. The statute does not dictate that other procedures cannot be utilized to supplement the statutory procedure. For example, the appointing authority and the director of personnel services could agree to arbitrate a proposed dismissal, demotion or suspension and in fact withdraw a proposed action pursuant to an arbitration award. K.S.A. 75-2949 (2) provides the authority for the above action. The examiner certainly understands the need for statutes such as K.S.A. 75-2949. He is convinced, however, that the legislature did not intend to draft a law which would preclude employers and employees from agreeing upon supplementary procedures which they perceive to enhance fairness and equality in the civil service system.

An argument can be made that it would be an impossible task to negotiate conditions of employment governed by rules and regulations because of the number of appropriate units of classified state employees. A great many of these units contain the same classified positions as other units. Considering the states contention that conditions of employment must be uniformly applicable for all similar classified positions, how does the state then negotiate in good faith? It must be remembered that the meet and confer process itself is the responsibility of the

representative of the public agency. The makeup of the team of persons designated by statute to meet and confer changes, in part, during the negotiating process with various appropriate units. This change affords the opportunity to various public managers to become involved in the process itself. The chairman of the team remains constant thus providing a measure of continuity to the process. The appropriate governing body must then decide which, if any, of the memorandums of understanding will be implemented. The burden placed on the state negotiating team(s) can then be considered "difficult" at most.

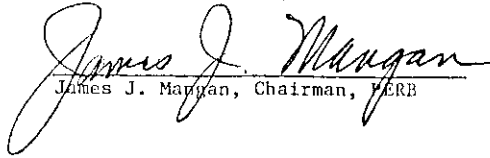
It is obvious from the testimony of Mr. Hoffman who serves as a member of the team "representative of the public agency" and minutes of the three meet and confer sessions that respondent did not engage in good faith give and take negotiations in an effort or endeavor to reach agreement on defined conditions of employment which are set by statute, or by administrative rules and regulations. The position of respondent rather reflects a desire to discuss such conditions of employment only to the extent that such conditions are not set by statute or administrative rule and regulation. Respondent believes there to be other vehicles allowing employee organizations to make known proposals with regard to any condition of employment set by statute or administrative rule and regulation. This examiner cannot conceive of any vehicle for the employee organization to make their position known, other than the meet and confer process, which would not be a political vehicle and thus prohibited by law.

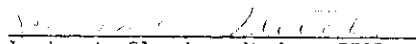
It is therefore the recommendation of the examiner that the Public Employee Relations Board sustain the charge of the union and find respondent guilty of a violation of K.S.A. 75-4333 (b) (5). Further respondent should cease and desist from such prohibitive practices and meet and confer in good faith over all subjects listed at K.S.A. 75-4322 (t).



Jerry Powell, Hearing Examiner
Public Employee Relations Board

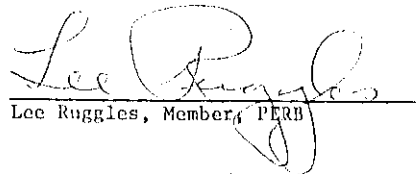
The hearing examiner's report and recommended findings are hereby approved and adopted as a final order of the Board.

IT IS SO ORDERED THIS 18th DAY OF February 1980, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.


James J. Mangano, Chairman, PERB


Louisa A. Fletcher, Member, PERB


Urbano L. Perez, Member, PERB


Lee Ruggles, Member, PERB

ABSENT
Art Veach, Member, PERB