BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of Fire Fighters, Local 64, Petitioner,	)	
v.	)	Case No. 75-CAE-9-1993
City of Kansas City, Kansas (Fire Department), Respondent.	)	

Pursuant to K.S.A. 75-4321 *et seq.* and K.S.A. 77-501 *et seq.*

INITIAL ORDER

On the 26th day of March, 1993, the above-captioned prohibited practice complaint came on for formal hearing pursuant to Kansas Statutes Annotated (K.S.A.) 75-4334 before presiding officer Monty Bertelli. Due to reassignment, Susan L. Hazlett has been appointed as a substitute presiding officer in this matter.

The Petitioner, International Association of Fire Fighters, Local 64 (hereinafter "I.A.F.F."), appeared by and through counsel, James R. Waers. Witnesses on behalf of the Petitioner were William Robert Bassler III, Brian P. Hachinsky, Mark Bishop, and Robert Wing. The Respondent, City of Kansas City, Kansas Fire Department (hereinafter the "City"), appeared by and through counsel, Daniel B. Denk. Witnesses on behalf of the Respondent were Robert Beery, James W. Cole, Granville O'Neal, Wilbert L. Caton, John Roberson, James W. Ryan, and Robert Horn.

75-CAE-9-1993-F

ISSUE PRESENTED

WHETHER OR NOT THE EMPLOYER, THE CITY OF KANSAS CITY, KANSAS FIRE DEPARTMENT, WILLFULLY INTERFERED WITH, RESTRAINED AND COERCED PUBLIC EMPLOYEES IN THE UNION BARGAINING UNIT FROM EXERCISING THEIR STATUTORY RIGHTS GRANTED IN K.S.A. 75-4324, IN VIOLATION OF K.S.A. 75-4333(b)(1).

FINDINGS OF FACT

1. Petitioner is an employee organization, as defined by K.S.A. 75-4322(i). I.A.F.F. is the exclusive bargaining representative, as defined by K.S.A. 1995 75-4322(j), for all sworn employees of the Kansas City, Kansas Fire Department of the rank of Captain or equivalent and below, except for confidential and supervisory employees who are excluded. (Respondent's Posthearing Brief; Joint Exhibit No.1)

2. Respondent is a public agency or employer, as defined by K.S.A. 1995 Supp. 75-4322(f), which has elected to come under the provisions of the Kansas Public Employer-Employee Relations Act (hereinafter "PEERA") in accordance with K.S.A. 1995 Supp. 75-4321(c). (Parties' Posthearing Briefs)

3. The Memoranda of Agreement relevant to this matter are the 1989-1991 agreement and the 1992-1994 agreement. (Joint Ex. 1)

4. The Kansas City, Kansas Fire Department is a paramilitary organization with a chain of command, at the time of the filing of this matter, descending from the Chief of the Fire Department, through the Deputy Chief, Operations Chiefs, Battalion Chiefs, Captains, Driver, and Fire Fighters, in that order. (Joint Ex. 1)

5. Article 15 of both the 1989-1991 Memoranda of Agreement and the 1992-1994 Memoranda of Agreement is the same in both agreements and states, in part:

> Whenever the Chief or his designee summons an employee to appear before him for disciplinary action against said employee, a Union representative, if requested by the employee, shall be allowed to accompany said employee, at the time designated by the Department, and to advise him.

At no other location, in the agreements, is the issue of union representation during employee interview sessions mentioned. (Joint Ex. 1; Tr. pp. 140-141)

6. Kansas City, Kansas Fire Department General Order #44, issued on October 27, 1987, was in effect at all relevant times in this matter. The subject of such order was "Fire Department Discipline & Investigations." Part VIII(C)(6) of such order specifically stated:

> Department employees giving statements or being questioned concerning internal matters may not have an attorney or representative present during the interview session.

(City Ex. 1)

7. The parties stipulated that there were three individual members of the bargaining unit that allegedly made requests for union representation during the interview process, specifically, William Robert Basler III, Brian P. Hachinsky, and Mark Bishop. (Tr. p. 7)

8. Basler and Hachinsky, identified in paragraph 7, above, were employed as Fire Fighters for the City and were assigned to the pumper crew at Fire Station No. 1. Bishop, identified in paragraph 7, above, was employed as a Driver for the City and was also assigned to the pumper crew at Fire Station No. 1. (Tr. pp. 8-10, 56-57, 87-88)

9. At the time of the alleged incident in this matter, John Roberson was employed by the

City as Senior District Chief, or acting Operations Chief; Robert Horn was employed by the City as Assistant Chief; Wilbert Caton was employed by the City as Battalion Chief; and James Ryan was employed by the City as Assistant Chief. The interviews in question in this matter were conducted by the aforesaid individuals. Approximately 24 bargaining unit persons were interviewed, commencing on October 27, 1992, and concluding on or about November 5, 1992. (Tr. pp. 200-201, 235, 247, 258, 260-270)

10. Events occurred at the Kansas City, Kansas Fire Headquarters on or about October 21, 1992, which led to disciplinary charges being filed on October 22, 1992, against two bargaining unit members, Michael Quinn and Mark Bishop. (Pet. Ex. 1 and 2)

11. Robert Wing is President of I.A.F.F. Local 64 and has held such position for approximately eight years. According to testimony by Wing, both Quinn and Bishop were allowed union representation in the meeting of October 22, 1992, in which disciplinary action was taken against said employees. Quinn received a suspension until a hearing upon the recommendation of termination, and Bishop received a two-day suspension. (Tr. pp. 129-133)

12. On October 27, 1992, bargaining unit members Basler, Hachinsky and Mark Dailey were asked to report to the office of Chief Horn, and were individually interviewed. Also present in Chief Horn's office were Chief Roberson and Chief Ryan. (Tr. pp. 15, 260; Resp. Posthearing Brief p. 9)

13. During the interview of Basler in Chief Horn's office on October 27, 1992, Basler requested union representation, which was denied. Chief Horn told Basler that they were investigating the events which resulted in the discipline of Quinn and Bishop. (Tr. pp. 15-17,

259-260, 265)

14. During the interview of Hachinsky in Chief Horn's office on October 27, 1992, Hachinsky requested union representation, which was denied. Chief Horn told Hachinsky that they were investigating the events which resulted in the discipline of Quinn and Bishop. (Tr. pp. 62, 259-260, 265)

15. Basler was interviewed a second time on November 5, 1992, by Chief Horn and Chief Caton regarding the same matter. (Tr. pp. 18-19; Resp. Posthearing Brief p. 11)

16. Bishop was interviewed on or about November 5, 1992, by Chief Horn and Chief Caton in Chief Horn's office. During such interview, Bishop asked for union representation, which was denied. During Basler's second interview on the same date, Basler also asked for union representation, which was denied. (Tr. 31, 89-92, 99)

17. During the interview of Bishop, Chief Horn asked Bishop questions in regard to a phone call with Mike Quinn and told Bishop the interview was for investigation purposes. Chief Horn advised Bishop that nothing Bishop said could result in discipline, and that it was a fact-finding hearing. (Tr. pp. 91, 98-99, 268)

18. Basler, Hachinsky and Bishop understood that they were under an obligation to obey a direct order and to answer posed questions truthfully and if they did not do so, they may be subject to discipline. (Tr. 32-33, 81-21, 103-104)

19. At the conclusion of the interviews, Basler and Hachinsky were asked to place in their own handwriting what they observed on October 21, 1992. (Tr.pp.18, 63; Resp. Posthearing Brief p. 9)

20. Neither Baslor nor Hachinsky received any discipline as a result of either the October 27 interview or the November 5 interview. Bishop did not receive any additional discipline as a result of the November 5 interview. (Tr.pp. 34,72, 111, 266)

21. After Basler was interviewed on October 27, and prior to putting a statement in writing, Basler phoned Woody Cole, IAFF Local 64 executive committee member, on that same date. Cole advised him not to refuse a direct order, and would call him back. Later that day, Bob Wing advised Basler that he had talked to Chief Ryan, and that "as long as [they] or any of the other people that had been called in were not in any trouble or could not get in any trouble, that it was basically okay what had happened..." Hachinsky was present and heard Wing's aforesaid advice, but had already given his written statement to Chief Horn. (Tr.pp. 26-28, 72)

22. At each interview on or about October 27, 1992, Chief Horn also advised each employee being interviewed that they were not entitled to union representation because it was just a fact-finding interview, and the interviewee was not under investigation and would not be subject to discipline as a result of the interview. Chief Horn also gave each of the employees a direct order to answer the questions and requested a written statement from each interviewee. (Tr.pp. 23-25, 44, 72, 237-243, 248-252)

CONCLUSIONS OF LAW

This prohibited practice charge was filed with the Public Employee Relations Board (hereinafter "PERB") on November 13, 1992, alleging violation of K.S.A. 75-4333(a) and (b)(1), which reads:

> (a) The commission of any prohibited practice, as defined in this section, among other actions, shall constitute evidence of bad faith in meet and confer proceedings.
> (b) It shall be a prohibited practice for a public employer or its designated representative willfully to:
> (1) Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324; ...

K.S.A. 75-4324 reads in pertinent part:

> Public employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment...

Both parties in this case liberally cite federal decisions made under the National Labor Relations Act (hereinafter "NLRA") and prior PERB administrative decisions made under the PEERA. The Petitioner bases its case almost entirely on *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1974), a federal decision which held that union members have the right to insist upon the presence of a union representative at an interview which the employee "reasonably believes may result in disciplinary action." 420 U.S. at 258.

The City correctly states, in their post-hearing brief, that PERB cannot treat NLRB decisions or federal court decisions as binding or controlling precedent, citing K.S.A. 75-4333(e), which provides:

> In the application and construction of this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent.

Furthermore, the Kansas Supreme Court has recently cautioned against the use of federal

decisions in public employment labor disputes. *See City of Wichita v. Public Employee Relations Bd.*, 259 Kan. 628 (1996). In that case, the Supreme Court stated, "The facts herein illustrate the wisdom of not relying on NLRA cases in deciding PEERA issues," and cited K.S.A. 75-4321(a)(4) as the policy behind PEERA:

> There neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationships arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions.

The Respondent also cites PERB Case No. 75-CAE-8-1990, *Service Employees Union Local 513 v. City of Hays* as controlling precedent in this matter. It is a well-established principle that the "*doctrines of ... stare decisis* [is] not generally applicable to administrative determinations." *Coggins v. Public Employee Relations Board*, 2 Kan.App.2d 416, 420, 581 P.2d 817 (1978).

On the other hand, absent any controlling state law in this matter, federal decisions and prior PERB decisions may be cited as possible persuasive authority. In *Kansas Association of Public Employees v. Public Services Employees Union*, 218 Kan. 509 (1976), the Kansas Supreme Court cited K.S.A. 75-4333(e), stating that PEERA "points to the 'fundamental distinctions' between private and public employment and admonishes us that 'no body of federal or state law...shall be regarded as binding or controlling precedent.'" That Court, nevertheless, determined that federal cases could be applicable in that matter because it involved a "rule of fundamental fair play, and should be universally applicable," even though the Court held that "the

facts do not bring the rule into play in [that] case." 218 Kan. At 517. Also *See National Education Association v. Board of Education*, 212 Kan. 741, 749 (1973), in which the Kansas Supreme Court stated that "...some [federal decisions] may have value in areas where the language and philosophy of the acts are analogous." [1] Therefore, use of federal decisions as persuasive authority in PEERA cases will be made with great caution and reserve.[2]

As both parties in this matter have recognized, there is little case law in Kansas interpreting K.S.A. 75-4324, other than the *KAPE v. PERB* case cited above. That case, however, involved a representation election among public employees and the question "was whether any conduct of [the union] could be said to have interfered with, restrained or coerced those voting at the representation election in the free and intelligent exercise of their choice of representative," referring to K.S.A. 75-4333(c)(1). *KAPE v. PERB,* 218 Kan. at 511. Since the issue in the instant case is whether or not the rights granted to public employees in K.S.A. 75-4324 involve the right to union representation in certain types of employee interviews, the *KAPE v. PERB* case is not dispositive of this matter.

With little direction from Kansas law, therefore, an examination is appropriate of whether

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[1]The Kansas Supreme Court in *National Education Association v. Board of Education* also emphasized and recognized the differences between collective negotiations by public employees and collective bargaining as it is established in the private sector, in particular by the NLRA, and because of those differences, federal decisions cannot be regarded as controlling precedent.

[2]The Petitioner in this matter, and the hearing officer in the *City of Hays* PERB case, both made immediate jumps to federal law by concluding that PEERA, specifically K.S.A. 75-4324 and K.S.A. 75-4333(b)(1), are analogous to §7 and §8(a)(1) and (3) of the NLRA, without ever setting out any of the language in the federal act to which they refer.

or not public employees have a "Weingarten-type" right under the PEERA, and whether such right, if it exists, was willfully interfered with in this case. K.S.A. 75-4324 grants, in part, public employees the right to participate in union activities for the purpose of meeting and conferring with the public employer with respect to grievances and conditions of employment. The purpose of the act, itself, is to obligate the parties to negotiate, in good faith, grievance procedures and conditions of employment. Even though the parties negotiated, and entered into negotiated agreements for 1989-91 and 1992-94, I.A.F.F. appears to allege that the City violated employee rights which are fundamental, regardless of what has been explicitly agreed to by the parties.

The right I.A.F.F. is attempting to assert is found in the NLRA, specifically in §7, 29 U.S.C. §157, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities *for the purpose of* collective bargaining *or other mutual aid or protection* and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. [Emphasis added]

§8(a)(1), 29 U.S.C. §158(a)(3) provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." *Weingarten*, 420 U.S. at 252, 253.

I.A.F.F. asserts the aforesaid *Weingarten* right, by contending that §7 and §8 of the NLRA are analogous to K.S.A. 75-4324 and K.S.A. 4333(b)(1), respectively. It is interesting, however, that the exact language from the NLRA is never quoted by I.A.F.F. An examination of the exact

language of §7 of the NLRA reveals a significant dissimilarity with K.S.A. 75-4324, specifically, that language stating "...and to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection...*" [Emphasis added] K.S.A. 75-4324 clearly excludes any language referring to "mutual aid or protection," and only provides for "the right to...participate in the activities...for the purpose of meeting and conferring..." In fact, the Court in *Weingarten* stated that "the right inheres in §7's guarantee of the right of employees to act in concert for mutual aid and protection," the languague specifically excluded from the Kansas statute.

Arguably, public employees may have a right under the PEERA to meet and confer with the public employer in regard to "Weingarten-type" rights as they relate to discipline, just as they have the right to negotiate salaries, and other conditions of employment. In this case, the parties explicitly agreed *twice* to Article 15 of the negotiated agreements, which gives the employees the right to union representation when an employee is summoned to appear before the Chief *for disciplinary action against said employee.* At no other location, in either the 1989-1991 agreement or the 1992-1994 agreement, is the issue of union representation during employee interview sessions mentioned. Since I.A.F.F. is aware of existing law and employee rights, then they surely were also aware of General Order #44 which was in effect at the relevant times in this matter. General Order #44 explicitly stated that:

> Department employees giving statements or being questioned concerning internal matters may not have an attorney or representative present during the interview session.

Clearly, I.A.F.F. only agreed to union representation during *disciplinary* interviews, and left

untouched the right to union representation in employee interviews concerning internal matters. I.A.F.F. argues that *"Weingarten* rights arise from the Supreme Court's interpretation of Section 7 of the National Labor Relations Act...In Kansas this right arises from PEERA. This right to union representation arises from statute and not by contract." I.A.F.F. argues that "violation of *Weingarten* rights constitutes a violation of fundamental employee rights protected by PEERA, not a violation of the Agreement." However, the fundamental employee rights protected by PEERA are the right to *form* a union, the right to *join* a union, and the right to *participate in union activities* for the purpose of *meeting and conferring* with employers with respect to *grievances and conditions of employment*. There is no right under PEERA to participate in concerted activities for the purposes of "mutual aid and protection" which could give rise to a fundamental *Weingarten* right. The parties did meet and confer with respect to discipline, a condition of employment, and more specifically, union representation at disciplinary proceedings.

It can be concluded by the facts in this matter that Chief Horn informed every employee interviewed on October 27, 1992, and November 5, 1992, that the interviews were for investigation purposes of an internal matter and that the employees being interviewed would not be subject to discipline as long as they cooperated and answered questions truthfully. It is also clear that interviews were, in fact, held for investigation purposes of employee Quinn's actions on October 21, 1992, and no disciplinary action was taken against any employee interviewed on those dates as a result of such interviews. *Weingarten* appears to protect employee rights only in investigatory interviews *that the employee reasonably believes will result in disciplinary action against that employee.*

I.A.F.F. argues that Baslor, Hachinsky, and Bishop did not feel completely comfortable or certain that they were not going to be disciplined. However, even the rule in *Weingarten* states that the threshold question is whether or not the employee *reasonably believes* the interview will result in discipline. Applying a "reasonable person" standard, it can be concluded that it was unreasonable for the employees to believe the interview would result in discipline because Chief Horn clearly informed them, in front of witnesses, that the interview *would not* result in discipline. In addition, out of 24 employees interviewed, Baslor, Hachinsky, and Bishop were apparently the only three employees who did not believe Chief Horn.

The City references another federal decision on the issue of public employee interviews, which is also persuasive in this matter. In *NLRB v. United States Postal Service*, 689 F.2d 835 (1982), no violation was found; the Court found that the public employee could not reasonably fear that he would be disciplined when the supervisor doing the interviewing specifically told the employee that the employee was not subject to discipline as a result of the interview, and that the purpose of the interview was not to discipline the employee.

In conclusion, *Weingarten* rights do not exist as a fundamental right under PEERA. On the other hand, "Weingarten-type" rights as they relate to discipline must be negotiated, as are other conditions of employment. The parties did negotiate such rights in this matter. They came to an agreement in 1989 and again in 1992 regarding specifically when a union representative could be present in an employee interview, with General Order #44 having been in place since 1987. Even if the parties had not negotiated the employees' "Weingarten-type" rights, I.A.F.F. has not produced sufficient evidence that the interviews conducted by Chief Horn were

disciplinary interviews or investigatory interviews which the employees reasonably believed would result in discipline against those employees. Therefore, any "Weingarten-type" rights did not attach and were not applicable.

Furthermore, although the Kansas legislature has clearly required that the employer's motive, good faith, negligence, or other relevant factors, be considered by requiring any prohibited practice to have been *willfully* committed, this issue does not need to be reached at this time.

ORDER

IT IS HEREBY ADJUDGED AND DECREED that based upon the facts presented in this case, the Respondent City of Kansas City, Kansas Fire Department, for the reasons set forth above, has not committed a prohibited practice pursuant to K.S.A. 75-4333(b)(1).

IT IS THEREFORE ORDERED that this case is hereby dismissed.

IT IS SO ORDERED this 28th day of October, 1996.

Susan L. Hazlett
Substitute Hearing Officer

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the Hearing Officer's decision in this case. The Initial Order may be reviewed by the Public Employee Relations Board, either on their own motion, or at the request of a party, pursuant to K.S.A. 77-527. The Order will become final fifteen (15) days from the date of service, plus three (3) days for mailing, unless a petition for

review is filed pursuant to K.S.A. 77-526 within that time with the PERB, addressed to: Kansas Department of Human Resources, PERB Office, 1430 SW Topeka Blvd., Topeka, KS 66612.

Certificate of Service

I, hereby certify that on the 31st day of October, 1996, a true and correct copy of the above and foregoing Initial Order was placed in the U.S. Mail, first class, postage prepaid to:

James R. Waers
BLAKE & UHLIG, P.A.
475 New Brotherhood Bldg..
753 State Avenue
Kansas City, Kansas 66101
Attorney for Petitioner

Daniel B. Denk
MCANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Avenue, 4th Floor
P.O. Box 1300
Kansas City, Kansas 66117
Attorney for Respondent

The members of the PERB on this 4th day of November, 1996.

Sharon L. Tunstall