Case No. 38447-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WASHINGTON STATE COUNCIL OF
COUNTY AND CITY EMPLOYEES,
AFSCME COUNCIL 2, AND LOCAL 270 thereof,

Respondents,

v.

CITY OF SPOKANE, a Washington
municipal corporation,

Appellant.

WASHINGTON STATE LABOR COUNCIL, PROFESSIONAL AND TECHNICAL EMPLOYEES LOCAL 17, AND THE WASHINGTON FEDERATION OF STATE EMPLOYEES' AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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I. IDENTITY AND INTERESTS OF AMICI CURIAE

The interests of *Amici Curiae* Washington State Labor Council (WSLC), the Professional and Technical Employees Local 17 (PROTEC17), and the Washington Federation of State Employees (WFSE) are fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Spokane's adoption of Section 40 of its City Charter, a so-called open collective bargaining law, was correctly found to be unconstitutional by the trial court, since the law irreconcilably conflicts with Washington's Public Employees' Collective Bargaining Act (PECBA), among other reasons.

The law directly undermines the PECBA's policy of promoting collective bargaining. Washington courts, the Public Employment Relations Commission (PERC), and authority from across the nation have consistently recognized that public bargaining tends to inhibit the free and open discussion vital to

successful negotiations. Public bargaining discourages compromise, encourages posturing, and politicizes the bargaining process. Local governments may not enact laws that so conflict with the PECBA, which by its own terms overrides any conflicting "statute, ordinance, rule or regulation of any public employer." RCW 41.56.905.

Section 40 also conflicts with the PECBA because it necessarily requires the City to commit an unfair labor practice. The PECBA requires parties to negotiate in good faith, which imposes a duty to meet at reasonable times and places. By refusing to meet except in a public session, a party acts unreasonably and violates its duty to bargain in good faith.

Finally, Section 40 has already led to adverse outcomes, and will continue to do so across the state, by allowing the bargaining process to devolve into a quagmire where the parties are never even able to reach the bargaining table. The PECBA does not allow parties to evade their bargaining obligation by setting unreasonable conditions precedent to bargaining.

III. ARGUMENT

A. Section 40 Conflicts With The PECBA, Which Is Intended To Promote Collective Bargaining.

Section 40 is unlawful because it conflicts with the PECBA, rendering it unconstitutional under Article XI, § 11 of our state Constitution. The PECBA was enacted for the express purpose of promoting improved relationships between public employers and their employees, RCW 41.56.010, yet Section 40 fundamentally undermines public sector bargaining by impeding the negotiations process. The law also conflicts with the PECBA because it necessarily requires the City to commit an unfair labor practice. It will also lead to absurd results, as it has already done here, where one party's insistence on an unreasonable condition precedent to bargaining prevents the parties from being able to meet and negotiate at all.

A local law will be found to be unconstitutional where it conflicts with the general laws of Washington State. *City of Bellingham v. Schampera*, 57 Wn.2d 106, 109, 356 P.2d 292 (1960). "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or

licenses that which the statute forbids and prohibits, and vice versa." *Id.* at 111 (internal quotes omitted).

As discussed in more detail below, courts and agencies confronted with attempts by one party to open collective bargaining to public scrutiny have identified a plethora of harm that would result, including:

- Inhibiting the normal give and take in negotiations
- Setting bargaining off on a discordant note
- Discouraging parties from compromising for fear of creating the appearance of retreating
- Encouraging posturing for the record
- Causing parties to feel overly conscious of their remarks and interfering with ease of expression.
- Reducing spontaneity and flexibility
- Politicizing the bargaining process
- Allowing premature public scrutiny of contract issues that could be misconstrued
- Encouraging parties to hire professional negotiators
- Preventing parties from being able to compromise some of their interests to reach the best overall settlement for the group due to presence of multiple constituencies represented

- Exposing public employee unions' internal thought processes

All of these harmful effects are directly at odds with the PECBA's goal of promoting improved relationships between public employers and employees. Section 40 cannot be reconciled with the PECBA and must therefore be struck down.

1. Washington Courts and PERC Have Recognized That Opening Collective Bargaining to the Public Is Contrary To The Policies Advanced By The PECBA.

The PECBA is intended to "promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." RCW 41.56.010. Notably, the Act expressly provides that if it is found to conflict with "any other statute, ordinance, rule or regulation of any public employer," the provisions of the Act shall control. RCW 41.56.905.

Section 40 directly undermines this policy and will impede public sector collective bargaining across the state.

Requiring negotiations to take place in public is detrimental to the process of reaching a labor agreement, and can even impede the bargaining process from commencing at all.

This Court has recognized the harm that would be caused if public sector collective bargaining were publicized:

> it would disrupt and politicize the bargaining process to prematurely publicize the proposals of parties in the bargaining process. Public scrutiny of contract issues discussed prior to completing negotiations might be misconstrued, and disclosure would hinder a vital part of the bargaining process—the free exchange of views, opinions, and proposals.

Am. Civil Liberties Union of Washington v. City of Seattle, 121 Wn. App. 544, 553, 89 P.3d 295 (2004) (lists of collective bargaining issues were exempt from disclosure under the PRA because disclosure would be injurious to the process).

PERC has similarly recognized the need for "ease of expression" when a union and a public employer are at the bargaining table, and acknowledged that the presence of a recorder "inhibit[s] free collective bargaining." *City of Pullman*, Decision 8086 at *7 (PECB, 2003), *aff'd*, Decision 8086-A (PECB, 2003) (internal cites omitted) (distinguishing recording

of investigatory meetings from bargaining, finding the former to be mandatory subject of bargaining while recognizing that an employer would commit an unfair labor practice by insisting on recording negotiations). The Commission recognized that when negotiations are recorded, "[e]ach becomes over-conscious of the recording of his remarks." *Id.* (internal cites omitted).

Indeed, it is likely because of this interest in promoting the frank exchange of ideas to help resolve contract issues that PERC has implemented rules providing that contract mediations are "not...open to the public." WAC 391-55-090.

2. The NLRB and Federal Courts Recognize That Open Collective Bargaining and/or Recording Negotiations Is Inconsistent with the Policies Underlying Collective Bargaining.

This Court and PERC's reasoning comports with a long line of authority recognizing the importance of privacy in collective bargaining. *See NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656 (10th Cir. 1981), *citing Bartlett-Collins Co.*, 237 NLRB 770 (1978), *cert. denied* 452 U.S. 961, 101 S.Ct. 3109 (1981). In the seminal case of *Bartlett-Collins*, the National Labor Relations Board (NLRB) addressed the deleterious effects of one party insisting on the presence of a court reporter

during bargaining, and found that an employer committed an unfair labor practice by insisting on recording negotiations. 237 NLRB 770. The Board reasoned that the presence of a recorder "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." In support of its conclusion, the Board cited labor experts' opinions regarding the detrimental effects of recording negotiations:

> Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes overconscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered. The discussion generally becomes stultified….
>
> [t]he presence of a stenographer tends to formalize proceedings and reduces the spontaneity and flexibility that are often manifested in successful bargaining.

Id. at n.9 (citing Maggiolo, Walter, "Techniques of Mediation in Labor Disputes," (Oceana Publications, N.Y., 1971), p. 63 and Beal, Wickersham and Kienast (1976), p. 217).

More recently, the NLRB has condemned the practice of one party insisting on recording negotiations in even stronger terms. In *Advanced Metal Techs. of Indiana, Inc.*, the NLRB adopted an Administrative Law Judge's findings characterizing an employer's insistence on tape recording negotiations as having "infected" the bargaining process "at its core." JD-61-13, 2013 WL 4922325 (NLRB Div. of Judges Sept. 11, 2013), *adopted,* S 09-CA-083508, 09-C, 2013 WL 5970942 (2013). The Judge reasoned that the employer's insistence had "fundamentally undermined –i.e., ended – the bargaining process." *Id.*

The NLRB's position on the harm caused by recording negotiations has been adopted by several appellate courts. The Tenth Circuit affirmed the NLRB's finding in *Bartlett-Collins* that the employer's insistence on recording negotiations was an unfair labor practice, reasoning that recording negotiations could result in a "stultified process" and "posturing for the record instead of the frank, no-holds-barred interchange of

ideas and persuasive forces that successful bargaining often requires." 639 F.2d 652, 657. Worse, the Court recognized that when the recording is demanded over the other party's objection, "bargaining is likely to begin on a discordant note." *Id.* at 656. While recognizing the possible benefits of recording negotiations, the Fifth Circuit concluded that those interests were subordinate to the interest in "ensuring peaceful resolution of industrial disputes." *Id.* at 657.

The Seventh Circuit endorsed the NLRB's reasoning in *Bartlett-Collins*:

> The informal nature of collective bargaining sessions and grievance hearings…requires that parties engage in free and open discussion. Accordingly, these sessions are usually not recorded because the presence of a court reporter is likely to inhibit the normal give and take which negotiations, if fruitful, should have.

Chicago Cartage Co. v. International Broth. Of Teamsters, Local 710, 659 F.2d 825, 829 (7th Cir. 1981).

The Second Circuit, too, has favorably cited *Bartlett-Collins* and recognized the ways in which publicity is

fundamentally incompatible with the collective bargaining process:

> Because negotiation of contract terms and grievances requires each party to compromise some or all of its interests in order to achieve a settlement best for the group as a whole, negotiators realize that the bargaining process could easily be stymied if each of the multiple, heterogeneous constituencies they represent are apprised of the details of the process. Experience teaches that labor contracts, like international treaties, cannot be openly arrived at.

Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, 605 F.2d 1228, 1242 (2d Cir. 1979).

3. Out of State Authority Has Also Consistently Recognized the Harm Caused When the Confidentiality of Negotiations is Destroyed.

Several state courts and public employee labor relations boards have explained the ways in which recording negotiations or insisting on conducting negotiations in public is

fundamentally at odds with the policy of promoting collective bargaining.[1]

Nearly fifty years ago, the New Jersey Public Employment Relations Commission found opening collective bargaining sessions to the public would "adversely affect the concept of collective bargaining as mandated by [New Jersey public employees collective bargaining laws]." *Briell Bd. of Educ. & Briell Educ. Ass'n*, State of New Jersey PERC, Docket No. CO-77-88-92 at *8 (June 23, 1977). In so finding, the Court reasoned that such laws would allow rival unions to attend collective bargaining sessions, compromising the very notion of employees' right to elect an "exclusive" bargaining representative. *Id.* at 8-9.[2]

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[1] As discussed below, the following states have weighed in on the problems with open and/or recorded collective bargaining: California, Florida, Illinois, Iowa, Kansas, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, and Wisconsin.

[2] The Commission's rationale was similar to the trial court's conclusion that open collective bargaining was inconsistent with the concept of an "exclusive" bargaining representative.

The Nevada Local Government Employee-Management Relations Board noted that, "[t]he reasons for closed negotiation sessions are too numerous and too obvious to be restated here," and found that in light of the state's public sector labor laws, "negotiation sessions are to be closed unless the parties mutually agree otherwise." *Washoe County School District*, Case No. A1-045295, 1976 WL 385442, at *3 (1976) (emphasis original). It later affirmed this principle in *City of Reno*, concluding that a union violated its duty to bargain by insisting upon a stenographer. The Board reasoned that "[o]ne party's insistence upon the presence of a stenographer, over the objection of the other, creates an uncooperative and repressive climate for collective bargaining" and the law "does not require a party to negotiate under such inequitable circumstance." Case No. A1-045472, 1991 WL 11746841, at *3 (1991).

The Supreme Court of Iowa has held that allowing one party to unilaterally determine whether negotiations would be conducted publicly was incompatible with the policy of

promoting harmonious and co-operative relationships between government agencies and their employees. *Burlington Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*, 268 N.W.2d 517, 523 (1978). To avoid the "probable violence" that would result to the relationship between public employers and employees if one party could impose public negotiations, the Court held that negotiations could only be conducted publicly if both sides agreed.

In *Negotiations Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n*, the Vermont Supreme Court reasoned that to allow one party to unilaterally determine whether negotiations would occur publicly would "upend[] the intended parity of bilateral negotiations" contemplated in the state's collective bargaining laws, and give the employer "unilateral discretion to determine whether either party is placed at a substantial disadvantage." 206 Vt. 636, 650, 184 A.3d 236 (2018) (noting the "customary practice" of bargaining

in private and the "sensitive nature of certain negotiation topics").

The Supreme Court of New Hampshire concluded that opening bargaining to the public would "destroy" the process and observed that "the delicate mechanisms of collective bargaining would be thrown awry if viewed prematurely by the public." *Talbot v. Concord Union School District*, 114 N.H. 532, 535, 323 A.2d 912 (1974) (concluding that collective bargaining sessions were not subject to New Hampshire's Right to Know Law). The Court further explained that the "opening of such sessions to the public could result in the employment of professional negotiators, thus removing the local representatives from the bargaining process." *Id.* at 914.

The Wisconsin Employment Labor Relations Commission concluded that the duty to bargain imposes a duty to meet in private:

> Through private, bilateral collective bargaining, [] governmental bodies and the labor organizations which represent their employees may explore and

> consider a myriad of problems without having to make commitments and decisions on all alternative solutions which may surface. The process of exploratory problem-solving, which is an essential ingredient to effective and successful collective bargaining, in many cases may be frustrated if the collective bargaining process were conducted in public forum.

City of Sparta & Local 1947-A Wisconsin Council of County & Municipal Employees, Case VIII, No. 19480, DR(M)-68, Decision No. 14520, at *5 (1976).

The Kansas Public Employee Relations Board put it bluntly in concluding that "meaningful collective negotiation would be destroyed if full publicity were accorded at each step of the negotiations." *City of Junction City*, Case No. 75-CAEO-2-1992, 1992 WL 12602058, at *21 (1992). The Board found that public bargaining "suppresses free and open discussion, causes proceedings to become formalized rather than spontaneous, induces rigidity and posturing, fosters anxiety that compromise might look like retreat and, therefore, freezes negotiators into fixed positions from which they cannot recede." *Id.*

The Florida Supreme Court likewise held that negotiations were not subject to public meeting laws based on "uncontroverted testimony by respectable national authorities in the field, that meaningful collective bargaining … would be destroyed if full publicity were accorded at each step of the negotiations." *Bassett v. Braddock*, 262 So.2d 425, 426 (1972).

The Massachusetts Court of Appeals acknowledged the widely held view that open collective bargaining would "damage the procedure of compromise inherent in collective bargaining" by inducing "rigidity and posturing." *Board of Selectmen of Marion v. Labor Relations Comm'n*, 388 N.E.2d 302, 303 (1979). The Court's decision affirmed a decision of the State Labor Commission, which explained the "dampening effect" that would result from the presence of third parties:

> Successful negotiations are based on compromise. They require that each side be free to test out a variety of proposals on the other; withdrawing some, giving up others in order to gain a better advantage in a different area. The presence of third parties necessarily inhibits such compromises and reduces the flexibility management and unions

> must have to reach agreement. Positions taken in public tend to harden and battle lines are drawn in spite of the mutual desire of the parties to meet in an acceptable middle ground.

Town of Marion and AFSCME, MUP-2116 (1975).

The Missouri Court of Appeals reasoned that collective bargaining was not subject to the Open Meetings Act, because so finding would "destroy the limited bargaining rights of public employees by exposing the public employees' thought-processes, and those of the employer, to the public eye and ear." *State ex rel. Bd. of Pub. Utilities v. Crow*, 592 S.W.2d 285, 291 (1979).

The California Public Employee Relations Board endorsed the "default rule that no party may unilaterally impose or insist on negotiations being recorded or on inviting observers to bargaining," recognizing that such a rule "supports sound labor relations" and "prevent[s] negotiations from stalling over preliminary topics." *Orange County Employees Association*, 43 PERC ¶ 73, 2018 WL 6499748 (2018).

In adopting *Bartlett-Collins*, the Oregon Employment Relations Board noted that the long-standing precedent had come to guide labor/management collective bargaining with no "labor-management disharmony or unrest in this area of the law." *Washington County Dispatchers Association,* Case Nos. UP-015/27-13, 2014 WL 3339216, at *7 (2014). The Board was convinced that the "negative consequences of allowing a party to insist on electronic recording of bargaining sessions remain detrimental and deleterious to successful collective bargaining." *Id.*

Similarly, in *County of Kane*, the Illinois State Labor Relations Board concluded that allowing one party to insist on recording negotiations "inhibits the free give-and-take necessary for effective negotiations." 4 PERI ¶ 2031, 1988 WL 1588655 (1988). The Board concluded that the goal of creating an accurate record was subordinate to the concern of "ensuring peaceful resolution of labor relations disputes." *Id.*

Further, as discussed in more detail below, several states have not only recognized the detrimental effect of recording or publicizing collective bargaining, but have found that it is an unfair labor practice and inconsistent with the duty to bargain in good faith for one party to do so, as the City has done here.

B. Section 40 conflicts with state law because by conditioning bargaining on meeting in public, the law prevents the City from fulfilling its obligation to bargain in good faith and to meet at reasonable times and places.

The PECBA requires parties to bargain in good faith, which includes the duty to meet at reasonable times. RCW 41.56.030(4). Section 40 amounts to a refusal to bargain unless bargaining occurs on the City's terms, in public session. This amounts to a refusal to bargain.

"To prove a failure to meet, the complainant must show that it requested negotiations over a mandatory subject of bargaining and the other party failed or refused to meet, **or imposed unreasonable conditions or limitations that frustrated the collective bargaining process.**" *Kitsap Cty.*

Juvenile Det. Officers' Guild v. Kitsap Cty., 1 Wn. App. 2d 143, 158, 404 P.3d 547 (2017) (emphasis added, internal cite omitted).

Allowing a party to condition bargaining on the other party succumbing to a newly imposed precondition is not compatible with the duty to meet at reasonable times without attaching unreasonable conditions. Collective bargaining requires "the parties come to the bargaining table as **equals** trying to resolve differences through a give and take process." Harry T. Edwards, The Developing Labor Relations Law in the Public Sector, 10 Duq.L.Rev. 357, 366 (1972) (emphasis added). This cannot occur where one party dictates public bargaining, which is destructive to the bargaining process.

Moreover, whether bargaining should take place in public is a permissive subject of bargaining, meaning that it is a topic the parties are permitted but not required to bargain over. *Pasco Police Officers' Ass'n,* 132 Wn.2d 338, 344 (1986) (agreements over permissive subjects "must be a product of

renewed mutual consent."). Section 40 attempts to transform a permissive subject that the parties are not even required to discuss into one that the Union must accede to in order to bargain with the City.

As with recording bargaining sessions, allowing one party to insist on open collective bargaining would allow "negotiations to break down over a threshold procedural issue." *N.L.R.B. v. Bartlett-Collins Co*., 639 F.2d 652, 656 (10th Cir. 1981). "It would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process. Too often negotiations would flounder before their true inception." *Id.* (internal cites omitted). Indeed, insisting on public bargaining, like insisting on recording negotiations, is itself "a rejection of the bargaining duty" and "an undermining of the collective-bargaining relationship." *St. Louis Typographical, Local 8 (Graphic Arts Ass'n)*, 149 NLRB 750, 754 (1964) (Fanning, Brown, concurring).

By refusing to bargain except in public, a party fails to bargain in good faith and commits an unfair labor practice. PERC and the Court of Appeals partially agreed with this conclusion when considering a so-called open collective bargaining ordinance enacted by Lincoln County. *See Lincoln County*, Decision 12844-A (PECB 2018); *Lincoln County v. PERC*, 15 Wn.App.2d 143 (2020). However, each of those decisions wrongly concluded that *both* parties had committed ULPs by insisting on a permissive subject of bargaining. This conclusion leaves the parties in limbo, and fails to provide a practical means of resolving the dispute over whether bargaining will occur in public or in private.

While PERC ordered the parties to return to private bargaining if they were unable to resolve the dispute after negotiating and mediation over ground rules, the Court of Appeals decision reversed that portion of the remedy, leaving no identifiable means of resolving the dispute. In doing so, the Court of Appeals misconstrued the significance of the status

quo doctrine. While the Court correctly observed that the status quo doctrine has no applicability to permissive subjects, this does not mean that PERC's order to return to the past practice of private bargaining was incorrect.

An order requiring the parties to bargain privately is the appropriate remedy where one party has insisted on meeting publicly because this remedies the unlawful insistence on an unreasonable precondition to bargaining. While the status quo doctrine does not have direct applicability, as it would in a case involving a mandatory subject, it is still relevant insofar as the method the parties have historically used to bargain informs what is reasonable when one party attempts to deviate from that longstanding practice.

The duty to bargain in good faith requires parties to act *reasonably* when it comes to the procedures around meeting to negotiate. *See e.g.* RCW 41.56.030(4) (requiring parties to meet at "reasonable times"); *Kitsap Cty. Juvenile Det. Officers' Guild*, 1 Wn. App. 2d 143. As courts and administrative bodies

across the country have repeatedly observed, collective bargaining is traditionally conducted in private, and insisting that it be conducted publicly is inconsistent with the entire concept of collective bargaining.

To put it bluntly, when one party insists on bargaining publicly, contrary to the parties' long-standing history and industry norms, and the other party refuses to accede to that demand, only party is acting unreasonably. The PECBA requires a determination as to which party is being unreasonable in its refusal to meet; an order finding that both parties committed unfair labor practices and failing to resolve whether bargaining will occur publicly or privately is ill-founded.

Other courts and administrative agencies across the country have employed this reasoning to find that employers committed an unfair labor practice and refused to bargain in good faith by passing so-called transparency in collective bargaining laws, or by insisting on recording negotiations.

The Kansas Public Employee Relations Board recognized the dilemma caused when one party insists on a new ground rule, concluding that "[i]t would be contrary to the policy of [the Public Employer-Employee Relations Act] … to permit negotiations to breakdown over this preliminary procedural issue." *City of Junction City*, 1992 WL 12602058, at *21 (a party is prohibited from insisting to impasse on recording negotiations).

Similarly, in *County of Kane*, the Illinois State Labor Relations Board concluded that an employer violated its bargaining obligation when it insisted on the presence of a stenographer as a precondition to bargaining. *County of Kane*, 1988 WL 1588655. The Board aptly acknowledged that allowing a public employer to insist upon recording negotiations would leave the Union no choice but to "accede to the County's unilateral determination of the preconditions for bargaining." The Board concluded that the state's collective bargaining Act "does not require a party to bargain under such

inequitable circumstances" and found that transcription could only occur by mutual agreement.

The New Jersey Public Employment Relations Commission similarly held that a public employer's refusal to meet except in open public session "establishes an illegal condition precedent to negotiations, inconsistent with its duty to negotiate in good faith." *Briell Bd. of Educ. & Briell Educ. Ass'n,* Docket No. CO-77-88-92 (1977).

The Wisconsin Employment Labor Relations Commission found that insisting on public negotiations violated the duty to bargain in good faith:

> the statutory mandate that the parties meet and confer at reasonable times in good faith imposes a duty on the parties to be willing to meet in private, bilateral negotiations, and that accordingly, insistence to impasse by either party that such negotiations be conducted in public will be found to violate said party's duty to meet and confer at reasonable times and in good faith…absent extraordinary circumstances…

City of Sparta, Case VIII, No. 19480.

The New York Supreme Court for the County of Saratoga affirmed the state's Public Employee Relations Board in finding that the employer committed a ULP when it passed a resolution directing its negotiating committee "to urge that all negotiations … be conducted in open public sessions," and then refused to dismiss members of the press from the negotiation session. *Saratoga Cty. v. Newman*, 476 N.Y.S.2d 1020, 1021 (1984) (rejecting the argument that the union, too, had bargained in bad faith or that open public meeting law required negotiations to occur in public).

The Nevada Local Government Employee-Management Relations Board found that the employer refused to negotiate in good faith by insisting that negotiations sessions must be open to the public. *Washoe County School District*, 1976 WL 385442, at *1 (1976).

The Massachusetts Court of Appeals affirmed the state labor board's conclusion that a public employer refused to bargain in good faith by insisting on conducting meetings in

open). *Board of Selectmen of Marion v. Labor Relations Comm'n*, 388 N.E.2d 302, 303 (1979).

In *City of Reno*, the Nevada Local Government Employee-Management Relations Board concluded that a union violated its duty to bargain by insisting upon a stenographer, reasoning that the law "does not require a party to negotiate under such inequitable circumstance." 1991 WL 11746841, at *3 (1991).

The California Public Employee Relations Board recently found that a public employer violated state collective bargaining laws by passing a "Civic Openness in Negotiations" ordinance without affording unions an opportunity to meet and bargain over the proposed ordinance. *Orange County Employees Association*, 2018 WL 6499748.

In sum, similar attempts to force public bargaining on unions have been consistently found to constitute an unfair labor practice when other states' courts and labor boards have considered them.

C. Allowing Public Employers to Unilaterally Impose Public Negotiations Would Lead to Unacceptable Outcomes.

Allowing one party to set preconditions to bargaining, as the City has tried to do here, would lead to absurd results clearly not contemplated by our state's collective bargaining laws. A party could refuse to meet unless the other acceded to some unreasonable condition that constituted a permissive subject of bargaining. Bargaining could be forestalled indefinitely while the parties bickered over permissive subjects that bore no relation to wages and working conditions.

The case at hand involves exactly this type of absurd situation, where the parties have been unable to meet to bargain since Section 40 took effect on December 1, 2019, and have been without a contract since the most recent contract expired on December 31, 2020.

It is easy to imagine even more absurd and undesirable outcomes. A public employer opposed to collective bargaining that had no desire to be bound by a collective bargaining

agreement with a union could simply enact an open collective bargaining ordinance as a means of avoiding ever even having to bargain at all.

Employers or unions could insist on petty terms having nothing to do with negotiations. A party could insist, for instance, that it would not meet to bargain unless the other team agreed to wear shirts endorsing a particular sports team. More realistically, an employer could insist that it would not meet unless the union agreed to some term regarding internal union governance or administration. A public employer could, for instance, refuse to bargain unless the union agreed to have a non-member on its negotiating team.

As Judge Korsmo noted in his concurring opinion in *Lincoln County*, a public employer's resolution "requiring bargaining in Times Square at midnight New Year's Eve or in Tahiti the following day" should clearly not be effectual. *Lincoln County v. PERC*, 15 Wn.App.2d 143, 161. Yet the

court's decision in *Lincoln County* would allow an employer to mire negotiations upon exactly such an unreasonable demand.

Fortunately, such absurd outcomes are not contemplated by the PECBA, which requires the parties to act "reasonably" in fulfilling their duty to bargain in good faith. Section 40 and other so-called transparency in collective bargaining laws will continue to result in the breakdown of the collective bargaining, directly undermining and conflicting with the PECBA.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's invalidation of Section 40.

This document contains 4,977 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 17th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the Washington Appellate Court E-Filing System, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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DATED this 17th day of February, 2022 at Seattle, WA.

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Washington State Labor Council, Professional and Technical Employees Local 17, and the Washington Federation of State Employees submits copies of the following out of state administrative decisions in an appendix for the Court's convenience.

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County of Kane, 4 PERI ¶ 2031, 1998 WL 1588655 (1988)	59-71
Orange County Employees Association, 43 PERC ¶ 73, 2018 WL 6499748 (2018)	72-98
Town of Marion and AFSCME, MUP-2116 (1975)	99-103

Washington County Dispatchers Association, Case Nos. UP-015/27-13, 2014 WL 3339216 (2014)	104-115
Washoe County School District, Case No. A1-045295, 1976 WL 385442 (1976)	116-119

Respectfully submitted this 17th day of February, 2022.

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Attorney for Attorney for Washington State Labor Council

CERTIFICATE OF SERVICE

I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the Washington Appellate Court E-Filing System, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

PARTY/COUNSEL	**DELIVERY INSTRUCTIONS**
Jessica L. Goldman Elizabeth R. Kennar Jesse L. Taylo SUMMIT LAW GROUP, PLLC 315 Fifth Avenue South, Suite 1000 Seattle, WA 98104-2682 *Counsel for Appellant*	☐ Hand Delivery ☐ Certified Mail ☐ Facsimile ☐ E-mail ☐ U.S. Mail ☒ E-Service
Philip A. Talmadge Aaron P. Orheim Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 *Counsel for Respondent*	☐ Hand Delivery ☐ Certified Mail ☐ Facsimile ☐ E-mail ☐ U.S. Mail ☒ E-Service

DATED this 17th day of February, 2022 at Seattle, Washington.

By: _____
Esmeralda Valenzuela, Paralegal

P.E.R.C. NO. 77-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIELLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-77-88-92

BRIELLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

On the basis of a stipulated record and briefs in an unfair practice proceeding, the Commission finds that the Board violated the New Jersey Employer-Employee Relations Act by refusing to negotiate with the Association unless such negotiations were conducted in open public session. The Commission determines that the Board's insistence on conducting collective negotiations with the Association in open public session established an illegal condition precedent to negotiations, inconsistent with the Board's duty to negotiate in good faith within the meaning of N.J.S.A. 34:13A-5.4(a)(5). The Commission further concludes that the Board's demand does not relate to terms and conditions of employment, is not mandated by the Open Public Meetings Act [N.J.S.A. 10:4-6 et seq., popularly known as the "Sunshine Law"], contrary to the Board's contentions, and is therefore not a required subject for collective negotiations.

The Commission orders the Board to cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment and from interfering with, restraining or coercing employees in that unit from exercising rights guaranteed by the Act by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings, and affirmatively orders the Board to begin negotiating with the Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association in a manner consistent with the terms of its Decision and Order; to post notices whereby its employees will be notified of the Board's corrective actions; and to notify the Chairman of the steps taken to comply with the Order.

P.E.R.C. No. 77-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	:	
BRIELLE BOARD OF EDUCATION,	:	
Respondent,	:	
- and -	:	Docket No. CO-77-88-92
BRIELLE EDUCATION ASSOCIATION,	:	
Charging Party.	:	

Appearances:
For the Respondent, Frederick E. Lombard, Esq.

For the Charging Party, Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Mr. Michael D. Schottland and Mr. William L. O'Reilly on the brief)

DECISION AND ORDER

On October 7, 1976, the Brielle Education Association (hereinafter the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the Brielle Board of Education had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act") and in particular alleged unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/

1/ The cited subsections prohibit employers, their representatives, and agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by this Act." "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

It appearing to the Commission's Director of Unfair Practices that the allegations of the charge, if true, may constitute unfair practices within the Act, a Complaint was issued on February 11, 1977.

The parties to this matter have waived an evidentiary hearing and an intermediate Hearing Examiner's Recommended Report and Decision, and have submitted this matter to the Commission for decision on stipulated facts and legal briefs, all of which were filed by April 21, 1977. The parties' Stipulation of Fact provided as follows:

> 1. The Brielle Board of Education (hereinafter the "Board"), is a Public Employer, the employer of the employees in question, and is subject to the provisions of the New Jersey Employer-Employee Relations Act, as amended (hereinafter the "Act").
>
> 2. The Brielle Education Association (hereinafter the "Association"), is an employee representative within the meaning of the Act, is subject to its provisions, and is the exclusive negotiations representative of an appropriate unit of public employees, employed by the Board.
>
> 3. The Board and the Association waive any right to a formal hearing in this matter and hereby agree to submit the above captioned matter to the Commission for a decision based upon the within stipulations of fact and legal briefs, pursuant to N.J.A.C. 19:14-6.7. The Board and the Association stipulate that the within stipulations of fact contain all facts which may be pertinent to a decision in this matter.
>
> 4. Legal briefs, proposed findings and conclusions concerning this matter must be received by the Commission no later than thirty (30) days after the Commission mails to the parties conformed, executed copies of the within stipulations.
>
> 5. On June 8, 1976, at a regular meeting of the Brielle Board of Education, the Board passed a Resolution, a copy of which is attached hereto and made a part hereof /attachment omitted/ requiring that all future negotiations with the Association, which did not include personnel matters, be conducted in public session.

6. In September of 1976, the Association made a demand upon the Board that collective negotiations concerning the terms and conditions of employment of the employees represented by the Association commence on October 1, 1976, at a non-public meeting between representatives of the Board and the Association.

7. The Board responded to the aforementioned demand of the Association in September 1976, and agreed to the October 1, 1976 negotiations session proposed by the Association. However, the Board, referring to the above mentioned Resolution of June 8, 1976, reiterated its position that all negotiations with the Association, including those on October 1, 1976, would be conducted in public session.

8. The negotiation session between the Board and the Association, scheduled for October 1, 1976, was attended by representatives of the Board and the Association. However, negotiations did not proceed owing to the Board's insistence that negotiations proceed in public and the Association's refusal to participate in public session negotiations.

9. As a result of the aforementioned position of the Board with regard to public negotiations, the Association filed a charge of unfair practice with the Commission on October 7, 1976, alleging that the Board's insistence upon public negotiations constitutes an illegal pre-condition to negotiations, violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

10. The Board's position with regard to this matter is contained in its letter to the Commission, dated November 30, 1976, which is attached hereto and made a part hereof. /attachment omitted/

11. The Association's position with regard to this matter is contained in its statement attached to the Charge filed in this matter, which is attached hereto and made a part hereof. /attachment omitted/

12. Prior to the enactment of N.J.S.A. 10:4-6 et seq., collective negotaitions between the Board and the Association were conducted in closed session and only representatives of the Board and Association were allowed to attend and/or participate in those sessions.

13. The Board and the Association agree that the sole issue presented to the Commission for a decision by the instant matter, is whether the Board's insistence that collective negotiation sessions between the parties be open to the attendance of the public is an unlawful pre-condition to negotiations, violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

Pursuant to the Act and the Commission's Rules and based upon the parties' Stipulation of Fact, as aforesaid, the Commission makes the following determinations upon review of the entire record herein, including the Complaint, the stipulations, and the briefs.

The Association contends that the Board's insistence upon conducting collective negotiations with the Association in open public session is an illegal pre-condition to negotiations violative of the Constitution of this State and constituting a per se violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The Board, on the other hand, argues that its insistence on negotiating in open public session is not a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). Quite to the contrary, the Board contends that its position regarding public view negotiations is a proper exercise of its discretionary authority under N.J.S.A. 10:4-6, et seq., popularly known as the "Sunshine Law."

Our task in this matter is to decide whether the Board's insistence that collective negotiations between it and the Association be conducted in open public session is an unlawful pre-condition to negotiations violative of N.J.S.A. 34:13A-5.4(a)(1) and (5). We must also address the question of the applicability of the "Sunshine Law" to collective negotiations. While this question is one of first impression we may look to the Act and the experience and adjudications under the copied National Labor Relations Act and other public sector labor relations statutes as a guide for the administration and adjudication of disputes under our jurisdiction. 2/

2/ See Lullo v. International Association of Fire Fighters, 55 N. J. 409 at 424 (1970).

The Act's declaration of policy declares that the public policy of this State is to promote the prompt settlement of public sector labor disputes in the interests of the people of this State through the provisions of the Act. However, the declaration of policy specifically recognizes that the people of this State are not direct parties to such disputes (N.J.S.A. 34:13A-2). In companion provisions the Act imposes a reciprocal duty on public employers and the exclusive majority representatives of public employees in appropriate units to meet at reasonable times and to negotiate with respect to grievances and terms and conditions of employment (N.J.S.A. 34:13A-5.3). It should be noted that the right of negotiations attaches only to the majority representative and that public employers are prohibited from negotiating terms and conditions of employment or processing grievances presented by a minority employee organization, when there is a majority representative (N.J.S.A. 34:13A-5.3).

The Act's concept of exclusivity of representation has been held by the Supreme Court of this State to be analogous to the similar provisions of the National Labor Relations Act. Commenting upon this concept, the Court found it to be at the very core of our national labor relations policy and ruled that its inclusion in the Act was a valid legislative vehicle to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation.[3/]

3/ See Lullo v. International Association of Fire Fighters, supra, at 426-427, citing with approval NLRB v. Allis Chalmers Mfg. Co., 87 S. Ct. 2001 (1967).

As previously stated, the Board relies on the provisions of the "Sunshine Law" to vindicate its actions with regard to this matter. More specifically, the Board relies on N.J.S.A. 10:4-12 in support of its position. This section provides in pertinent part:

> b. A public body may exclude the public only from that portion of the meeting at which the public body discusses...
>
> (4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

In considering our decision in this matter we have drawn upon our knowledge of public sector labor relations in this State. Based upon our analysis of this knowledge we find that the great majority of negotiation sessions conducted by public employers and representatives of public employees are not susceptible to coverage by the "Sunshine Law's" open meeting provisions. Typically, a negotiations session involves and is restricted to small groups or single individuals representing both the public employer and the majority representative. There are numerous, informal exchanges of ideas and written data and during a series of negotiations sessions many proposals and counter-proposals may be exchanged between the parties. It is difficult, if not impossible, to predict with any degree of certainty when or if any specific proposal will be accepted by both parties. Further, no individual proposal may usually

be considered as finally agreed to until an entire package of items, such as compensation, fringe benefits, vacations and grievance procedures, has been finalized and accepted by both parties.

It is our belief that the processes described above are clearly excluded from the purview of the "Sunshine Law", as they involve neither public bodies, meetings, nor public business as defined by that law. Our conclusion is buttressed by the similar conclusions reached by the Supreme Court of Florida and the Attorneys General of Massachusetts and Wisconsin. These authorities held the "Right to Know" or "Sunshine" Laws of their respective jurisidictions to be inapplicable to collective negotiations, even in the absence of any provision of those laws providing for such exceptions. Their conclusions were based on premises similar to those we have relied upon and their findings generally conform to our conclusion that negotiating sessions are not meetings or public business contemplated by the respective statutes.4/

It should be noted that the "Sunshine Law", by its very provisions, does not extend to informal or purely advisory bodies with no effective authority to bind the public body or to groupings composed of an individual public official and his subordinates who are not collectively empowered to act by vote. Furthermore, to be covered by the statute, a meeting must be open to all the public body's members, subject to the proviso contained in N.J.S.A.

4/ See Basset v. Braddock, et al, 202 So.2d 425 at 427-428 (1972); see also fn 9, citing the opinions of the Attorneys General of Massachusetts and Wisconsin. It should be noted that the Wisconsin "Right to Know" Law was later amended to specifically exclude public sector collective bargaining, Chapter 426, Laws of 1975. City of Sparta and AFSCME, WERC Decision No. 14520, April 7, 1976.

10:4-11, and the members present must intend to discuss and act on the public body's business.[5/] Thus, in order to be subject to the "Sunshine Law", the public body would have to open a negotiations session to all of its members, an effective majority of those members must be in attendance and be empowered to act by vote, and the body must intend to discuss or to act upon the public business.[6/]

Even assuming arguendo that a particular negotiations session between a public body and a majority representative was conducted so as to trigger the application of the "Sunshine Law" to the proceeding, it is our belief that such application could adversely affect the concept of collective negotiations mandated by our Act. This conclusion is supported by the fact that, should the "Sunshine Law" be applied in a vacuum, the public employer would be free, in an unfettered exercise of its statutory discretion, to unilaterally open the meeting to participation by the general public.[7/] Certainly that public could also include rank and file unit members and the leaders of minority organizations.[8/] Therefore the concept of exclusivity of representation and the right of public employers and public employees to negotiate through

5/ See Formal Opinion No. 19-1976, New Jersey Attorney General, explaining N.J.S.A. 10:4-6, et seq. and advising that the Legal Committee of the New Jersey State Department of Education was not subject to the provisions thereof.

6/ See N.J.S.A. 10:4-7 and 10:4-8(a) and (b).

7/ N.J.S.A. 10:14-12 provides in pertinent part "...Nothing in this Act shall be construed to limit the discretion of the public body to permit, prohibit, or regulate the active participation of the public at any meeting."

8/ For a similar conclusion, see Town of Winchendon and International Brotherhood of Police Officers, Case No. MUP-2527, Massachusetts Labor Relations Commission (1976) at pg. 6, fn 4.

representatives of their own choosing, and the Constitutional right to organize as stated by the New Jersey Supreme Court in Lullo, supra, could be compromised. As the "Sunshine Law" does not require public view negotiations, we find that a public employer's refusal to negotiate with a majority representative unless such negotiations sessions are conducted in open public session is violative of the Act.

We note that our conclusion herein is in accord with the decisions of the public sector labor relations agencies of Connecticut, Maine, Massachusetts and Wisconsin. These agencies were construing the application of similar "Sunshine" legislation to their public sector negotiations statutes.[9/] These "Sunshine" statutes provided either no, or a discretionary, option for the public employer to exclude negotiations from open public meetings. Of particular interest is the decision of the Massachusetts Labor Relations Commission in the Zoll case, supra. The holding in that matter was based on an analogy to cases decided under the National Labor Relations Act (hereinafter the "NLRA"). The Supreme Judicial Court of Massachusetts, in like manner to the Supreme Court of New Jersey, has held that State's public sector labor

9/ See Town of Stratford and Local 998, Int'l Assoc. of Fire Fighters, Case No. MPP-2222, May 30, 1972, Connecticut State Board of Labor Relations; Quamphogan Teachers Association and Board of Directors School Administrative District No. 35, Case No. 73-05, April 20, 1973, State of Maine Public Employees Labor Relations Board; Zoll and the City of Salem and Local 1780, Int'l Assoc. of Fire Fighters, Case No. MUP-309, Massachusetts Labor Relations Commission, December 14, 1972; and City of Sparta v. AFSCME, Wisconsin Employment Relations Commission, Decision No. 14520, April 7, 1976.

relations statute to be based upon the NLRA and the case law derived from the federal statute.[10/]

We have also examined the pertinent federal sector adjucications. The National Labor Relations Board (hereinafter the "NLRB") has found that an employer's insistence that negotiations be conducted in the presence of a stenographer taking down a verbatim transcript to be inconsistent with the approach usually taken in good faith by a participant in order to reach agreement and is consistent with frustrating meaningful collective bargaining.[11/] In another case the NLRB determined that an employer's insistence on using a tape recorder throughout bargaining sessions was evidence of a bad faith negotiations posture.[12/] Also, an employer's insistence that negotiations be conducted in the presence of rank and file employees in the unit, to whom the employer had issued a general invitation to attend, was found by the NLRB to be interference with the employees' right to bargain through representatives of their own choosing.[13/]

Based upon the entire record in this matter and mindful of the preceding discussion we find that the Board's insistence on conducting collective negotiations with the Assocation in open public session does not relate to terms and conditions of employ-

10/ See Poirier v. Superior Court, 337 Mass. 522 at 526-527 (1958) and Jordan Marsh Co. v. Labor Relations Commission, 312 Mass. 597 at 601 (1942), and Lullo, supra, at pg. 424.

11/ Reed and Prince Mfg. Co., 28 LRRM 1608 (1951); enf. 32 LRRM 2225 (Ca 1 1953); cert. denied 33 LRRM 2133 (1953).

12/ Architectural Fiberglass Division of Architectural Pottery, 65 LRRM 1331 (1967).

13/ L. G. Everest, Inc., 31 LRRM 1553 (1953) and cases cited in fn 2, at pg. 309 (Cf. Administrative Ruling of the NLRB General Counsel, Case No. SR-213 (1959), 45 LRRM 1048).

ment, is not mandated by the Open Public Meetings Act, and is therefore not a mandatory subject of collective negotiations. Thus, the Board's refusal to negotiate unless such negotiations sessions are conducted in open public session establishes an illegal condition precedent to negotiations, inconsistent with its duty to negotiate in good faith within the meaning of N.J.S.A. 34:13A-5.4(a)(5). We find further that the Board's action necessarily interfers with employees in the exercise of their right derivatively violates N.J.S.A. 34:13A-5.4(a)(1) as well.

However, nothing in our Act, the Open Public Meetings Act, or any other statute that we are aware of would preclude the parties from agreeing to conduct their negotiations in open public session. Therefore, this is a permissive subject of negotiations. Either party may propose it and the parties would be free to agree to it but neither party can insist upon open public negotiations as a precondition to negotiations.[14/]

We firmly believe that our construction of the two statutes in question promotes the public policy underlying both enactments. In the first instance the rights guaranteed to public employees to

14/ We offer no opinion on the question of whether a public employer's insistence upon public session collective negotations violates the constitutional right of public employees to present their proposals and grievances through representatives of their own choosing. (Constitution of 1947, Art. I, Par. 19) But, see Basset v. Braddock, supra, in which the Supreme Court of Florida held that state's "Sunshine Law" to be inapplicable to collective negotiations owing to the constitutional provision guaranteeing the right of collective bargaining to public employees.

negotiate collectively through representatives of their own choosing is retained. Secondly, our construction also preserves the intent of the "Sunshine Law" that the public's business be conducted in full view of the body politic. Nothing in our opinion restricts the right of a public body to consider, receive public comment, debate, and vote upon any proposed collective negotiations agreement in open public session.

ORDER

The respondent, Brielle Board of Education, shall:

1. Cease and desist from:

Refusing to negotiate in good faith with the Brielle Education Association concerning terms and conditions of employment of employees in the unit represented by the Association and from interfering with, restraining, or coercing employees in that unit from exercising rights guaranteed by the Act, by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

The Brielle Board of Education shall, forthwith, begin negotiating with the Brielle Education Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association. Such negotiations are to be conducted in a manner consistent with the aforementioned terms of this decision and order.

3. Post at its central office building at the Board of Education in Brielle, New Jersey, copies of the attached notice. Copies of said notice on forms to be provided by the Chariman of the Public Employment Relations Commission, shall, after being duly signed by respondent's representative, be posted by respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by respondent to insure that such notice will not be altered, defaced or covered by any other material.

4. Notify the Chairman in writing, within twenty (20) days of receipt of this Order what steps the respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision.
Commissioners Forst and Hipp abstained.
Commissioner Hurwitz was not present.

DATED: Trenton, New Jersey
June 21, 1977
ISSUED: June 23, 1977

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the Brielle Education Association concerning terms and conditions of employment of employees in the unit represented by the Association and will not interfere with, restrain or coerce employees in that unit from exercising rights guaranteed by the Act, by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings.

WE WILL, forthwith, begin negotiating with the Brielle Education Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association. Such negotiations will be conducted in a manner consistent with the terms of the Commission's decision and order.

BRIELLE BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625, Telephone (609) 292-6780

1992 WL 12602058 (KS PERB)

Public Employee Relations Board

State of Kansas

CITY OF JUNCTION CITY, KANSAS, PETITIONER
vs.
JUNCTION CITY POLICE OFFICERS ASSOCIATION, RESPONDENT
AND
JUNCTION CITY POLICE OFFICERS ASSOCIATION, PETITIONER
vs.
CITY OF JUNCTION CITY, KANSAS, RESPONDENT

Case No. 75-CAEO-2-1992
Case No. 75-CAE-4-1992
July 31, 1992

INITIAL ORDER

***1** ON March 23 and 24, 1992 the above-captioned prohibited practice complaints came on for formal hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appeared by Michael G. Barricklow, 5400 S. 159th, Rose Hill, Kansas 66133.
Respondent: Appeared by Charles A. Zimmerman, City Attorney, P.O. Box 287, Junction City, Kansas 66441

ISSUE PRESENTED FOR DETERMINATION

Case No. 75-CAE-4-1992

I. WHETHER THE ACTION TAKEN BY THE JUNCTION CITY COMMISSION ON TUESDAY, SEPTEMBER 3, 1991, OF REVISING THE CITY-WIDE GRIEVANCE POLICY FOR ALL CITY EMPLOYEES CONSTITUTED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 75-4333(b)(1) AND (b)(5) AS A UNILATERAL CHANGE IN A MANDATORILY NEGOTIABLE SUBJECT.
a. WHETHER THE DECISION TO CHANGE THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT, OR A SUBJECT OF MANAGEMENT RIGHTS.

b. WHETHER THE IMPLEMENTATION OF CHANGES TO THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT OR A SUBJECT OF MANAGEMENT RIGHTS.

II. SHOULD THE CITY OF JUNCTION CITY BE FOUND TO HAVE COMMITTED A PROHIBITED PRACTICE FOR UNILATERALLY REVISING THE CITY-WIDE GRIEVANCE POLICY, WHETHER THE APPROPRIATE REMEDY IS TO ORDER THE CITY TO RESCIND THE CHANGES, AND PROCEED TO MEET AND CONFER WITH THE JUNCTION CITY POLICE OFFICERS ASSOCIATION OVER THE PROPOSED CHANGES.

III. WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(5) BY REFUSING TO ALLOW THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO "MECHANICALLY RECORD IT OWN MINUTES" OF THE MEET AND CONFER SESSIONS.
a. WHETHER MEET AND CONFER SESSIONS ARE CONTROLLED BY THE KANSAS OPEN MEETINGS ACT, K.S.A. 75-4317 ET SEQ.

IV. WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(1) BY ATTEMPTING TO ESTABLISH A LACK OF TRUST IN THE JUNCTION CITY POLICE OFFICERS ASSOCIATION CHIEF NEGOTIATOR, MICHAEL BARRICKLOW, THROUGH STATEMENTS ATTRIBUTED TO THE CHIEF OF POLICE.

Case No. 75-CAEO-2-1992

V. WHETHER THE TELEPHONE CALLS MADE BY MICHAEL G. BARRICKLOW, CHIEF NEGOTIATOR FOR THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO THE CERTAIN MEMBERS OF THE CITY COMMISSION OF THE CITY OF JUNCTION CITY, KANSAS, ON FRIDAY, SEPTEMBER 27, 1991, CONSTITUTES A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(c)(2) AND 75-4333(c)(3) BY INTERFERING WITH THE MEET AND CONFER PROCESS BY CIRCUMVENTING THE DULY AUTHORIZED BARGAINING REPRESENTATIVES OF THE PUBLIC EMPLOYER.

VI. WHETHER A MEMBER OF AN EMPLOYEE BARGAINING UNIT IS BARRED FROM DISCUSSING A SUBJECT OF MANDATORY NEGOTIABILITY WITH AN ELECTED PUBLIC OFFICIAL WHO IS A MEMBER OF A GOVERNING BODY PURSUANT TO K.S.A. 75-4322(G) DURING THE TIME THAT SUBJECT IS AN ISSUE OF MEET AND CONFER NEGOTIATIONS BETWEEN THE EMPLOYEE'S RECOGNIZED REPRESENTATIVE AND THE REPRESENTATIVE OF THE GOVERNING BODY.

SYLLABUS

***2** 1. **DUTY TO BARGAIN** - Good Faith - Unilateral changes. It is a well established labor law principle that a unilateral change, by a public employer, in terms and conditions of employment is a prima facie violation of its public employees' collective negotiation rights, but not *per se* a prohibited practice.

2. **DUTY TO BARGAIN** - Unilateral Changes - Responsibility of employer prior to change. Where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

3. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. A finding of wilful conduct requires a showing that the party continued a course of conduct in conscious disregard of the foreseeable injurious consequences.

4. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. A person is presumed to intend the natural and logical consequences of his acts. Thus if conduct is sufficiently lacking in consideration for the rights of others, and indifferent

to the consequences it may impose, then, regardless of the actual state of the mind of the party and his actual concern for the rights of others, it is wilful conduct.

5. **PROHIBITED PRACTICES** - Wilful Violation - Definition elements. Wilful conduct does not require a deliberate intention to injure. Rather the " "intent" in wilful conduct is not an intent to cause injury, but it is an intent to do an act, or an intent to not do an act, in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to the rights of another.

6. **PROHIBITED PRACTICES** - Insistence on negotiating non-mandatory topic - Tape recording negotiation sessions. The demand for verbatim recording devices during negotiations as a means to record those negotiations is not a mandatory subject of bargaining under PEERA, and either party's insistence to impasse on this issue is, accordingly, a prohibited practice, without regard to whether such insistence was in good or bad faith.

7. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Purpose of PEERA - Legislative Intent. In enacting PEERA the Legislature established that it is the public policy of this state to promote harmonious and cooperative relationships between government and its public employees by permitting such employees to organize and bargain collectively. The purpose of PEERA is to encourage the use of the collective bargaining process in the public sector.

***3** 8. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Interpretation of Statutes - Harmonizing conflicting statutes. Where two statutes deal with the same subject matter, i.e. collective bargaining sessions, and are not inconsistent with each other, they must be harmonized to the extent possible - notwithstanding the fact that the statutes may have been enacted at different times with no reference to each other. This principle of statutory construction operates because the law does not favor repeal by implication.

9. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Interpretation of Statutes - Requirements under Kansas Open Meetings Law. While the Open Meetings Law contained in K.S.A. 75-4317 et seq. manifests a general policy that all meetings of a governmental body should be open to the public, meet and confer sessions under PEERA are not subject to the Act.

10. **PROHIBITED PRACTICES** - Interference, Restraint or Coercion - Elements of coercive speech. Employers have a constitutional right to express opinions that are noncoercive in nature. In considering coercive effect of speech, any assessment must be made in the context of its setting, the totality of the circumstances, and its impact upon the employees. Statements found to be isolated, trivial, ambiguous and susceptible to innocent interpretation, given no background of union animus, do not violate K.S.A. 75-4333(b)(1).

11. **DUTY TO BARGAIN** - Selected Representatives for meet and confer - Duties and rights. Each party to a meet and confer relationship has both the right to select its representatives for bargaining and the duty to deal with the chosen representative of the other party.

12. **PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT** - Exclusive Representative - purpose. Kansas has adopted, through the Public Employer-Employee Relations Act ("PEERA"), a statutory policy that authorizes public bodies to accord exclusive recognition to representatives chosen by the majority of an appropriate unit of employees for the purpose of meeting and conferring on conditions of employment and adjusting grievances. The consequences of exclusive representation is the limiting of the rights of individual employees.

13. **DUTY TO BARGAIN** - Open Meetings for negotiations - Pubic forum. When a governing body has either by its own decision or under statutory command, determined to open its decision making processes to public view and participation, the governing body has created a *"public forum"* dedicated to the expression of views by the general public. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the

basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

14. **PROHIBITED PRACTICES** - Bypassing Chosen Representative. The bypassing of the public employer's chosen meet and confer representative by employee organization officials directly contacting members of the governing body to discuss subjects under negotiation constitute a violation of K.S.A. 75-4333(c)(2) as interfering with respect to selecting a representative for the purpose of meeting and conferring or the adjustment of grievances

FINDINGS OF FACT [1]

***4** 1. Petitioner, the Junction City Police Officers Association, ("JCPOA") is an *"employee organization"* as defined by K.S.A 75-4322(i) and is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for all non-exempt police officers who are employed by Respondent, City of Junction City, Kansas ("City"), for the purpose of negotiating collectively with the respondent pursuant to the Public Employer-Employee Relations Act of the State of Kansas, with respect to conditions of employment as defined by the K.S.A. 75-4322(t).

2. Respondent, City of Junction City, Kansas ("City"), is a *"public agency or employer"*, as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c), and a municipality organized pursuant to the laws of the State of Kansas and is classified under those laws as a city of the first class. The Police Department is an entity falling under the jurisdiction and control of the City and is charged with maintaining the safety and security for citizens residing in the City.

3. Dr. Hazel Swartz is the Director of Chapter I for U.S.D. 475 and also its grants writer. She is a Junction City City Commissioner, having served approximately one year on the Commission at the time of the formal hearing. (Tr.p. 55-56).

4. Kenneth Merle, Jr. is the marketing officer of the Central National Bank. He also serves as a Junction City City Commissioner, having served approximately three years at the time of the formal hearing. (Tr.p. 84).

5. Theodore Sanders serves as a Junction City City Commissioner. (Tr.p. 161).

6. Jerry E. Smith is the Police Chief of Junction City, having served for thirteen years. He has served as a member of the City's bargaining team for all previous negotiations with the JCPOA. (Tr.p. 100-01).

7. Tom Wesoloski is employed by the Junction City Police Department, and served as President of the JCPOA during the times involved in this complaint. (Tr.p. 110-11).

8. Robert Story serves as a Sergeant of the Junction City Police Department where he has been employed for approximately seven and one-half years. (Tr.p. 154-55).

9. Dan Breci serves as a patrolman with the Junction City Police Department where he has been employed for approximately two and three-fourths years. (Tr.p. 182-83).

10. David W. Tritt is the Personnel Director for the City of Junction City, having served in that position for two and one-half years. He has served in a similar capacity for the Adams Products Company for ten (10) years, with CR Industries for three (3) years, and with Pittsburg Plate Glass. He has experience in contract negotiations and two and one-half years of experience working under the Public Employer-Employee Relations Act. (Tr.p. 205, 232).

11. Blaine R. Hinds is the City Manager of the City of Junction City, having served in that position for four (4) years. He has seventeen (17) years of experience dealing with labor relations and collective bargaining familiar with PEERA. (Tr.p. 290, 298, 300).

***5** 12. The JCPOA noticed the City in mid-April, 1991 of its desire to meet and confer for purposes of negotiating a 1992 contract. (Tr.p. 257).

13. The first meet and confer session between the JCPOA and the City on a 1992 contract took place on May 23, 1991 with Michael Barricklow serving as the chief negotiator for the JCPOA. (Tr.p. 46). A chief negotiator had been appointed by the City to represent it in negotiations. The negotiator appointed by the City was Dave Tritt. (Tr.p. 26). The purpose of that first meeting was to exchange proposals and establish ground rules for negotiations. (Tr.p. 19, 34, 259-60).

14. The JCPOA, at the commencement of meet and confer sessions on the 1992 contract, noticed twelve (12) items for negotiations, including a separate grievance procedure for police officers. The grievance procedure was one of the items ultimately taken to impasse. (Tr.p. 45, 47, 51, 106-07, 131-32, 167, 207, 208; Ex. E, F, 8). Additionally, the JCPOA submitted a two page document entitled Negotiation Ground Rules and listing ten (10) ground rules for the negotiations. Item Number Seven (#7) related to tape recording the negotiation sessions. Item number seven provided:
"7. A summary of each session will be kept by each team. Each party reserves the right to make tape recordings of each negotiation session. These tapes are for the sole use of the negotiating teams in closed sessions." (Tr.p. 262; Ex. C).

15. With reference to Item Number Seven, Michael Barricklow inquired if the City negotiating team had any objections to the JCPOA mechanically recording the meet and confer sessions. (Tr.p. 34).

16. The JCPOA maintained it was an association right to take their own minutes of the negotiation sessions in what ever manner it chose. (Tr.p. 20). In addition, the JCPOA urged the following reasons for requiring mechanically recording the meet and confer sessions:
1. A tape recording provides a good reference to which to refer to confirm what was or was not said or agreed to during the negotiation sessions. (Tr.p. 37, 163).

2. Being on the record keeps negative remarks out of the negotiations. (Tr.p. 37).

3. By having statements on the record there would be less potential for reprisals by management on members of the JCPOA negotiating team because of what was said or done during the negotiations. (Tr.p. 37).

4. The parties would be less reluctant to share information. (Tr.p. 53).

16. The City negotiating team, composed of Mr. Hinds, Mr. Tritt and Chief Smith, objected to having any of the negotiating sessions mechanically recorded. (Tr.p. 19, 25, 215-16). The reasons given for not wanting the sessions recorded included:
1. There never had been a problem in the past that required recording, and there was nothing to indicate anything had changed for these meetings. (Tr.p. 20).

2. The recording could have a chilling effect on the negotiation process. (Tr.p. 20).

3. It would impede negotiations by inhibiting the open and free exchange of ideas and information as the team members speak for the record. (Tr.p. 20, 111-12, 216).

***6** 4. The tapes could be used by other bargaining units for personal or negotiation purposes. (Tr.p. 20-21, 217).

5. Tape recorders had never been used in past negotiations. (Tr.p. 25-26).

6. Tape recording of meet and confer sessions is not a mandatory subject of negotiation. (Tr.p. 216).

16. In an attempt to reach a compromise on the use of tape recorders, the JCPOA offered not to publicly disclose the tapes of the sessions. This offer was rejected. (Tr.p. 21).

19. The ground rules were ultimately agreed upon at the June 5th meeting; including changes to the tape recording proposal. The new wording of Item Number Seven provided:
"7. A summary of each session will be the responsibility of each team. The JCPOA will peruse (sic) the right of taping the sessions through appropriate means." (Tr.p. 263; Ex. D).

20. While being able to explain the benefits that could result from tape recording the meet and confer sessions, none of the JCPOA witnesses could delineate any terms and conditions of employment affected by the tape recording or the denial of tape recording, of meet and confer sessions. (Tr.p. 35).

21. On August 21, 1991 the JCPOA filed with the Public Employer-Employees Relations Board ("PERB") a notification of impasse and request for appointment of a mediator indicating the parties were in agreement. By letter dated August 23, 1991, Roger Naylor, Federal Mediation and Conciliation Service, was appointed to mediate the dispute. The letter used was a computer generated form letter. Unfortunately, the letter in one paragraph erroneously listed the parties at impasse as the City of Hays, Kansas and Service Employees Union Local rather than the JCPOA and the City of Junction City. When the error was brought to the attention of the PERB a correction was sent out on October 18, 1991 to Roger Naylor and the parties. (Case No. 75-I-11-1992).

22. Officer Breci testified Chief Smith made a comment at one September staff meeting that "You guys need to get with your negotiator and tell him basically what department he is working for." (Tr.p. 185). Officer Breci stated the comment was done light heartedly, but appeared to embarrass the JCPOA members present at the meeting. (Tr.p. 193).

23. Sergeant Story testified he was approached by Chief Smith who mentioned the August 23, 1991 letter. Sergeant Story believed the Chief was making fun of the JCPOA, but was not of the opinion the Chief's comments were made to influence him to change his negotiator. (Tr.p. 177-78, 181). He felt the comment was made in jest, and that the Chief thought the incident was humorous. (Tr.p. 181).

24. Sergeant Story could not recall Chief Smith ever making any other comment about the ability of the JCPOA negotiator or that the JCPOA should seek someone else to represent it. (Tr.p. 181, 195). He believed the comment was an isolated incident and not an ongoing practice. (Tr.p. 181-82, 194, 235).

25. Chief Smith does not recall making the comment "You guys need to go out and find someone that knows what he's doing due to the fact he doesn't even know where he's negotiating," at any staff meeting in September, 1991, or to any individual JCPOA member. (Tr.p. 110).

***7** 26. Chief Smith admits, after receiving the August 23, 1991 letter, he contacted JCPOA President Tom Wesoloski and asked if he had received the letter. Mr. Wesoloski stated he had not received a copy. Chief took the August 23, 1991 letter to Mr. Wesoloski because he thought it could have a bearing on the negotiations, and if it was a mistake, Mr. Wesoloski should be aware of it so as to attempt to rectify the problem. He did not take the October 23, 1991 letter to Mr. Wesoloski because it was

self explanatory and required not remedial action. (Tr.p. 142-43). Smith commented at that time, "If the association is going to pay someone to negotiate, they should at least know the difference between Hays and Junction City." (Tr.p. 110-11; Ex. 6).

27. It was Chief Smith's opinion the JCPOA should not have retained the services of an outside negotiator for the 1992 negotiations because the community would rather see police officers negotiate for themselves; the JCPOA would receive more citizen support in their requests had they stayed within the organization for its negotiator. He maintained this was his personal opinion and not that of his position as Chief of Police so it did not affect his negotiation duties. (Tr.p. 123-24, 127, 139-40).

28. The first session with federal mediator Roger Naylor was held on September 27, 1991 at the Harvest Inn in Junction City, Kansas. The parties met jointly with the mediator to list items at impasse, then moved to separate caucus rooms. (Tr.p. 274-75).

29. Prior to the first mediation session the members of the JCPOA negotiating team advised Michael Barricklow that the City Commission's had at its September 3, 1991 Commission meeting changed the City-wide Grievance Procedure. During the joint mediation session with Mr. Naylor from the Federal Mediation Service, Michael Barricklow inquired of Mr. Tritt whether the City Commissioners were aware that "grievance procedure" was a subject presently under negotiations. Mr. Tritt answered they were so aware, however members of the JCPOA negotiating team doubted the veracity of Mr. Tritt's answer. Despite this doubt, the JCPOA negotiating team did not request of Mr. Tritt that he return to the Commission to inquire if they were aware of the mandatory negotiability of the subject "grievance procedure." (Tr.p. 28-29).

30. After the parties separated to caucus in different rooms at the Harvest Inn, Mr. Barricklow telephoned City Commissioners Ken Talley, Hazel Swartz and Theodore Sanders. (Tr.p. 9, 28, 161, 172). Each contact commenced with Mr. Barricklow introducing himself as the superintendent for another school district and the chief negotiator for the JCPOA. (Tr.p. 10, 28, 56).

31. Commissioner Swartz was contacted by telephone at approximately 10:30 a.m. on September 27, 1991 at her place of employment. (Tr.p. 56, 160). The telephone call lasted between 8 and 15 minutes. (Tr.p. 67).

32. Commissioner Swartz and Michael Barricklow talked about three subjects; salary for police officers, a grievance procedure for police officers, and police officers performing certain types of off-duty employment. (Tr.p. 57, 160). The conversations were initiated by Mr. Barricklow. (Tr.p. 57, 59). Commissioner Swartz did not ask any questions of, nor elicited any information from, Michael Barricklow during the contact. (Tr.p. 68).

***8** 33. The conversation concerning the grievance procedure centered around whether she was aware a grievance procedure was a mandatory subject of bargaining; that it was currently being negotiated; and if that information had been given to them by Chief Negotiator Tritt. She answered in the affirmative to each questions. (Tr.p. 61-62).

34. Commissioner Swartz was aware the City had appointed Dave Tritt as Chief Negotiator for the City, and had received briefings from Mr. Tritt concerning the status of the JCPOA negotiations. (Tr.p. 58). She told Michael Barricklow she felt uncomfortable with the conversation, and thought it was inappropriate. (Tr.p. 57-58, 59, 60, 68).

35. Commissioner Swartz did not feel coerced, restrained or interfered with in performance of her duties as a City Commissioner because of the Barricklow conversations. (Tr.p. 69), nor did she loose confidence in Mr. Tritt as the City's Chief Negotiator. (Tr.p. 80).

36. Commissioner Talley received a telephone call from Michael Barricklow at his place of employment on September 27, 1991. (Tr.p. 85). The telephone call lasted between 3 to 5 minutes. (Tr.p. 94, 160).

37. During the contact Mr. Barricklow inquired if Commissioner Talley was aware the City's Chief Negotiator, Mr. Tritt, was doing something illegal. (Tr.p. 85-86). Commissioner Talley was surprised by the call and inquired why Mr. Barricklow was

talking to him instead of Mr. Tritt concerning matters under negotiation. (Tr.p. 86-87). Commissioner Talley terminated the conversation, refusing to discuss any particular subject, because he believed the conversation was inappropriate. (Tr.p. 86, 88).

38. While not feeling personally threatened by the contact, Commissioner Talley did feel the negotiations could be threaten. (Tr.p. 90, 94). He perceived Michael Barricklow's intent in making the telephone call was to " "defer my faith in my negotiator." (Tr.p. 94).

39. The conversation with Commissioner Sanders was the same as the conversation with Commissioner Swartz. (Tr.p. 161).

40. Both Commissions Swartz and Talley were aware that negotiations were going on between the City and the JCPOA on the same day the contacts were made. (Tr.p. 57, 85, 293-94).

41. Both Commissioner Swartz and Commissioner Talley acknowledged, as public officials, they received calls from city employees at their homes. (Tr.p. 62, 89).

42. This was the first time the JCPOA had ever directed inquiries directly to commission members rather than through the appointed negotiator. (Tr.p. 27).

43. Since Mr. Tritt is responsible to take any subsequent tentative agreement with the JCPOA back to the City Commission for ratification, his veracity, credibility and persuasiveness with the City Commissioners is important. (Tr.p. 278-79).

44. All terms and conditions of employment affecting the police officers are not memorialized in the written 1991 JCPOA contract. (Tr.p. 129). While no Grievance Procedure was specifically provided for in the 1991 JCPOA contract, police officers were covered by the City-wide Grievance Procedure, as set forth in the Employee Handbook, in existence at the time of negotiations on the 1991 contract. (Tr.p. 25, 30-33, 138, 223, 242, 328; Ex. A).

***9** 45. Witnesses Swartz, Talley, Smith, Story, Tritt and Hind acknowledged awareness that a "grievance procedure" is a mandatory subject of negotiations. (Tr.p. 70-71, 79, 97, 103-04, 159, 209, 212, 321).

46. During negotiations on the 1991 JCPOA contract, the City did not indicate to the JCPOA negotiating team it contemplated changing the City-wide Grievance Procedure during the term of the contract. (Tr.p. 33, 223).

47. During the 1991 contract negotiations, the JCPOA never indicated or agreed to allow the City to change the existing City-wide Grievance Procedure during the term of the 1991 contract nor did the City request a waiver of negotiations on any contemplated changes. (Tr.p. 33-34, 223-24).

48. The 1991 JCPOA contract contains no provision waiving the JCPOA right to negotiate changes in the City-wide Grievance Procedure. (Tr.p. 34).

49. Mr. Tritt first discussed with Mr. Hinds the need to make changes in the existing City-wide Grievance Procedure in June, 1991. Mr. Hind assigned the task of rewriting the grievance procedure to address these problems to Mr. Tritt with the assistance of the city attorney. (Tr.p. 225-26).

50. The need for changes in the existing City-wide Grievance Procedure was precipitated by events relating to a non-Police Department grievance that arose in late 1990. In the spring of 1991 the City determined the existing grievance procedures were unwieldy, and the multiple step appeal process unnecessarily protracted the grievance proceedings. (Tr.p. 225). According to Mr. Hinds, the City had to make some changes regarding employees other than the police officers, and could not wait until all the negotiations had taken place with the JCPOA, The City implemented the changes and continued to negotiate with the JCPOA regarding any changes in the grievance procedure the JCPOA viewed as necessary. (Tr.p. 320).

51. Input on proposed changes to the City-wide Grievance Procedure was not sought from department heads. (Tr.p. 229). The City administration did not even contact the Chief of the police department, Jerry Smith for his input on the proposed changes prior to its adoption by the City Commission. (Tr.p. 105).

52. The JCPOA was not provided a copy of the proposed changes to the City-wide Grievance Procedure prior to consideration and adoption by the City Commission at its September 3, 1991 meeting. Additionally, the city employees did not receive advance copies of the proposed changes, nor were their opinions or recommendations solicited. (Tr.p. 42, 44, 230, 318).

53. The new City-wide Grievance Procedure was finalized as Policy Resolution No. 91-7. (Tr.p. 243; Ex. I).

54. According to Police Chief Smith, the fact that the City intended to consider changes in the City-wide Grievance Procedure at the September 3, 1991 Commission meeting appeared in the newspaper, and on television and radio. (Tr.p. 105, 169, 229).

55. The JCPOA, upon receiving information that the City intended to consider changing the City-wide Grievance Procedure, made no request to negotiate the proposed changes. (Tr.p. 41).

***10** 56. Policy Resolution No. 91-7, was adopted by the City Commission on September 3, 1991, and it superseded the city-wide grievance procedure that appeared in the Employee Handbook. (Tr.p. 244). All city employees, including the police officers, were then covered by the new, city-wide, grievance procedure. (Tr.p. 18-19, 44, 72, 82, 93, 95, 106, 129).

57. The adoption of the new City-wide Grievance Procedure made changes in the then existing City-wide Grievance Procedure that appeared in the Employee Handbook. (Tr.p. 78, 82, 96-97, 130, 214). The major changes included a reduction of time required to complete the grievance process, elimination of the three-person grievance panel provided at the final appeal step and replacing it with a single hearing officer position filed by a local attorney, and reducing the categories of grievances that are eligible to proceed to the final step in the grievance process. (Tr.p. 225-26).

58. The JCPOA was first officially advised that the Grievance Procedure had been changed and the police officers would be working under a new City-wide Grievance Procedure through a memorandum to Hestor dated September 10, 1991, after the changes had been adopted by the City Commission. (Tr.p. 12, 44, 102; Ex. 1).

59. The Commission changes to the City-wide Grievance Procedure came at a time when a separate police department grievance procedure was a subject of negotiations on a 1992 JCPOA contract. (Tr.p. 13, 103). The membership to the JCPOA were upset that the City had unilaterally changed the City-wide Grievance Procedure affecting the police officers without first submitting the proposed changes to the meet and confer process. (Tr.p. 158).

60. At the time of the formal hearing on this prohibited practice complaint, negotiations on the 1992 JCPOA including a separate grievance procedure for the police department, had not been completed. (Tr.p. 81).

61. Amending the existing City-wide Grievance Procedure and negotiating a separate Police Department grievance procedure as part of the 1992 JCPOA contract were mutually exclusive processes. (Tr.p. 230-31, 323). Both Chief Smith and Mr. Tritt considered the negotiations on grievance procedures that occurred between the JCPOA and the City were on a separate grievance procedure for the police officers to be included in the 1992 contract, and not on the proposed changes to the City-wide Grievance Procedure. (Tr.p. 137, 227-28). As Mr. Tritt testified, "We had negotiations on their (JCPOA) own [Police Department grievance procedure], but not for the City-wide." (Tr.p. 232).

62. Mr. Tritt, Mr. Hind and Chief Smith admitted that no negotiations occurred between the JCPOA and the City on the proposed changes to the City-wide Grievance Procedure. (Tr.p. 131, 231-32, 319, 325).

63. Mr. Tritt acknowledges that public employers cannot unilaterally change a mandatory subject of meet and confer without first negotiating with the recognized representative of the affected employees. (Tr.p. 263).

***11** 64. The City admits that it could have negotiated a grievance procedure for the police department different than the City-wide Grievance Procedure. (Tr.p. 247). The Junction City firefighters negotiated a 1992 contract which included a separate grievance procedure for the fire department. (Tr.p. 83, 93, 245; Ex. G). Mr. Hind testified that it would have been reasonable to change the City-wide Grievance Procedure for all other non-represented city employees by the September 3, 1991 resolution, but continue the old City-wide Grievance Procedure for the Police Department pending negotiations with the JCPOA. (Tr.p. 329).

65. At the time of the formal hearing on this prohibited practice complaint, a fact-finder had not been appointed and the fact-finding process to resolve the impasse in negotiations on the 1992 JCPOA contract had not been completed. (Tr.p. 224, 303, 307-324). Likewise, the fact-finding process was not employed prior to the adoption of Policy Resolution No. 91-7 on September 3, 1991. (Tr.p. 52).

66. No grievances were filed by a police officer under the new City-wide Grievance Procedure since its adoption September 3, 1991. (Tr.p. 233).

67. The parties, since the formal hearing on the prohibited practice complaint, have completed the meet and confer process and ratified a 1992 JCPOA contract including a separate grievance procedure for the Police Department.

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE I

WHETHER THE ACTION TAKEN BY THE JUNCTION CITY COMMISSION ON TUESDAY, SEPTEMBER 3, 1991, OF REVISING THE CITY-WIDE GRIEVANCE POLICY FOR ALL CITY EMPLOYEES CONSTITUTED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 75-4333(b)(1) AND (b)(5) AS A UNILATERAL CHANGE IN A MANDATORILY NEGOTIABLE SUBJECT.

a. WHETHER THE DECISION TO CHANGE THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT, OR A SUBJECT OF MANAGEMENT RIGHTS.

b. WHETHER THE IMPLEMENTATION OF CHANGES TO THE CITY-WIDE GRIEVANCE POLICY IS A MANDATORILY NEGOTIABLE SUBJECT OR A SUBJECT OF MANAGEMENT RIGHTS.

A. Unilateral Action

The legislative parameters of the duty to bargain under Public Employer-Employee Relations Act ("PEERA") are found in 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*."

K.S.A. 75-4322(m) defines "*Meet and confer in good faith*" as:

> "*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*."

***12** The Kansas Supreme Court has interpreted these statutes to mean:

> "*the Act [PEERA] imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations*." Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983).

After the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under PEERA. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991, p.29 (Feb. 10, 1992) ("Savings Clause"); *See* National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952). If the parties are not able to agree on the terms of a mandatory subject of bargaining they are said to have reached "*impasse*." Savings Clause, at p.29; West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526, 541-423 (Conn. 1972). Under PEERA when good faith bargaining has reached impasse and the impasse procedures set forth in K.S.A. 75-4332 have been completed, the employer may take unilateral action on the subjects upon which agreement could not be reached. Id.

A party's refusal to negotiate a mandatory subject of bargaining is a prohibited practice pursuant to K.S.A. 75-4333(b)(5) and (c)(3), although the party has every desire to reach agreement upon an overall memorandum of agreement, and earnestly and in all good faith bargains to that end. Savings Clause, at p.29; *See* 48 Am.Jur.2d, Labor and Labor Relations, § 998 at p. 812. A prohibited practice can be found despite the absence of bad faith, and even where there is a possibility of substantive good faith. *See* Morris, The Developing Labor Law, Ch. 13, at p. 564. Additionally, as the United States Supreme Court explained in NLRB v. Katz, 369 U.S. 736, 743 (1962), ("Katz"), even in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively with the chosen representatives of his employees in much the same manner as a flat refusal to bargain.

[1] It is a well established labor law principle that a unilateral change, by a public employer, in terms and conditions of employment is a prima facie violation of its public employees' collective negotiation rights. Brewster-NEA v. USD 314, Brewster, Kansas Case No. 72-CAE-2-1991 (Sept. 30, 1991) p. 23 ("Brewster"); Katz, supra. It is also well settled, however, that a unilateral change is not *per se* a prohibited practice. Brewster, at p.23. As the court concluded in NLRB v. Cone Mills, Corp., 373 F.2d 595 (4th Cir. 1967):

"Thus, we think it is incorrect to say that unilateral action is an unfair labor practice per se. See Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1423 (1958). We think it more accurate to say that unilateral action may be sufficient,

standing alone, to support a finding of refusal to bargain, but that it does not compel such a finding in disregard of the record as a whole. Usually, unilateral action is an unfair labor practice -- but not always."

***13** After a negotiated agreement has been reached between the public employer and the exclusive representative of public employees pursuant to K.S.A. 75-4321 et seq., then during the time that agreement is in force, the public employer, acting unilaterally, may not make changes in items included in that agreement or changes in items which are mandatorily negotiable, but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included in the resulting agreement. *See* NEA-Wichita v. U.S.D. 259, 234 Kan. 512 (1983).

The underlying rationale for this principle appears to be two-fold. First, because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a *"mandatory"* bargaining item. Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Secondly, since only unilateral changes are prohibited, an unfair labor practice will not lie if the *"change"* is consistent with the past practices of the parties. R. Gorman, Basic Text on Labor Law, 450-54 (1976).

Black's Law Dictionary, 5th ed. 1979) defines *"procedure"* as:
"The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which regulates the formal steps in an action or other judicial proceeding; a form, manner and order of conducting suits or prosecutions. The judicial process for enforcing rights and duties recognized by substantive law and for justly administering redress for infraction of them."

There is no question that the resolution adopted by the City on September 3, 1991 established a procedure for addressing the grievances of all City employees, including the police officers. The *"Grievance Policy"* contained in the Employee Handbook, (Ex. A), clearly sets forth the *"machinery," "mode of proceeding,"* and *"formal steps"* for handling a complaint filed by any. City employee, including a police officer. K.S.A. 75-4324 gives public employees the right to organize for the purpose of meeting and conferring with public employers with respect to conditions of employment. K.S.A. 75-4322(t) defines ""*conditions of employment*" in pertinent part as meaning "*grievance procedures*." If a topic is by statute made a part of the terms and conditions of employment, then the topic is by statute made mandatorily negotiable. *See* NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, Syl. 5, 1983).

Certain subjects "*which lie at the core of entrepreneurial control*" cannot be made mandatory subjects of bargaining. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 223 (1963) (Justice Stewart concurring). As quoted by the Kansas Supreme Court in U.S.D. No. 352 v. NEA-Goodland, 246 Kan. 137, 143 (1990):
***14** "*Perhaps the single greatest, and almost universally recognized, limitation on the scope of bargaining or negotiation by state public employees is the concept of managerial prerogative as it has developed in the public sector. In essence, the concept creates a dichotomy between 'bargainable' issues, that is those issues which affect conditions of employment, and issues of 'policy' which are exclusively reserved to government discretion and cannot be made mandatory subjects of bargaining. Anno., 84 A.L.R.3d 242, §3 [a].*"

Here, the decision to establish or modify a grievance policy for City employees is within the managerial prerogatives set forth in K.S.A. 75-4326 and not mandatorily negotiable. However, the grievance procedures should be viewed as the mechanics for applying the policy, and must be negotiated prior to implementation of the policy. Fraternal Order of Police, Lodge No. 4 v. City of Kansas City, Kansas, Case No. 75-CAE-4-1991 (November 15, 1991); Brewster-NEA v. Unified School District 314, Brewster, Kansas, Case No. 72-CAE-2-1991 (September 30, 1991).

The City argues "*that because Policy Resolution PR-7 superseded the entire grievance procedure [then existing and set forth in the Employee Handbook], the JCPOA would have been in the position of having no grievance procedure for its members if PR 7 was not applicable City-wide*." It further contends that even if the revision of the City-wide grievance policy constituted a prohibited practice, "*no harm was done to the JCPOA*." (Res. Brief p. 8).

Whether the change is viewed as beneficial or detrimental is irrelevant to the determination of whether there was a unilateral change in terms and conditions of employment. Brewster, at p. 25. In School Bd. of Indian River County v. Indian River County Education Ass'n, Local 3617, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

> "*A unilateral increase in benefits could foreseeable do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent. them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership*."

The reason that unilateral action is prima facie unlawful is in the high degree of probability that it may frustrate a bargaining opportunity. Even if there has actually been a unilateral change in a term and condition of employment, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain. As the court noted in Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984):

> "*The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith*."

***15 [2]** In summary, where a public employer seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the employer must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

The City asserts the grievance procedure adopted by the City on September 3, 1991, with minor differences, was "*substantially the same grievance procedure as the City proposed to the JCPOA on July 26, 1991*." The issue was the subject of negotiations on the 1992 contract during the meet and confer sessions up to August 23, 1991, and during the subsequent meetings with the mediator as the first step in the impasse procedures. This, the City argues, provided the JCPOA ample opportunity to negotiate the grievance procedure prior to its adoption and implementation in September, 1991.

At the onset it is necessary to remember during the same period of time the City was negotiating with the JCPOA a 1992 contract containing a separate grievance procedure, it was also preparing to adopt a new City-wide grievance procedure to replace the existing grievance procedure covering all City employees including the police officers. What the City apparently fails to recognize in its arguments is these are two distinct and mutually exclusive activities. The duty to bargain applies equally to both. David Tritt, Director of Personnel and the City's chief negotiator, was cognizant of this duality. According to Mr. Tritt, he did not

consider the negotiations with the JCPOA on the 1992 contract to be negotiations on the new City-wide grievance procedure. Further, Tritt testified there were, in fact, no negotiations with the JCPOA on the City-wide grievance procedure prior to its adoption in September. This was corroborated by the testimony of Chief Smith. Nothing in the 1991 contract or negotiations leading to that contract indicate a waiver by the JCPOA of any right to negotiate changes in the grievance procedure. Clearly, the JCPOA had neither the opportunity to, nor waived its right to, bargain any change in the grievance procedure.

Even assuming, *arguendo*, that the negotiations on the 1992 JCPOA contract could be considered in determining whether the City satisfied its obligation to meet and confer in good faith on grievance procedures as the City argues, the evidence clearly indicates that the parties never reached agreement on the terms of any new grievance procedure, and, having reached impasse, never completed the impasse procedures required by K.S.A. 75-4332. Both Personnel Director Tritt and City Manager Blain, while testifying the parties did meet with the mediator appointed by the Public Employee Relations Board in accordance with K.S.A. 75-4332(c) when the parties reached impasse on the 1992 contract, admitted that the fact-finding provisions of K.S.A. 75-4332(d) were not complied with prior to the September 3, 1991 adoption of the City-wide grievance procedure.

***16** Whether viewed as a failure to negotiate or a failure to complete the K.S.A. 75-4332 impasse procedure, essentially when the City took the unilateral action complained of herein, it in effect sought to, and did modify, during the life of the existing 1991 JCPOA contract, the terms and conditions of employment of the police officers. Such unilateral action constitutes a failure to meet and confer as required by K.S.A. 75-4327(b), and a prohibited practice as set forth in K.S.A. 75-4333(b)(1) and (5).

B. Willfulness

In its defense, the City argues the absence of "*wilfulness*." City Manager, Blain Hinds, testified the City had to make changes in the City-wide grievance procedure and could not wait until all the negotiations had taken place with the JCPOA. [2] So the City made the changes but continued to negotiate on the 1992 contract including any changes to the grievance procedure sought by the JCPOA.

K.S.A. 75-4333(b) sets forth eight categories of conduct which, if undertaken by the public employer, constitute a prohibited practice and evidence of bad faith in meet and confer proceedings. Such conduct is to considered a prohibited practice only if engaged in "*willfully*." PEERA, however, does not contain a definition of "*willful*."

"*Wilful*" conduct can be difficult to define with precision, and requires a case-by-case examination. Dictionaries provide two alternative definitions of ""*willful:*" (1) "*deliberate*" or "*intentional*," and (2) "*headstrong*," ""*heedless*" or "*obstinate*." The American College Dictionary, at p. 1396 (6th ed. 1953) defines "*willful*" in these two ways. First:

> "*[W]illed, voluntary, or intentional; wilful murder*."

Second:

> "*[S]elf-willed or headstrong, perversely obstinate or intractable*."

The same dictionary includes "*headstrong*," "*perverse*" and "*wayward*" as synonyms for "*willful*" indicating that they refer to one who stubbornly insists upon doing as he pleases despite authority. Thus, "*willful*" suggests a stubborn persistence in doing what one pleases especially in opposition to those whose wishes or commands ought to be respected or obeyed -- "*a willful*

child who disregarded his parent's advise." In the context here, a public employer who disregards the legislative commands of the Public Employer-Employee Relations Act, and the rights of the public employees.

The American Heritage Dictionary of the English Language, at p. 1466 (4th ed. 1973) defines "*willful*" as follows:
"*1. Said or done in accordance with one's will; deliberate [; or]*

"*2. Inclined to impose one's will; unreasoningly obstinate*."

Websters Ninth New Collegiate Dictionary, at p. 1350 (9th ed. 1986) also defines "*willful*" as:
***17** "*1. [O]bstinately and often perversely self-willed [; or]*

"*2. [D]one deliberately; intentional*.

Finally, Black's Law Dictionary, at p. 1434 (5th ed. 1979), provides the following definitions for the word "*willful;*"
"*Preceding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary. An act . . . is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law*.

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"*A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other is negative*."

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"*Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification*." (emphasis added).

Clearly, use of the first definition places a much more difficult burden upon the complaining party to prove a prohibited practice for not only must it be shown that an act was committed, but also that it was **committed with the intent** to violate the act or injure the other party. The second definition, by contrast, removes the requirement of evil intend. Of course, where it can be shown that a party has undertaken a course of conduct with evil intent, a prohibited practice will be found. However, the absence of an evil intent will not necessarily insulate a party from being found to have committed a prohibited practice. Examination of various definitions of "*wilful conduct*," as an alternative to evil intent, require that it appear the party (1) had knowledge of existing conditions, and was conscious from such knowledge that injury will likely or probably result from his conduct, and (2) with indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. 57A Am.Jur.2d, §263, p.298. In choosing between the two alternative definitions, it must be kept in mind that PEERA should be construed liberally to accomplish the purposes set forth in the act. [3] Accordingly, the knowledge of the consequences together with the choice to proceed evincing the constructive intent or state of mine that characterizes "*willful conduct*" is the appropriate definition for applying the "*wilfully*" requirement of K.S.A. 75-4330.

a. Knowledge

[3] For conduct to be wilful it must be shown that the party knew or reasonably should have known in light of the surrounding circumstances that his conduct would naturally or probably result in injury. Mandel v. U.S., 545 F. Supp 907 (1982). The requisite knowledge can be actual or constructive, Lynch v. Board of Education, 412 N.E.2d. 447 (Ill. 1980), and is judged by an objective rather than subjective standard. [4] In certain cases it can be presumed from the exhibited conduct that the party's intentions were wilful. Teachers Association of District 366 v. USD 366, Yates Center, Kansas, Case No. 72-CAE-7-1881 (Nov. 10, 1988), p.5. [5] Stated another way, a finding of wilful conduct requires a showing that the party continued a course of conduct in conscious disregard of the foreseeable injurious consequences. Mandel v. U.S., supra.

b. Constructive Intent.

***18 [4]** To be considered "*wilful*" the conduct must be conscious and intentional and of such a nature that under the known existing conditions injury will probably result therefrom. It is said a person may so disregard the rights of others and be so headstrong in proceeding in the face of known potential injury to those rights, that the law is justified in assuming that his conduct is ""*intentional and unreasonable*". Dussell v. Kaufman Constr. Co., 157 A.2d 740 (Pa. 1960). This doctrine is based upon the principle that a person is presumed to intend the natural and logical consequences of his acts. Payne v. Vance, 133 N.E. 85 (Ohio 1921). Thus if conduct is sufficiently lacking in consideration for the rights of others, and indifferent to the consequences it may impose, then, regardless of the actual state of the mind of the party and his actual concern for the rights of others, it is wilful conduct. Pelletti v. Membrila, 44 Cal.Rptr. 588 (1965); Ewing v. Cloverleaf Bowl, 143 Cal. Rptr. 13 (1978); Tresemer v. Barke, 150 Cal.Rptr. 384 (1978).

c. Intent To Injure

[5] Wilful conduct does not require a deliberate intention to injure. Lynch v. Board of Education, supra. **Rather the "intent" in wilful conduct is not an intent to cause injury, but it is an intent to do an act, or an intent to not do an act, in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to the rights of another.** Roberts v. Brown, 384 So.2d 1047 (Ala. 1980); Grimshaw v. Ford Motor Co., 174 Cal.Rptr. 348 (1981); Thompson v. Bohiken, 312 N.W.2d 501 (Iowa 1981); Brisboise v. Kansas City Public Service Co., 303 S.W.2d 619 (Mo. 1957); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979). Furthermore, ""*ill will*" is not a necessary element of "wilful" conduct, and the conduct charged need not be based in ill will or malicious intent. Bolin v. Chicago S.P., M.& O. R. Co., 84 N.W. 446 (Wisc. 1900). Willfulness means something more than good intentions coupled with bad judgment, but not necessarily an intent to do harm; it requires a conscious indifference to the consequences. Stephens v. U.S., 472 F.Supp. 998 (1979).

In the instant case, both City Manager Hinds and Personnel Director Tritt had extensive experience in public employee negotiations and testified they were familiar with the Public Employer-Employee Relations Act. The evidence clearly demonstrates the City was aware grievance procedures are mandatory subjects for negotiations; aware the City had an obligation to negotiate any proposed changes to terms and conditions of employment through impasse before unilateral action could be taken; and was aware no negotiations with the JCPOA were undertaken nor impasse procedures completed at the time the September 3, 1990 City-wide grievance procedure was adopted. While the City may not have intended to cause injury to the JCPOA or the police officers, "*it did intend to do an act [adopt a new City-wide grievance procedure], or intent to not do an act [negotiate with the JCPOA prior to adopting the City-wide grievance procedure]* " so as to evince the constructive intent or state of mine that characterizes "*willful*" conduct. Certainly a reasonable man, especially one with the labor relations experience of Hinds and Tritt, knew, or had reason to know, that such conduct would, to a high degree of probability, result in injury to the JCPOA by denying it the rights guaranteed by K.S.A. 75-4327(b). [6] It is obvious the conduct of the City was sufficiently lacking of consideration for the rights of the JCPOA to "*meet and confer in good faith . . . in the determination of conditions of employment*" of the police officers as guaranteed in K.S.A. 75-4327(b), and rights of the police officers as public employees

guaranteed in K.S.A. 75-4324, and indifferent to the consequences of its September 3, 1991 action so as to constitute wilful conduct as required by K.S.A. 75-4333(b).

ISSUE II

***19** SHOULD THE CITY OF JUNCTION CITY BE FOUND TO HAVE COMMITTED A PROHIBITED PRACTICE FOR UNILATERALLY REVISING THE CITY-WIDE GRIEVANCE POLICY, WHETHER THE APPROPRIATE REMEDY IS TO ORDER THE CITY TO RESCIND THE CHANGES, AND PROCEED TO MEET AND CONFER WITH THE JUNCTION CITY POLICE OFFICERS ASSOCIATION OVER THE PROPOSED CHANGES.

Having determined that the actions of the City in unilaterally adopting the new City-wide grievance procedure on September 3, 1991 constituted a prohibited practice as a violation of K.S.A. 75-4330(b)(1) and (5), it is necessary to next determine the appropriate remedy. The JCPOA requested the City be ordered to rescind the new City-wide grievance procedure, at least as to its applicability to the police officers; to reinstate the previous grievance procedure for use by the police officers during negotiation proceedings; and to meet and confer with the JCPOA concerning the proposed changes to the grievance procedure. The City argues that since the parties have reached agreement on a new grievance procedure as part of the 1992 contract the issue is moot.

A case is moot when no further controversy exists between the parties and where any judgment of the court would be without effect. NEA-Topeka, Inc. v. U.S.D. 501, 227 Kan. 529, syl. #1 (1980). Here a controversy continues to exist as to whether the city committed a prohibited practice by its actions of September 3, 1991, so the matter cannot be considered moot. However, with the ratification of the 1992 contract between the JCPOA and the City containing a grievance procedure, to order the new City-wide grievance procedure rescinded as applied to police officers, or the parties to negotiate the proposed changes in the City-wide grievance procedure, will serve no purpose. Since such remedy as requested by the JCPOA would be without effect, it must be denied. The JCPOA request for fees and costs is also denied. [7] The appropriate remedy is an order directing the City to cease and desist taking future unilateral action on matters effecting the terms and conditions of employment of the police officers.

ISSUE III

WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(5) BY REFUSING TO ALLOW THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO "MECHANICALLY RECORD IT OWN MINUTES" OF THE MEET AND CONFER SESSIONS.
a. WHETHER MEET AND CONFER SESSIONS ARE CONTROLLED BY THE KANSAS OPEN MEETINGS ACT, K.S.A. 75-4317 ET SEQ.

A. Tape Recording Sessions

Read together, sections K.S.A. 75-4322(m), 75-4324, 75-4327(b), 75-4333(b)(5) and 75-4333(c)(3), establish the obligation of the employer and the representative of its employees to meet and confer with each other in good faith with respect to "*conditions of employment*." These sections are similar or identical to Sections 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158. [8] In N.L.R.B. v. Wooster Div. of Borg-Warner Corp. 356 U.S. 342 (1958) ("Borg-Warner") the Supreme Court held that the duty to bargain in good faith is limited to the subjects of wages, hours and terms and conditions of employment. On matters concerning those subjects "*neither party is legally obligated to yield*." Borg-Warner, 356 U.S. at 349; Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office, Case No. 75-CAE-9-1990 (March 11, 1991), p.19)("Adjutant General"). However, as to other matters, designated non-mandatory, "each party is free to bargain or not to bargain, and to agree or not to agree." Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978); *See* Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 210 (1964). Accordingly, lawful subjects of bargaining are divided into two categories; mandatory and non-mandatory.

***20** A party is not permitted to insist on a non-mandatory subject as a condition or a prerequisite to an agreement on the mandatory subjects. Savings Clause, at p.30; Borg-Warner, 356 U.S. at 349; N.L.R.B. v. Operating Engineers Local 542, 532 F.2d 902, 907 (3rd Cir. 1976). Such insistence is, in effect, a refusal to bargain about mandatory subjects of bargaining. Savings Clause, at p. 30; Borg-Warner, 356 U.S. at 349. Even in the absence of bad faith, a party violates the duty to meet and confer in good faith by insisting on a nonmandatory subject as a precondition to bargaining. Borg-Warner, 356 U.S. at 348-50.

The JCPOA, during discussions of the ground rules for negotiations, sought to tape record the meet and confer sessions to obtain a verbatim transcript. The City objected. Negotiations were undertaken without the requested recording but the JCPOA subsequently filed a prohibited practice charge with the PERB claiming the City's refusal to allow the tape recording of the negotiating sessions constituted a violation of the duty to meet and confer in good faith as proscribed by K.S.A. 75-4333(b)(5).

The employer in N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981) insisted on verbatim recording of collective bargaining sessions. The federal court upheld the Board determination that verbatim recording of collective bargaining sessions was a nonmandatory subject of bargaining:
"*It is our view that the issue of the presence of a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations does not fall within 'wages, hours, and other terms and conditions of employment.' Rather these subjects are properly grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment.' As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue. Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978)*.

Thus, the employer's insistence to impasse on the verbatim recording was a violation of the duty to bargain in good faith. Id, at p.655-58. The court also reasoned that verbatim recording could chill negotiations since the presence of a court reporter "*may cause the parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiation*." Id. at p. 656. A party's insistence on tape recording collective bargaining negotiations constituted an unfair labor practice the court concluded. Id.

***21** In Latrobe Steel Co. v. N.L.R.B., 630 F.2d 171 (3rd Cir. 1980) the court upheld the Board's finding that verbatim recording of collective bargaining negotiations is a nonmandatory subject of bargaining. It was nonmandatory, the state reasoned, because there is "*no significant relation between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees*." Id. at p. 176. Moreover, the Court explained, verbatim recording had the potential to chill negotiations and thereby impede reaching an agreement which it was the policy of the NLRA to encourage. Thus, by insisting on a nonmandatory subject of bargaining as a precondition to negotiation of mandatory subjects of bargaining, the company had violated its duty to bargain in good faith. Id. at p.179.

Finally, as the NLRB reasoned in Bartlett-Collins Co., 99 LRRM 1034, 1036 (1978):

> "*The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours and other terms and conditions of employment.' As it's our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue. Id. at 773*.

There appears no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees. *Cf* Chemical Workers Local No.1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179, 78 LRRM 2974 (mandatory subjects limited to issues that settle an aspect of the relationship between the employer and employees); N.L.R.B. v. Massachusetts Nurses Ass'n, 557 F.2d 894, 897-98, 95 LRRM 2852 (1st Cir. 1977) (an interest arbitration clause is a non-mandatory subject of bargaining as it bears only a remote or incidental relationship to terms or conditions of employment); Leeds & Northrup Co. v. N.L.R.B., 391 F.2d 874, 877, 67 LRRM 2793 (3rd Cir. 1968) (principle at heart of statutory provision is requiring negotiation on basic terms which are vital to the employees' economic interest).

[6] It would be contrary to the policy of PEERA which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to breakdown over this preliminary procedural issue. *See* Latrobe Steel Co. v. N.L.R.B., 105 LRRM 2393, 2396 (1980). The use of a recorder could inhibit free and open discussions in collective bargaining sessions. Thus the adverse effects on the bargaining process outweigh the need for a verbatim transcript. Insistence on a recording device over the other party's objection further suggests a lack of confidence in the good faith of the other side. Such manifestations of suspicion and distrust are antithetical to the negotiations process. Bartlett-Collins, 639 F.2d at 656. The demand for verbatim recording devices during negotiations as a means to record those negotiations is not a mandatory subject of bargaining under PEERA, and either party's insistence to impasse on this issue is, accordingly, a prohibited practice, without regard to whether such insistence was in good or bad faith. *See* Bartlett-Collins Co., 99 LRRM at 1035-36.

***22** The recording of meet and confer sessions not being a mandatory subject of negotiations under PEERA, the City did not refuse to meet and confer in good faith as required by K.S.A. 75-4333(b)(5) when it refused to allow the sessions to be tape recorded.

B. Open Meetings

The JCPOA argues that even if the issue of recording meet and confer sessions is not a mandatory subject of negotiations, the City still cannot refuse to allow the use of a tape recorder because the sessions are subject to the Open Meetings Law, K.S.A. 75-4317 et seq.

This analysis must begin with a review of the pertinent sections of the Open Meetings Law. K.S.A. 75-4317 provides:
"*(a) In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.*

"*(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a).*"

K.S.A. 75-4317a defines "*Meeting*" as:

> "*As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency.*"

K.S.A. 75-4318 provides:
"*(a) Except as otherwise provided by state or federal law . . ., all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions*

thereof, including boards, commissions, authorities, councils, committees, subcommittees, and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public . . ."

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"*(e) The use of cameras, photographic lights and recording devices shall not be prohibited at any meeting mentioned by subsection (a) of this section, but such use shall be subject to reasonable rules designed to insure the orderly conduct of the proceedings at such meeting.*"

Certain exceptions to the open meetings requirement are set forth in K.S.A. 75-4319:
"*(a) Upon formal motion made, seconded and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. . . .*"

"*(b) No subjects shall be discussed at any closed or executive meeting, except the following: (1) Personnel matters of non-elected personnel;*

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"*(3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency; . . .*"

***23** Clearly, if meet and confer sessions are subject to the dictates of the Kansas Open Meetings Law, pursuant to K.S.A. 75-4318(e), neither party could prohibit ""recording devices" from the sessions. To refuse to meet and confer based upon the presence of such devices would constitute a prohibited practice as proscribed by K.S.A. 75-4333(b)(5).

[7] The Kansas Open Meeting Law as set: forth above manifests a general policy that all meetings of a governmental body should be open to the public. In enacting PEERA the Legislature established that it is the public policy of this state to promote harmonious and cooperative relationships between government and its public employees by permitting such employees to organize and bargain collectively. The purpose of PEERA is to encourage the use of the collective bargaining process in the public sector. Collective bargaining involves a process of exploratory problem solving in which governmental bodies and labor organizations explore and consider a variety of problems to be resolved through compromise. The process of compromise is therefore the essential ingredient of effective and successful collective bargaining. Carroll County Educ. Ass'n v. Board of Ed., 448 A.2d 345, 351-52 (Md. 1982)(Davidson, J. dissenting).

Meeting and conferring in public tends to inhibit if not destroy the collective negotiation process. It suppresses free and open discussion, causes proceedings to become formalized rather than spontaneous, induces rigidity and posturing, fosters anxiety that compromise might look like retreat and, therefore, freezes negotiators into fixed positions from which they cannot recede. Most courts, labor boards, and commentators agree that collective bargaining in public tends to damage the process of compromise necessary for successful collective bargaining. (See authorities cited below).

[8] The issue for determination in this complaint is whether the statute opening the conduct of public business to the general public was meant to accommodate the statutorily protected rights of public employees granted in the Public Employer-Employee Relations Act. The Open Meetings Law declares public policy; it is a statute of general application. Nevertheless the act admits of exceptions, and the rights it confers are conferred upon the general public and not upon any particular segment or representative of the general public. All open-meeting legislation involves the accommodation of differing interests. The Public Employer-

Employee Relations Act also appears to be a statute of general, application. It grants limited but protected rights to certain public employees. Public employees are guaranteed the right to express their grievances and make proposals on conditions of employment to their employer's representative. Where two statutes deal with the same subject matter, i.e. collective bargaining sessions, and are not inconsistent with each other, they must be harmonized to the extent possible - notwithstanding the fact that the statutes may have been enacted at different times with no reference to each other. This principle of statutory construction operates because the law does not favor repeal by implication. Of course, to the extent the provisions of the two statutes are irreconcilable, the later statute governs. Criminal Inj. Comp. Bd. v. Gould, 381 A.2d 55 (Md. 1975); Bd. of Fire Comm'rs v. Potter, 300 A.2d 680 (Md. 1973); Department v. Greyhound, 234 A.2d 255 (Md. 1967).[9] Applying these principles in the present case, it is clear that the two statutes are not inconsistent, facially or otherwise. Plainly, they may be harmonized and each given effect.

***24** First, it is argued that the public interest is best served by conducting public sector labor negotiations in sessions closed to the public. *E.g.*, Burlington Community Sch. Dist. v. Public Employment Relations Bd., 268 N.W.2d 512, 523-24 (Iowa 1978); Board of Selectmen of Marion v. Labor Relations Comm'n, 388 N.E.2d 302, 303 (Mass.App. 1979); State ex rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 290-91 (Mo.App. 1979); Talbot v. Concord Union School Dist., 323 A.2d 912, 913-14 (N.H. 1974); *accord* N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652, 656 (10th Cir. 1981); Latrobe Steel Co. v. N.L.R.B., 630 F.2d 171, 176-79 (3rd Cir. 1980); *See* Quamphegan Teachers Ass'n v. Board of Directors, School Admin. Dist. No. 35, Case No. 73-05, April 20, 1973 (Maine Public Employees Relations Board); Mayor Samuel E. Zoll & The City of Salem, Mass. & Local 1780, Int'l Ass'n of Firefighters, Case No. MUP-309, December 14, 1972 (Mass. Labor Relations Comm.); Washoe County Teachers Ass'n & the Washoe County School Dist., Nevada Local Gov't Employee-Management Relations bd., Case No. AI-045295, May 21, 1976; Briell Bd. of Educ. & Briell Educ. Ass'n, State of New Jersey PERC, Docket No. CO-77-88-92, June 23, 1977; Pennsylvania Labor Relations Bd. v. Board of School Directors of the Bethlehem Area School Dist., Case No. PERA-C-2861-C, April 11, 1973, GERR 505 (E-1) (Pennsylvania Labor Relations Board 1973); City of Sparta & Local 1947-A Wisconsin Council of County & Municipal Employees, AFSCME, AFL-CIO, Case VIII, No. 19480, DR(M)-68, Decision No. 14520, April 7, 1976 (Wisconsin Employment Labor Relations Commission); *See also* 1 Werne, Law and Practice of Public Employment Labor Relations §15.3 at 266-67 (1974); Committee on State Labor Law, Section of Labor Relations Law, A.B.A., 2 Committee Reports 274 (1975). These cases, in general advance the notion that the presence of the public and press at such negotiating sessions inhibits the free exchange of views and freezes negotiations into fixed positions from which neither party can recede without loss of face; in other words, that meaningful collective negotiation would be destroyed if full publicity were accorded at each step of the negotiations.

When the New Hampshire Supreme Court considered the question in the context of an open meeting statute that did not provide a collective bargaining exception, it observed that there was considerable support for the proposition that *"the delicate mechanisms of a collective bargaining would be thrown awry if viewed prematurely by the public."* Tolbot v. Concord Union School Dist., 323 A.2d 913, 913 (N.H. 1974) ("Tolbot"). The New Hampshire Supreme Court concluded:
"There is nothing in the legislative history of the Right to Know Law to indicate that the legislature specifically considered the impact of its provisions on public sector bargaining. However, it is improbable that the legislature intended the law to apply in such a fashion as to destroy the very process it was attempting to open to the public.

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***25** *"We agree with the Florida Supreme Court 'that meaningful collective bargaining . . . would be destroyed if full publicity were accorded at each step of the negotiations (Bassett v. Braddock, 262 So.2d 425, 426 (Fla. 1972) and hold that the negotiation sessions between the school board and union committees are not within the ambit of the Right to Know Law. However, in so ruling, we would emphasize that these sessions serve only to produce recommendations which are submitted to the board for final approval. The board's approval must be given in an open meeting in accordance with RSA 91-A:3 (Supp. 1973), this protecting the public's right to know what contractual terms have been agreed upon by the negotiators."*

The court in Talbot also noted the position of several State labor boards that bargaining in public would tend to prolong negotiations and damage the procedure of compromise inherent in collective bargaining. Talbot, 323 A.2d at 912. The reason underlying this conclusion was that the presence of press and public induces rigidity and posturing by the negotiating teams and provokes in them anxiety that compromise will look like retreat. 1 Werne, The law and Practice of Public Employment Labor Relations § 15.3, at 266-67 (1974); Wickham, Tennessee's Sunshine Law: A Need For A Limited Shade and Clearer Focus, 42 Tenn.L.Rev. 557, 564 (1974); 1975 Committee Report of the Labor Relations Law Section of the American Bar Association, Part I at 274.

There is, however, nothing in the history of *"open meetings"* or *"sunshine"* or *""Freedom of Information"* legislation which indicates the public interest is best served by public participation in public-sector collective bargaining. State Ex Rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 290 (Mo.App. 1979). One thorough study indicates that the federal government and all fifty states have legislation providing that some segments of the government must open some or all of their meetings to public observation, but concludes that *""[c]ollective bargaining negotiations cannot effectively be carried out if open to the public."* Statutory Comment, Government in the Sunshine Act: A Danger of Overexposure, 14 Harv.J.Legis. 620, 623, 630 (1977). Professor Douglas Wickham, an advocate of open-meeting laws, nevertheless acknowledges that ". . . *open-meeting legislation involves the reconciliation of serious value conflicts . . ."* and argues that courts should recognize *". . . the infeasibility of conducting collective bargaining negotiations in public.. The give and take of compromise involves too much loss of face to expect the participants to bargain freely before outside observers."* Wickham, Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus, 42 Tenn.L.Rev. 557, 564-65 (1975).

Secondly, the meet and confer sessions contemplated by PEERA are not within the ambit of the Open Meetings Law. This is so because the relevant *"body or agency"* for purposes of K.S.A. 75-4318 of the Open Meetings Law is the City Commission, not its negotiating representative, Mr. Tritt. Consequently, unless a quorum of the members of the board is present at negotiating sessions, the sessions are not *"meetings"* within the contemplation of K.S.A. 75-4317a of the Open Meetings Law.

***26** In *In re* Arbitration between Johns Constr. Co. & U.S.D. No. 210, 233 Kan. 527, 529-30 (1983), the court held the Kansas Open Meetings Law does not apply to proceedings before an arbitration board which is holding a hearing on a dispute arising out of a contract for the construction of a school building.
"We have no hesitation in holding that it does not. The Kansas Open Meetings Act, by the express language of K.S.A. 1982 Supp. 75-4318(a), applies only to agencies of the state and political and taxing subdivisions thereof, receiving or expending and supported in whole or in part by public funds. The arbitration board in this case was created by a contract entered into between the school district and a private contractor. The arbitration board was not a public agency as contemplated by the statute, and hence, was not subject to the provisions of the Kansas Open Meetings Act."

It must be remembered, that even after an agreement is reached by the negotiating teams, the ultimate decision as to whether such tentative agreement should be ratified remains with the governing body, and that debate and vote must take place in an open meeting. The purpose of the Kansas Open Meetings Law is thereby satisfied without frustrating the meet and confer process under PEERA. The Missouri appellate court, in examining the Missouri open meetings act, reached a similar conclusion in finding the open records act did not cover public sector negotiations. In State ex rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 291, (1979), the court reasoned:
"Further, it must be borne in mind that the relators cannot, in any event, bind the City Council of Springfield by their negotiations. . . . The relators are the employer's representatives; they have the authority to negotiate, but . . . the legislative authority . . . cannot be bound by the results of the relators' negotiations. When discussions by the negotiators are complete, the results are to be reduced to writing and presented to the [legislative body] for adoption, modification or rejection . . ."

Additionally, the Kansas Open Meetings Law admits of exceptions. Of particular importance here is K.S.A. 75-4319(b)(3) quoted above. When required to determine whether bargaining sessions were exempt from the Missouri Open Meetings Act, the Missouri court gave a similar exception covering *"meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote"* a broad interpretation to include all aspects of employee negotiations. The court reasoned:
"We have the same view as the New Hampshire court [in Tolbot v. Concord Union School Dist., 323 A.2d 913, 913 (N.H. 1974)]: it is improbable that the General Assembly intended the Open Meetings Act to apply in such manner as to destroy the limited bargaining rights of public employees by exposing the public employees' thought-process, and those of the employer, to the public eye and ear. . . . The public interest does not require that the mechanisms of public sector collective bargaining be inhibited and eventually destroyed by requiring that the negotiations, or discussion about those negotiations, be conducted in public." State Ex Rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 291 (Mo.App. 1979).

***27** Finally, one must look at the actions of public employers and public employee representatives relative to meet and confer sessions since the adoption of PEERA in 1971. In the almost 20 years since the adoption of PEERA and the Kansas Open Meetings Law this appears to be the first case to raise the issue of open meetings for meet and confer sessions. The reasoning of the New York court in County of Saratoga v. Newman, 476 N.Y. Supp.2d 1020, 1022 (1984) appears equally appropriate here:
"Despite the fact that the Open Meetings law took effect over seven years ago, the instant case is on of first impression in the courts of this state. In fact, on only one occasion, nearly five years ago, did a party raise the instant question before P.E.R.B. Town of Shelton Island, 12 PERB, par 3112. This is clear evidence that neither public employers, nor employee organizations, have considered negotiating sessions to be covered by the Open Meetings Law. Such a long standing practical construction by the parties affected by the statute in question should be given considerable interpretive weight."

[9] While the Open Meetings Law contained in K.S.A. 75-4317 et seq. manifests a general policy that all meetings of a governmental body should be open to the public, meet and confer sessions under PEERA are not subject to the Act.[10] Accordingly, the JCPOA did not have a right under the Kansas Open Meetings Law to tape record the meet and confer sessions, and the City did not violate K.S.A. 75-4333(b)(5) by refusing to allow the sessions be recorded.

ISSUE IV

WHETHER THE CITY OF JUNCTION CITY COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 75-4333(b)(1) BY ATTEMPTING TO ESTABLISH A LACK OF TRUST IN THE JUNCTION CITY POLICE OFFICERS ASSOCIATION CHIEF NEGOTIATOR, MICHAEL BARRICKLOW, THROUGH STATEMENTS ATTRIBUTED TO THE CHIEF OF POLICE.

K.S.A. 75-4333(b)(1) makes it a prohibited practice for a public employer willfully to:
"Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;"

K.S.A. 75-4325 provides:
"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. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations."

The mandate of K.S.A. 75-4333(b)(1) is the broadest of the subdivisions of 75-4333(b), and is identical to Section 8(a)(1) of the National Labor Relations Act. [11] Motive, as expressed in the decisions of the National Labor Relations Board ("NLRB"), is not the critical element of a Section 8(a)(1) violation. The test applied by the NLRB has been that:

***28** *"interference, restraint, and coercion under section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."*

[10] The JCPOA complains that Chief of Police Jerry Smith approached JCPOA President Tom Wesoloski and made the comment, *"If the association is going to pay someone to negotiate, they should at least know the difference between Hays and Junction City."* This statement, the JCPOA alleges, was intended to establish a lack of trust in the JCPOA Chief Negotiator, Mike Barricklow, by inferring a lack of ability. In N.L.R.B. v. Virginia Electric & Power Co., 314 U.S.. 469 (1941) the United States Supreme Court held that employers had a constitutional right to express opinions that were noncoercive in nature. In considering coercive effect of speech, any assessment must be made in the context of its setting, the totality of the circumstances, and its impact upon the employees. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1968); N.L.R.B. v. Exchange Parts, 375 U.S. 405 (1964). Statements found to be isolated, trivial, ambiguous and susceptible to innocent interpretation, given no background of union animus, do not violate K.S.A. 75-4333(b)(1). *See* Pease Co. v. N.L.R.B., 666 F.2d 1044 (1981). However, comments that are not isolated or not made in a joking or casual manner may be unlawful. *See* Southwire Co. v. N.L.R.B., 820 F.2d 453 (1987). It is within the competence of the finder-of-fact to judge the impact of statements made within the employer-employee relationship. N.L.R.B. v. Wilhow Corp., 666 F.2d 1294 (C.A. 10th 1981).

The evidence reveals the comment was an isolated incident; made in jest or because Chief Smith thought it was humorous, and not made with the intent to influence the JCPOA to change its negotiator or put him in disrepute. There was no evidence presented of animus toward the JCPOA or their representative by Chief Smith. Such speech, while probably inappropriate under the circumstances, falls short of the coercion or interference contemplated as being violative of K.S.A. 75-5433(b)(1).

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ISSUE V & VI

WHETHER THE TELEPHONE CALLS MADE BY MICHAEL G. BARRICKLOW, CHIEF NEGOTIATOR FOR THE JUNCTION CITY POLICE OFFICERS ASSOCIATION TO THE CERTAIN MEMBERS OF THE CITY COMMISSION OF THE CITY OF JUNCTION CITY, KANSAS, ON. FRIDAY, SEPTEMBER 27, 1991, CONSTITUTES A PROHIBITED PRACTICE WITHIN THE MEANING OF K.S.A. 75-4333(c)(2) AND 75-4333(c)(3) BY INTERFERING WITH THE MEET AND CONFER PROCESS BY CIRCUMVENTING THE DULY AUTHORIZED BARGAINING REPRESENTATIVES OF THE PUBLIC EMPLOYER.

WHETHER A MEMBER OF AN EMPLOYEE BARGAINING UNIT IS BARRED FROM DISCUSSING A SUBJECT OF MANDATORY NEGOTIABILITY WITH AN ELECTED PUBLIC OFFICIAL WHO IS A MEMBER OF A GOVERNING BODY PURSUANT TO K.S.A. 75-4322(G) DURING THE TIME THAT SUBJECT IS AN ISSUE OF MEET AND CONFER NEGOTIATIONS BETWEEN THE EMPLOYEE'S RECOGNIZED REPRESENTATIVE AND THE REPRESENTATIVE OF THE GOVERNING BODY.

***29** **[11]** K.S.A. 75-4333(c)(2), in pertinent part, makes it a prohibited practice for a public employee organization willfully to: *"Interfere with, restrain or coerce a public employer . . . with respect to selecting a representative for the purposes of meeting and conferring or the adjustment of grievances."*

This statute basically prohibits an employee organization from interfering with an employer's choice of representatives for the purposes of meeting and conferring. Each party to a meet and confer relationship has both the right to select its representatives for bargaining and the duty to deal with the chosen representative of the other party. *See* Mine Workers Local 1854, 238 NLRB 1583 (1980); Frito-lay, Inc. v. Teamsters Local 137, 623 F.2d 1354 (9th Cir. 1980).

The complained of interference here is the direct contact by Michael G. Barricklow, JCPOA Chief Negotiator, with City commission members to discuss subjects, then under negotiation, thereby by-passing the commission's chosen negotiating representative, David Tritt. The evidence shows Mr. Barricklow discussed with Commission member Swartz at least three subjects under negotiation. With commission member Talley he indicated Mr. Tritt was *"doing something illegal,"* and was prevented by Mr. Talley's objections from discussing any specific subjects. In both situations the commission members expressed concern to Mr. Barricklow that such conversations were directed to them rather than their chief negotiator. The contacts were initiated by Mr. Barricklow, and there is no history of similar contacts during negotiations or evidence of commission members initiating contacts with JCPOA members or officials to discuss subjects of negotiation. According to Mr. Talley, he viewed the contact as an attempt to undermine his faith in the City's negotiator, Mr. Truitt.

In Mr. Barricklow's defense, the JCPOA argues the right of a citizen to discuss a matter of public concern with an elected official. The U.S. Supreme Court has held that public employees may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of their work. Pickering v. Board of Education, 391 U.S. 563, 568 (1968); *See also* Keyishian v. Board of Regents, 385 U.S. 589 (1967). Such rights, however, are not without limits. The U.S. Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy. Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271, 285 (1984).

[12] Kansas has adopted, through the Public Employer-Employee Relations Act ("PEERA"), a statutory policy that authorizes public bodies to accord exclusive recognition to representatives chosen by the majority of an appropriate unit of employees for the purpose of meeting and conferring on conditions of employment and adjusting grievances. The consequences of exclusive representation is the limiting of the rights of individual employees. Where, before the adoption of PEERA, any employee was free to negotiate with the public employer over his terms and conditions of employment, now the public employer may not *"meet and confer"* with any employees of the bargaining unit except through their exclusive representative.

***30** The extent to which a public employee's right to communicate with his elected officials is restricted by the doctrine of exclusive representation was addressed in Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175 (1976). In Madison Sch., during the course of a regularly scheduled open meeting of the Board of Education public discussion turned to currently pending labor negotiations between the board and the teacher's union. One speaker was a nonunion teacher who, over union objection, addressed one topic of the pending negotiations; the union's demand for a *"fair share"* clause which would require all teachers to pay union dues. Subsequently, after a collective-bargaining agreement had been ratified which did not include the *"fair share"* clause, the union filed a complaint claiming the board committed a prohibited practice by permitting the nonunion teacher to speak at its public meeting. The union contended that constituted negotiations by the board with a member of the bargaining unit other than the exclusive representative. The Wisconsin PERB found the board committed a prohibited practice, and that decision eventually reached the United States Supreme Court on review.

[13] When a governing body has either by its own decision or under statutory command, determined to open its decision making processes to public view and participation, the governing body has created a *"public forum"* dedicated to the expression of views by the general public. *"Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone."* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972). If the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding public employees from discussions on matters concerning working conditions, when they are the ones most vitally concerned with the proceedings. Madison Sch., 429 U.S. at p.175. As the Supreme Court concluded in Madison Sch.:

"The participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."

The mere expression of an opinion at a public forum, i.e. City council meeting, about a matter subject to collective bargaining, whether or not the speaker is a member of the bargaining unit, poses no genuine threat to the policy of exclusive representation expressed in PEERA, provided the speaker does not seek to reach an agreement or bargain with the governing body. *See* Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. at 180 (Stewart, J., concurring). The important factors are that the meeting be open to the public, and the public employee address the governing body not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.

***31** Here the comments of Mr. Barricklow complained of were not to a meeting of the governing body as a whole but rather to individual governing body members at their places of employment. While it may be that these elected officials do, from time to time, receive telephone calls at work and home, from citizens, including City employees, such does not transform these conversations into *""public forums."* It is a fundamental principle of First Amendment doctrine, articulated in Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 27, 45-46 (1983), that to establish a public forum, it must by long tradition or by government designation be open to the public at large for assembly and speech. There is nothing in the record to support a conclusion that such telephone contacts to discuss policy questions have either by long tradition or by government designation been open for general public participation. The telephone contacts between Mr. Barricklow and council members Swartz and Talley are not protected by the *"public forum"* doctrine, and will not suffice to overcome the doctrine of exclusivity or serve as a defense to a K.S.A. 75-4330(c)(2) complaint. Of additional importance is the fact that Mr. Barricklow is neither an employee of the City nor a citizen of Junction City, but rather an outside, paid negotiator.

No prior PERB decisions can be found to provide guidance in this case, however the Secretary of Human Resources in Unified School District 501, Topeka, Kansas v. NEA-Topeka, ("U.S.D. 501"), 72-CAEO-1-1982 & 72-CAEO-3-1981 (July 19, 1983), directly addressed the issue of bypassing the public employer representative under the Professional Negotiations Act. The recognition and exclusivity rights of the certified employee organization provided in PEERA and the PNA are the same, and the pertinent language of. K.S.A. 75-4333(c)(3) is identical to the language of K.S.A. 72-5430(c)(2). [12] In fact, the PERB, in Topeka Printing Pressmen & Assistants Union No. 49 v. State of Kansas, et al., CAE-1-1978 (January 25, 1978), determined that both laws *"are substantially the same,"* and concluded that it is inconceivable that two laws enacted at approximately the same time and utilizing substantially the same procedures could be interpreted differently.

[14] In U.S.D. 501 the Secretary determined that the bypassing of the board of education's chosen negotiations representative by association officials directly contacting board members to discuss subjects under negotiation constituted a violation of K.S.A. 72-5433(c)(2) as interfering *"with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances."*
"In summary, it is clear that both parties have the right to designate a representative for negotiations purposes. Furthermore, it is a prohibited practice for either party to interfere with the other party's selection of their representative.

***32** *"It is a well-established principle that the designation of a representative by the parties is accompanied by rights of exclusivity for negotiations purposes. The examiner is of the opinion that the legislature intended to give both parties the right to exclusive representations*. . . .

"In the instant case, NEA-Topeka claims that the association retains the right to communicate directly with the board, regarding negotiation matters, thereby circumventing the designated representative of the board. . . .

". . . The examiner is of the opinion that the legislature fully intended to embody the general principles of labor relations when they enacted the Professional Negotiations Act. The legislation protects the rights of teachers to organize and negotiate,

through representatives of their own choosing. The school board also has the right to designate a representative. . . . Most importantly, once a school board has designated a representative, that representative is the exclusive representative of the board for negotiations purposes, unless the board indicates to the contrary.

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". . . the examiner believes that the association cannot be negotiating in good faith with the representative of the board if it is simultaneously negotiating directly with the Board. This would also deny the Board the right to designate a representative for negotiation purposes; a right expressly granted by the statute."

Under the circumstances, considered as a whole, and given his expertise and experience in public employer-employee negotiations and PEERA, Mr. Barricklow knew or should have known of his obligation to negotiate only with the City's chosen representative, and that by contacting the City council members he was circumventing that representative in negotiations. From the evidence it can be reasonably inferred that Mr. Barricklow's conduct was wilful. His motives are immaterial for the reasons set forth in Section 1(B) above. Mr. Barricklow, therefore, must be determined to have committed a prohibited practice as set forth in K.S.A. 75-4333(c)(2) when on September 27, 1991 he bypassed the City's chosen representative for negotiations, Mr. Tritt, and directly" contacted members of the City Council.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED that the City shall cease and desist implementing unilateral changes to the terms and conditions of employment of the police officers without first alternatively noticing the changes and seeking negotiation with the employees' exclusive representative, or providing such adequate and timely notice of the intended change as to provide the JCPOA an opportunity to request negotiations prior to implementation.

IT IS FURTHER ORDERED that the JCPOA shall cease and desist attempting to negotiate directly with members of the governing body of the City, and shall forthwith negotiate only through the City's chosen representative.

***33** Dated this 31st day of July, 1992

Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations

Footnotes

1 "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean ... that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburg Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

2 See Finding of Fact #50 above.

3 PEERA was designed to accomplish the salutary purpose of promoting harmony between public employers and their employees. The basic theme of this type of legislation "was that through collective bargaining the passions, arguments and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." H.K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99, 103 (19); West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526 (Conn. 19). The duty to meet and confer in good faith takes on more important dimensions in the public sector because employees of government are denied the right to strike. City of New Haven v. Conn. St. Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979). "Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives ..." Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 19).

4 That is, it is not necessary that the party himself recognizes conduct as being extremely dangerous; it is enough that he know, or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable person the highly dangerous character of his conduct. Foldi v. Jeffries, 461 A.2d 1145 (NJ 19).

5 In this case the hearing officer stated, "It should be noted that while the Professional Negotiations Act requires that any violation thereof must be found to be 'wilful,' the existence of intent may be determined by inference.

6 As cited above, in School Bd. of Indian River County v. Indian River County Education Ass'n. Local 3617, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

> "A unilateral increase in benefits could foreseeable do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."

7 Had the JCPOA taken some affirmative action to protect their rights upon receiving notice of the City's intention to change the City-wide Grievance Procedure prior to the September 3, 1990 Commission meeting, and the City then proceeded with its unilateral action without submitting the proposed changes to meet and confer proceedings, the award of fees and costs may have been justified. See U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 v. 519, 530-32 (1990).

8 Although PEERA is modeled on the NLRA, it is not identical in all aspects. Because there are differences between the two acts, the rationale of decisions under the federal law is applicable to cases arising under PEERA insofar as the provisions of the two acts are similar or the objects to be attained ar the same. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 (February 10, 1992); See Law Enf. Labor Serv. v. County of Mower, 469 N.W.2d 496, 501 (Minn. 1991). As the Kansas Supreme Court concluded in U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531 (1990), "[a]n examination of the federal Labor-Management Relations Act, 29 U.S.C. §§ 141-197 (1988), provides us with guidance" in interpreting Kansas labor relations statutes, citing National Education Association v. Board of Education, 212 Kan. 741, 749 (1973).

9 The Kansas Open Meetings Law was adopted L. 1972, ch. 319, effective July 1, 1972, and the Public Employer-Employee Relations Act adopted L. 1971, ch. 264, effective March 1, 1972.

10 This interpretation finds further support in the fact that the Professional Negotiations Act specifically requires negotiation sessions be open to the public. K.S.A. 72-5423(b) provides:

> "Except as otherwise expressly provided in this subsection, every meeting, conference, consultation and discussion between a professional employees' organization and its representatives and a board of education or its representatives during the course of professional negotiations . . . is subject to the Kansas open meetings law."

Such a provision would be unnecessary had the legislature intended the Open Meetings Law to cover public sector negotiations. No such provision appears in the Public Employer-Employee Relations Act leading to the inference that such actions are not to be covered by the Open Meetings Law.

11 See footnote # 8, supra.

12 Compare K.S.A. 75-4333(c)(2), "interfere with, restrain or coerce a public employer . . . with respect to selecting a representative for the purposes of meeting and conferring or the adjustment of grievances;" with K.S.A. 72-5430(c)(2) "interfere with, restrain or coerce a board of education . . . with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances."

1992 WL 12602058 (KS PERB)

End of Document

1991 WL 11746841 (NV LGEMRB)

Local Government Employee-Management Relations Board

State of Nevada

CITY OF RENO, COMPLAINANT
v.
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 731, RESPONDENT

CASE NO. A1-045472
ITEM NO. 253-A
February 8, 1991

DECISION

For the Complainant:
***1** Randy K. Edwards, Esq.
Reno City Attorney's Office

For the Respondent:
Paul D. Elcano, Jr., Esq.

For the EMRB:
Tamara Barengo
Chairman
Salvatore C. Gugino
Member

STATEMENT OF THE CASE

On May 11, 1990, Complainant, City of Reno ("City"), filed this complaint with the Local Government Employee-Management Relations Board ("Board") against Respondent, International Association of Firefighters, Local 731 ("Union"), alleging that the Union engaged in bad faith bargaining by insisting upon the presence of a court reporter in negotiations, by failing to meet to negotiate at reasonable times, and by the totality of conduct, frustrating the bargaining process.

In response, the Union contends that the ground rules negotiated by the parties allowed the use of a court reporter, that either party has an inherent right to take the best notes possible during negotiations including transcription and further, that this dispute is a matter of interpretation of the ground rules and accordingly, a matter in which this Board has no jurisdiction.

Negotiation between the parties began with an exchange of written proposals in January, 1990. The Union proposed changes to 34 items; the City proposed 32.

On February 23, 1990, the parties met for the first time and agreed to four ground rules.

The second meeting was scheduled for March 1, 1990, but was cancelled the day before the meeting was to take place by the Union because the City would not provide free parking. On March 19, 1990, the second meeting was convened and the parties discussed certain proposals, but no tentative agreements were reached.

The third meeting took place on March 26, 1990. The parties discussed several proposals, but no agreements were reached.

The fourth meeting took place March 30, 1990. The Union brought a court reporter to transcribe the proceedings. The City objected to the verbatim transcription of the meeting and the meeting ended.

On April 20, 1990, the Union declared impasse and requested a list of factfinders pursuant to NRS 288.200.

On May 31, 1990, the City filed a Motion to Stay the Factfinding requested by the Union. On September 14, 1990, the Board heard arguments by the parties on the motion and denied the motion for stay with the intent that the parties should return to the bargaining table.

Previously, the Union filed a Motion to Dismiss the Complaint alleging the Board had no jurisdiction on the matter. The motion was taken under advisement and is dealt with infra.

On November 16, 1990, the Board conducted a hearing on the complaint in Reno, Nevada. The issues for determination by the Board were:
1. Whether the Board has jurisdiction in this matter;

***2** 2. Whether the Union violated its duty to bargain in good faith pursuant to NRS Chapter 288 by insisting upon the presence of a court reporter to make a verbatim record during negotiations;

3. Whether the Union violated its duty to bargain in good faith by engaging in conduct which frustrated the bargaining process; and

4. Whether the City violated its duty to bargain in good faith pursuant to NRS Chapter 288 by engaging in conduct frustrating the bargaining process.

The Board took the testimony of witnesses, examined evidence, heard argument by the parties and reviewed the papers and pleadings on file. From all the above, the Board concludes that the Union engaged in prohibited practices in violation of NRS 288.270(2).

DISCUSSION

I

ALLEGATIONS OF UNILATERALLY IMPOSED PRECONDITIONS TO BARGAINING ARE PROPERLY BEFORE THIS BOARD.

As a preliminary matter, the Board rejects the Union's argument that disputes over ground rules must be submitted to a factfinder pursuant to NRS 288.205(1) which provides:

> If the parties have not reached agreement by April 10, either party may submit the dispute to an impartial factfinder at anytime for his findings.

The Board recognizes that most parties establish bargaining ground rules and that such guidelines serve as a helpful device to streamline the negotiations process and to avoid petty disputes and unfair surprises. Nonetheless, disputes over the interpretation

of these guidelines cannot be permitted to detour the negotiations of mandatory subjects of bargaining. If negotiations were allowed to breakdown over mere threshold issues, those who wish to impede the collective bargaining process would have a "tool of avoidance" to wield at the expense of those willing to bargain in good faith. See NLRB v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981), cert denied 252 U.S. 961 (1981).

Further, ground rules are not mandatory subjects of bargaining pursuant to KRS 288.150. Accordingly, they may not be unilaterally submitted to factfinding. Also, ground rules cannot be implemented except by mutual agreement. No party can unilaterally impose a ground rule as a precondition to bargaining. Allegations of such occurrences are issues of good faith bargaining and therefore, properly before this Board pursuant to NRS 288.280.

II

INSISTENCE UPON THE PRESENCE OF A STENOGRAPHER IN NEGOTIATIONS IS A PROHIBITED PRACTICE.

The Union exceeded permissible bounds when it insisted that a court reporter be present in negotiations to make a verbatim record of the proceedings.

The Board is in accord with the National Labor Relations Board (NLRB) in Reed & Prince Mfg. Co., 96 NLRB 850, 28 LRRM 1608 (1951), enf'd on other grounds 205 F.2d 131, (CA 1 1953) cert. denied 346 U.S. 887 (1953):

> The presence of a stenographer at such negotiations is not conducive to the friendly atmosphere so necessary for the successful termination of negotiations, and it is a practice condemned by experienced persons in the industrial relations field. Indeed the business world itself frowns upon the practice in any delicate negotiations where it is so necessary for the parties to express themselves freely. The insistence by the respondent in this case upon the presence of a stenographer at the bargaining meeting is, in our opinion, further evidence of its bad faith.

***3** The NLRB further considered the issue and concluded that the demand by a party for the presence of a court reporter is not a mandatory subject of bargaining and that insistence to impasse on a non-mandatory subject is an unfair labor practice regardless of whether it was committed in bad faith. Bartlett-Collins Co., supra.

The presence of a stenographer can surely stifle the spontaneous, frank, no-holds-barred exchange of ideas and persuasive forces that successful bargaining often requires. One party's insistence upon the presence of a stenographer, over the objection of the other, creates an uncooperative and repressive climate for collective bargaining. NRS Chapter 288 does not require a party to negotiate under such inequitable circumstances and accordingly, the City did not commit a prohibited practice when it refused to bargain in the face of the Union's insistence on the presence of a court reporter.

The City immediately raised its objection to the court reporting at the meeting of March 30, 1990 (Petitioner's Exhibit "A", page 2). The City further articulated its objection in a letter of April 6, 1990 from Clay Holstine, Assistant City Manager, to Paul Elcano, Union Spokesman:

> In this case, we believe that the presence of a court reporter will increase posturing and inhibit rather than promote the exchange of facts and arguments. Court reporters do not take "notes" as you have characterized it. Rather, verbatim transcripts of all proceedings are reported. This defeats the entire idea of spontaneity and conciliation, even more so than tape recording. The fact that you have mentioned as a justification for

> a court reporter your concern that accurate "notes" can be presented to the EMRB indicates that you are entering these "negotiations", if they can be so characterized at this point, more with the idea of building a case against the City than in engaging in the type of dialogue and discussion necessary to hammer out a mutually agreeable contract. (Respondent's Exhibit "25").

Even in the face of this objection, the Union continued to maintain that stenographic recording was a condition to further bargaining, further evidence of bad faith.

The Board rejects the Union's argument that the making of a verbatim record by a stenographer is simply a form of note-taking and is allowed under one of the ground rules agreed upon by the parties which provides:

> Each party shall be responsible for keeping its own notes. Tape recording of the negotiating sessions is prohibited.

It is unreasonable, in fact, absurd, to conclude that there is no distinction between note-taking and making a verbatim record. Any reliance upon the ground rule on note-taking as license to use a stenographer is, in itself, evidence of bad faith.

The Board also finds without merit, the Union's argument that it was justified in its action because no one on the Union's bargaining team could take notes as proficiently as the person taking notes on the City's team.

***4** We also reject the Union's argument that the Nevada Open Meeting Law, NRS Chapter 241, permits recording of bargaining sessions. Indeed, the Nevada Legislature has recognized that the fundamental nature and characteristics of collective bargaining are distinct from those of other meetings involving public employers by excluding such bargaining sessions from coverage under NRS Chapter 241. NRS 288.220(1) provides:
The following proceedings, required by or pursuant to this chapter, are not subject to any provision of NRS which requires a meeting to be open or public:

1. Any negotiations or informal discussion between a local government employer and an employee organization or employees as individuals, whether conducted by the governing body or through a representative or representatives.

Also, see Washoe County Teachers Assn. v. Washoe County School District, EMRB Item No. 54, Case No. A1-045295 (May, 1976).

Lastly, the Union argues that it simply desires a recording of the truth as in judicial proceedings and that no harm can come from such an action. The Board disagrees. The Union's analogy is misplaced. The purposes of collective bargaining and those of the judicial process are not the same.

Collective bargaining cannot be equated with an academic search for truth - or even with what might be thought to be the ideal of one. NLRB v. Insurance Agent's International Union, 361 U.S. 488 (1970). The pursuit of truth and justice is not always the guiding beacon in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes. NLRB v. Bartlett-Collins Co., supra 657.

Finally, the Board notes that the number of cases in which bargaining parties resort to adjudication, and in which resolution depends upon an accurate record of the bargaining process, is small in comparison to the number of labor contracts negotiated. This fact supports the reasonableness of the Board's conclusion that any advantages from stenographic recording of negotiations are outweighed by its chilling effect on the bargaining process.

III

THE TOTALITY OF THE UNION'S CONDUCT IN BARGAINING CONSTITUTES A PROHIBITED PRACTICE.

A party's conduct at the bargaining table must evidence a sincere desire to come to an agreement. The determination of whether there has been such sincerity is made by "drawing inferences from conduct of the parties as a whole". NLRB v. Insurance Agents Union, supra. Also, see Stationary Engineers, Local 39 v. Lyon County, EMRB Item No. 241, Case No. A1-045457 (June, 1990) and Clark County Classroom Teachers Assn. v. Clark County School District, EMRB Item No. 62, Case No. A1-045302 (December, 1976).

In the instant case, the Union engaged in numerous acts which when viewed as a whole, constitute a violation of it's duty to bargain in good faith pursuant to NRS 288.270(2)(b).

Bargaining Meeting Cancelled

***5** On February 28, 1990, the Union cancelled a scheduled negotiations session with less than one day's notice using the feeble excuse that free parking was not provided (Petitioner's Exhibit "16"). Cancelling a previously scheduled meeting without good cause is evidence of bad faith. W.R. Hall Distributor, 144 NLRB 1285 (1963).

Refusal to Designate Representatives

Testimony from witnesses for both parties stated that the Union refused to designate the members of its bargaining team (Transcript at 119, 143, 179).

NRS 288.150(1) provides in pertinent part:

> Except as provided in subsection 4, every local government employer shall negotiate in good faith through one or more representatives of its own choosing concerning the mandatory subjects of bargaining set forth in subsection 2 with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees. (Emphasis added.)

Notwithstanding the Union's obligation to designate its bargaining representatives pursuant to statute, the refusal to do so is also further evidence of the Union's intent to frustrate the bargaining process.

Refusal to Provide Information

The refusal of the Union to provide documentation or even discuss how it arrived at its 15% cost figure for its salary proposal at the March 26, 1990 meeting (Transcript at 128, 183, 192) is contrary to the intent of NRS 288.180(2) which provides in pertinent part:

> . . . the employee organization or the local government employer may request reasonable information concerning any subject matter included in the scope of mandatory bargaining which it deems necessary for and relevant to the negotiations. The information requested must be furnished without delay.

Failure to provide reasonable information is a prohibited practice. Additionally, the Union's flippant response to the City that the request was "simply an attempt to avoid doing your own homework" (Petitioner's Exhibit "12") is further evidence of the Union's lack of sincere desire to reach agreement.

Premature Impasse Declared

Finally, we note the Union declared impasse and requested factfinding after only two bargaining sessions involving mandatory subjects. The parties had only limited discussion on eleven items in two meetings and they had not reached agreement on any of the sixty-six items on the table when the Union requested factfinding on April 20, 1990 (Petitioner's Exhibit "28"). This action is the most blatant in the Union's series of actions in contravention to its duty to bargain in good faith. This Board has consistently sent the parties back to the table where requests for factfinding have been premature. See Water Employees Assn. v. Las Vegas Valley Water District, EMRB Item No. 204, Case No. A1-045418 (March, 1988) and I.A.F.F., Local 1265 v. City of Sparks, EMRB Item No. 136, Case No. A1-045362 (August, 1982).

***6** The parties are required to make every effort to reach agreement. Engaging in surface bargaining as the Union has in this case, is a violation of the very intent of NRS Chapter 288 and it will not be permitted by this Board.

In summary, the Board finds the Union's conduct in these negotiations reprehensible. All evidence leads to the reasonable conclusion that the Union never intended to bargain in good faith and that it was simply posturing for factfinding and arbitration. Such conduct is clearly in violation of NRS 288.270(2)(b).

Accordingly, the Union is ordered to cease and desist from the actions complained of herein and to return to the bargaining table in a sincere effort to resolve the sixty-six items on the table.

FINDINGS OF FACT

1. That during January, 1990, the Union and the City opened negotiations with an exchange of proposals on sixty-six items.

2. That on February 23, 1990, the parties met to discuss ground rules. The parties agreed to four ground rules, among them, a rule allowing each party to take notes, but not to tape record the meetings.

3. That at the February 23, 1990 meeting, the Union made a summary rejection of the City's proposal on ratification procedures.

4. That at the February 23, 1990 meeting, the Union refused to designate its representatives at the bargaining table.

5. That on February 28, 1990, the Union cancelled a negotiations session scheduled for the next day because the City would not provide free parking.

6. That on March 19, 1990, the parties met for the second time and discussed five proposals. No agreements were reached.

7. That on March 26, 1990, the parties met for the third time and discussed six items. No agreements were reached.

8. That at the March 26, 1990 meeting, the Union refused to provide certain information regarding the cost of its salary proposal.

9. That on March 30, 1990, the parties met for the fourth time. No proposals were discussed.

10. That at the March 30, 1990 meeting, the Union insisted that a court reporter be present to record the bargaining session as a precondition to any further bargaining. The City objected the verbatim transcription of the meeting and the meeting ended.

11. That on April 20, 1990, the Union declared impasse and requested factfinding.

12. That the making of a verbatim record and the taking of notes are distinctly different and that agreements regarding note-taking do not necessarily apply to stenographic recording.

13. That the presence of a stenographer in negotiations over the objections of one of the parties is disruptive and frustrating to the bargaining process.

CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board possesses original jurisdiction over the parties and the subject matter of this complaint pursuant to NRS Chapter 288.

2. That Complainant, City of Reno, is a local government employer within the meaning of NRS 288.060.

***7** 3. That Respondent, International Association of Firefighters, Local 731, is an employee organization within the meaning of NRS 288.040.

4. That disputes regarding unilateral implementation of ground rules are matters of good faith bargaining properly before this Board pursuant to NRS 288.270 and 288.280.

5. That ground rules are not mandatory subjects of bargaining pursuant to NRS 288.150(2) and accordingly, disputes over ground rules are not matters for factfinding pursuant to NRS 288.205.

6. That insistence upon the use of a stenographer to make a verbatim record of bargaining sessions is a violation of the Union's duty to bargain in good faith pursuant to NRS 288.270(2)(b).

7. That the City did not commit an unfair labor practice when it refused to continue bargaining in the face of the Union's insistence upon the presence of a court reporter.

8. That the Union's cancellation of a bargaining session with one day's notice because of the City's failure to provide free parking is evidence of bad faith bargaining pursuant to NRS 288.270(2)(b).

9. That the Union's refusal to designate representatives for bargaining violates the intent of NRS 288.150(1) and is evidence of failure to bargain in good faith pursuant to NRS 288.270(2)(b).

10. That the Union's refusal to provide information regarding the cost of its salary proposal is a prohibited practice pursuant to NRS 288.270(2)(d).

11. That the Union's declaration of impasse and its request for factfinding after only two negotiation sessions on substantive items, during which only eleven (11) of sixty-six (66) were discussed and no items were agreed upon, was violation of the Union's duty to bargain in good faith pursuant to NRS 288.270(2)(b).

12. That the totality of the Union's conduct in the negotiations referred to herein constitutes a prohibited practice pursuant to NRS 288.270(2)(b).

ORDER

Upon decision rendered by the Board at its meeting on December 18, 1990, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the City's Complaint be, and the same hereby is, upheld;

2. That the Union's Counterclaim and its Motion to Dismiss be, and the same hereby are, denied;

3. That the Union shall cease and desist and in the future, shall refrain from engaging in the prohibited practices complained of herein;

4. That the parties shall return to the bargaining table to negotiate the unresolved issues in good faith, the first meeting to be not later than twenty (20) days from receipt of this Order;

5. That this Decision and Order shall be publicly posted by the City at work sites of employees affected by this decision for a period of sixty (60) days; and

6. That the Union shall pay the City for fees and costs in the sum of $500.00.

DATED this 8th day of February, 1991.

By _____

Tamara Barengo
Chairman

By _____

Salvatore C. Gugino
Member

1991 WL 11746841 (NV LGEMRB)

End of Document

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF SPARTA AND CITY OF SPARTA WATER UTILITY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wisconsin Statutes, Involving a Dispute between said Petitioner and LOCAL 1947-A WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO	Case VIII No. 19480 DR(M)-68 Decision No. 14520

DECLARATORY RULING

City of Sparta and City of Sparta Water Utility having on November 26, 1975, filed a petition requesting the Wisconsin Employment Relations Commission to issue a Declaratory Ruling on whether the City of Sparta and City of Sparta Water Utility can insist to impasse that collective bargaining sessions be conducted in public and correspondingly, whether Local 1947-A, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, can insist to impasse that collective bargaining proceed in private; and the parties having waived hearing in the matter; and the Commission having considered the briefs and arguments filed by the parties and being fully advised in the premises, makes and files the following Findings of Fact and Declaratory Ruling.

FINDINGS OF FACT

1. That the City of Sparta and City of Sparta Water Utility, hereinafter referred to as the Municipal Employers, have their offices at Sparta, Wisconsin.

2. That Local 1947-A, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization that maintains its offices at Madison, Wisconsin.

3. That, although the employes of the said Municipal Employers are in separate bargaining units, negotiations of their separate contracts are held jointly with the Union.

4. That in September of 1975, the Union and Municipal Employers held a negotiating session for the purpose of bargaining proposed amendments to the current labor contract; that this and prior negotiating sessions were closed to the members of the news media and the general public.

5. That on or about October 7, 1975, the Common Council of the City of Sparta passed a resolution adopting the position that all City negotiations should be open to the public and news media.

6. That the Union indicated that it would not attend negotiating sessions which were open to the public and news media; that the Municipal Employers refused to attend any sessions which were not open to the public; and that subsequently scheduled negotiating sessions were cancelled.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

DECLARATORY RULING

That a proposal by a municipal employer or labor organization that collective bargaining be conducted in public does not constitute a proposal regarding wages, hours and working conditions and therefore is not a mandatory subject of bargaining which can be insisted upon to the point of impasse; that the statutory mandate that the parties meet and confer at reasonable times in good faith imposes a duty on the parties to be willing to meet in private, bilateral negotiations and that accordingly, insistence to impasse by either party that such negotiations be conducted in public will be found to violate said party's duty to meet and confer at reasonable times in good faith as prescribed in Section 111.70(1)(d) of the Municipal Employment Relations Act, unless it can be demonstrated that extraordinary circumstances require that collective bargaining sessions be held in public; and conversely, absent such extraordinary circumstances, insistence by either party that such sessions be conducted in private will normally be found to be consistent with the statutory mandate that the parties meet and confer at reasonable times in good faith.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

CITY OF SPARTA AND CITY OF SPARTA WATER UTILITY, VIII, Decision No. 14520

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The Commission has previously held that a proposal that negotiations be conducted in public does not constitute a proposal regarding wages, hours and working conditions. Therefore, insistence upon same, to the point of impasse, has been found to constitute a prohibited practice within the meaning of the Municipal Employment Relations Act (MERA), and conversely resistence to a demand that bargaining sessions be held in public has been found not to constitute a prohibited practice within the meaning of the MERA. 1/

The Commission, in reaching this conclusion, also relied upon the definition of "collective bargaining" set forth in Section 111.70(1)(d) of the MERA 2/which states in material part:

> "'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment. . . "

It is the considered judgment of the Commission that the statutory duty to meet and confer at reasonable times, in good faith imposes a duty on the parties to be willing to meet in private, bilateral discussions since it is the Commission's experience that collective bargaining sessions are normally more successful when conducted in private, bilateral discussions. This conclusion is consistent with the position taken by the Commission in Lake Geneva wherein it stated:

> "The Commission recognizes that it is conventional for the collective bargaining that is engaged [in] by parties governed by MERA to proceed in private, nonpublic sessions; that there are sound reasons for such procedures, including the reason that public statements of position tend to reduce the possibilities for compromise; and that some municipal employers and labor organizations prefer to bargain publicly, but this preference reflects an exception to the general analysis."

The legitimacy of the need for confidential exchanges in the negotiation process is also recognized in the Open Meetings of Govern-

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1/ City of Lake Geneva (12184-A and 12208-B) 5/74; and Walworth County (12690 and 12691) 5/74.

2/ The Commission recognizes that its decisions in Lake Geneva and Walworth County were based primarily on its conclusion that the question of whether negotiations should be conducted in public was not a question involving wages, hours and conditions of employment. In those cases, the proposal to hold public negotiation sessions was made by the employe organization which does not enjoy the statutory power to determine whether negotiations will be conducted in public. Although the Commission reaffirms its conclusion in those cases that the question of whether negotiations should be conducted in public is not a mandatory subject of bargaining the decision herein is premised as well on a finding that a municipal employer, which admittedly has the statutory power to determine whether negotiations will be held in public, violates its duty to meet at reasonable times in good faith if it exercizes that power without adequate justification, and the rationale of the Commission in the Lake Geneva and Walworth County cases is modified to that extent.

mental Bodies Act, Section 66.77, Wisconsin Statutes, hereinafter referred to as the Open Meetings Statutes, which declares it ". . . to be the policy of the State that the public is entitled to the fullest and most complete information regarding the affairs of government as compatible with the conduct of governmental affairs and the transaction of governmental business." 3/

In order to effectuate this policy, the Open Meetings Statute also provides: 4/

> "(3) Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). Any action taken at a meeting held in violation of this section shall be voidable."

Notwithstanding, this clearly declared public policy, the Statute recognizes that certain exceptions to the "open sessions" proviso may be necessary for "the conduct of governmental affairs and the transaction of governmental business." 5/

Those exceptions are spelled out in Section 66.77(4), Wisconsin Statutes. The exception pertinent to the issue discussed herein provides that: 6/

> "(4) A governmental body may convene in closed session for purposes of:
>
> . . .
>
> (d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions".

Said section has already been found to apply to collective bargaining negotiations between municipal employers and labor organizations, 7/ and consequently, private collective bargaining sessions between municipal employers and labor organizations clearly do not violate the above-noted provisions of the Open Meetings Statute.

The Commission is of the opinion that its interpretation of MERA as normally requiring private, bilateral collective bargaining sessions need not frustrate the purpose of the Open Meetings Statute since it allows for public negotiations with the consent of the parties, and even without such consent, it does not restrict the right of governmental bodies to keep the public fully apprised of the positions of the parties and progress in collective bargaining negotiations. This may be accomplished through public discussions of said issue during meetings of such governmental bodies and by means of communications to the public through the

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3/ Section 66.77(1), Wisconsin Statutes.

4/ Section 66.77(3), Wisconsin Statutes.

5/ Supra, footnote 2.

6/ Section 66.77(4), Wisconsin Statutes.

7/ See Board of School Directors of Milwaukee vs. WERC (1969), 42 Wis. 2d 637 citing 54 Op. Atty. Gen. (1965) with approval.

news media. By utilizing such mechanisms, governmental bodies which are parties to the collective bargaining process can readily provide the public with full and complete information regarding governmental collective bargaining, which is a matter of legitimate public interest and concern. At the same time, through private bilateral collective bargaining, said governmental bodies and the labor organizations which represent their employes may explore and consider a myriad of problems without having to make commitments and decisions on all alternative solutions which may surface. The process of exploratory problem-solving, which is an essential ingredient to effective and successful collective bargaining, in many cases might be frustrated if the collective bargaining process were conducted in a public forum.

Thus, while there is a legitimate need for public knowledge and understanding of what transpires during the collective bargaining process between governmental bodies and the labor organizations which represent public employes, the Commission, in order to foster the effectiveness and success of such bargaining, concludes that the public's right to know must normally be achieved through mechanisms other than public collective bargaining sessions.

The Commission is persuaded that this conclusion is the most viable means of harmonizing the Open Meetings Statute with the mandates and intent of the MERA. In this regard, it must be noted that the Wisconsin Supreme Court in Board of School Directors of Milwaukee vs. WERC, 8/ found that governmental bodies had the right to make determinations under the Open Meetings Statute (at that time Section 14.90, Wisconsin Statutes) as to whether to meet in closed sessions pursuant to the exceptions set forth in the Statute provided that any tentative agreement reached was considered at a public meeting before a vote is taken on its adoption. However, it is also important to note that this decision occurred prior to the amendments to the MERA in 1971 which created a duty on the part of municipal employers and labor organizations to bargain 9/ with the concurrent duty to meet and confer at reasonable times, in good faith. 10/ Because the duty to bargain has since been legislatively imposed upon governmental bodies, the Commission is of the opinion that such governmental bodies may no longer decide unilaterally to conduct collective bargaining sessions in public or private.

Because it has been the Commission's experience that collective bargaining can normally be conducted more efficiently and successfully in private, bilateral discussions and because the Commission believes it has the duty to attempt to effectuate the policies of the MERA, in a manner which is in harmony with the intent and mandates of other state statutes, it herein concludes that the objectives of the MERA and the Open Meetings Statute can best be effectuated and reconciled by finding that except for extraordinary circumstances, neither governmental bodies nor labor organizations who are parties to a collective bargaining relationship can unilaterally insist that collective bargaining sessions be conducted in public. Such sessions may be conducted in public with the consent of both parties. In addition, if it can be demonstrated

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8/ Supra, footnote 6.

9/ Sections 111.70(3)(a)(4) and 111.70(3)(b)(3). Although Section 66.77 has also been amended since the decision in that case, said amendments would not appear to be relevant herein.

10/ Section 111.70(1)(d).

that there are no adequate alternative means by which the public can be provided accurate and complete information as to the position of the parties and the status of collective bargaining between governmental bodies and the labor organizations which represent public employes, insistence upon public negotiations by either party might be found to be justified by the Commission. Thus, the Commission concludes that, although the statutory mandate to meet and confer at reasonable times, in good faith, pursuant to Section 111.70(1)(d)(a) creates a requirement that the parties be willing to meet in private absent agreement to the contrary, said requirement is not present if it can be demonstrated on the facts in a given case that the purpose and intent of the Open Meetings Statute would inevitably be violated by either party's insistence that all collective bargaining sessions be conducted in private.

Dated at Madison, Wisconsin this 7th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

4 PERI ¶ 2031, 4 Pub. Employee Rep. for Illinois ¶ 2031, 1988 WL 1588655

Illinois State Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, CHARGING PARTY AND COUNTY OF KANE AND KANE COUNTY SHERIFF, RESPONDENTS AND COUNTY OF KANE, CHARGING PARTY AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, RESPONDENT

No. S-CA-88-51

Brogan, Chairman; and Clark and Simon, Board Members

June 27, 1988

Related Index Numbers

41.31 Bargaining Procedure, Ground Rules

41.37 Bargaining Procedure, Recording Negotiations

72.5331 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Imposing Conditions, Insistence on Recording Negotiations

Judge/Administrative Officer

Brogan, Chairman; and Clark and Simon, Board Members

Case Summary

County violated its bargaining obligation by insisting to impasse on presence of stenographer to make verbatim record of negotiations as precondition for any further bargaining sessions.

Full Text

DECISION AND ORDER OF THE ILLINOIS STATE LABOR RELATIONS BOARD

On March 16, 1988, Hearing Officer Judith Mostovoy of the Illinois State Labor Relations Board (Board) issued a Recommended Decision and Order, in the above-captioned case. Thereafter, in accordance with Section 1220.60(a) of the Rules and Regulations of the Illinois Labor Relations Boards, 80 Ill. Admin. Code, Section 1200, et seq. (Rules), exceptions to the Hearing Officer's Recommendation were timely filed by the County of Kane (County) and responses thereto were timely filed by the American Federation of State, County and Municipal Employees, Council 31 (AFSCME). After reviewing the record, exceptions, responses and briefs, we hereby adopt the Hearing Officer's findings of fact and conclusions of law as discussed below.

The charges in these matters stem from a dispute over the preconditions to collective bargaining sessions between AFSCME, the County and the Kane County Sheriff (Sheriff). The facts are well detailed in the Hearing Officer's Recommendation and will only be briefly summarized below.

On January 2, 1986, AFSCME filed a petition in Case No. S-RC-145 seeking to represent a collective bargaining unit of peace officers employed jointly by the Sheriff and the County. On September 24, 1986, the Board issued an Opinion and Direction of Election in County of Kane and Kane County Sheriff, 2 PERI ¶ 2048 (Ill. SLRB 1986), and, following a representation election, certified AFSCME as the exclusive bargaining representative of the employees in the appropriate bargaining unit, [1] on November 3, 1986. AFSCME thereafter requested that the Sheriff and the County engage in collective bargaining; however, the County refused and AFSCME filed an unfair labor practice charge in Case No. S-CA-87-63, on January 7, 1987. The Board, on May 28, 1987, adopted the Hearing Officer's Recommendation and found that the County had violated the Act by refusing

to recognize and bargain with AFSCME as the exclusive bargaining representative of its employees. County of Kane, 3 PERI ¶ 2040 (Ill. SLRB 1987).

The Sheriff and AFSCME, however, did begin negotiations in January, 1987, without the presence of the County. During the course of these separate negotiations, which consisted of 27 bargaining sessions, the Sheriff and AFSCME agreed to certain "ground rules" to govern the conduct of negotiations.[2] On September 4 and 17, 1987, the parties held their first bargaining sessions with *both* joint employers present. On September 29, the parties were scheduled to hold their third bargaining session, and the parties' representatives arrived at the site of the meeting, as did Nancy Hopp, a "certified shorthand reporter,"[3] who had been hired by the County to make a verbatim record of the proceedings.[4] AFSCME objected to the stenographer's presence and, upon the County's insistence that she remain at the bargaining table if negotiations were to continue, AFSCME representatives departed. Subsequent to the aborted September 29 session, AFSCME communicated to the County, but not to the Sheriff, its concerns regarding the making of a verbatim record, and stressed that it did not object to mere "note-taking." The County, however, remained insistent upon the presence of Hopp at the sessions and filed an unfair labor practice charge alleging that AFSCME had violated Section 10(b)(3) of the Act by refusing to bargain with a stenographer present at the negotiations. In response, AFSCME filed an unfair labor practice charge against the County and the Sheriff alleging that both had violated Section 10(a)(4) of the Act by refusing to bargain without the presence of the stenographer. The parties have apparently not returned to the bargaining table since the September 29, 1987 incident.[5]

The County, in defense of its actions, relies on General Electric Company v. N.L.R.B., 412 F.2d 512 (2nd Cir. 1969), and argues that it may select whomever it wishes to represent its interests at the bargaining table. We categorically reject the County's attempt to characterize the issue as an infringement upon its right to select the members of its bargaining team. It is abundantly clear on this record that AFSCME did not object to Hopp's presence or, indeed, even to her taking of notes. AFSCME's objection was simply, and only, to her making a verbatim record of the negotiation sessions.

Rather, the issue in this dispute is whether a party may unilaterally demand and insist upon a stenographic record of the negotiation sessions as a precondition to collective bargaining. Although we conclude that this dispute is not one over which parties may let negotiations grind to a halt and cause an impasse, we believe that the analysis must be broader than an inquiry into whether the issue is over a "mandatory subject of bargaining"[6] when, as here, the dispute is over the mechanics of bargaining, rather than its substance.

The Hearing Officer, relying upon the current approach of the National Labor Relations Board (NLRB), as set forth in Bartlett-Collins Co., 277 NLRB 770 (1978), found that the presence of a stenographer to take a verbatim record of negotiations is *not* a "mandatory subject of bargaining."[7] Since she found that it was *only* the County which had insisted upon this nonmandatory subject, she concluded that the County had committed an illegal refusal to bargain within the meaning of Section 10(a)(4) of the Act, and dismissed the County's charge against AFSCME and AFSCME's charge against the Sheriff.

However, the real dispute in this matter does *not* concern a "topic" or "subject" of bargaining relating to wages, hours or terms and conditions of employment at all. Rather, it concerns a "precondition" to the bargaining process itself. That is, this dispute is not over a substantive subject of negotiations within the "four corners" of the agreement; instead, the parties' argument stems from a procedural spat over the manner in which the bargaining process will occur. These preconditions or "ground rules" to bargaining often include subjects such as time and place of negotiations, number and/or timing of proposals, methods for advising the media of the progress of negotiations, and whether the negotiations should be open to the public. See Burlington Community School District v. PERB, 268 N.W.2d 517 (Ia.Sup.Ct.1978).

Despite the difference between these "preconditions" to bargaining and substantive "subjects" of bargaining, the traditional "mandatory subjects of bargaining" analysis is often used to examine the rights and duties of the parties at the bargaining table. The reason for this approach is clear: because the "ground rules" of bargaining do not lie within the exclusive discretion of one of the parties, and thus cannot be implemented by a party unless upon *mutual* agreement, they are denominated "nonmandatory"

subjects of bargaining. Therefore, no party may unilaterally impose a precondition to bargaining if an "impasse" over its implementation occurs. The obligation to bargain collectively in good faith is a mutual obligation, and a party that unilaterally establishes a condition precedent to collective bargaining thwarts the purpose and policy of the Act [8] and violates its duty to bargain in good faith.

We are cognizant that most parties establish bargaining ground rules and that such guidelines serve as a helpful device to streamline the negotiation process and to avoid petty disputes and unfair surprises. Nevertheless, disputes over the terms of these guidelines, and even over the very existence of them, cannot be permitted to detour negotiations over wages, hours and terms and conditions of employment. See *Taylor School District,* 1976 MERC Lab. Op. 1006. If negotiations were allowed to break down over mere threshold issues, the policy of the Act would be violated and those who wish to impede the collective bargaining process would have a "tool of avoidance" to wield at the expense of those willing to bargain in good faith. See N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981), *cert. denied,* 452 U.S. 961 (1981).

Regarding the precise issue in this case, the stenographic recording of a bargaining session, the NLRB and numerous experts in the field of labor relations and labor negotiations [9] have quite correctly recognized that the presence of a stenographer taking a verbatim record at a bargaining session inhibits "the free and open discussion necessary for conducting successful collective bargaining." Bartlett-Collins Co., 271 NLRB at 773, n. 9 (1978). We are in accord. Unless the parties agree to recording of negotiations, the presence of a stenographer can surely stifle the "spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires." N.L.R.B. v. Bartlett-Collins Co., 639 F.2d 652, 657. Moreover, the presence of a stenographer recording the precise colloquy of the bargaining representatives cannot only inhibit discussions, but can possibly impede bargaining over sensitive topics and further promote the preparation of litigation. In contrast, the absence of a formal recording of discussions promotes the fundamental nature and characteristics of collective bargaining and fosters a productive environment for the exchange of ideas, problems and sensitive issues. [10]

Although a stenographer may produce a true and correct recording of the bargaining talks, the pursuit of such accuracy, although a goal of adjudicatory hearings, is not always an imperative or even desirable goal in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said during negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of labor relations disputes. N.L.R.B. v. Bartlett-Collins Co., 639 F.2d at 657. In this regard, we conclude that one party's insistence upon, as a precondition to bargaining, the presence of a stenographer at the bargaining table over the objection of another, creates an uncooperative and repressive climate for collective bargaining. In fact, since the County insisted upon the stenographer's presence, AFSCME's only choice, if it wished to continue bargaining, was to accede to the County's unilateral determination of the preconditions for bargaining. The Act does not require a party to bargain under such inequitable circumstances. By not permitting the transcription of bargaining session, unless by mutual agreement, the focus of the meeting is shifted to the settlement of the issues of bargaining rather than the preparation for and defense of litigation, and the parties can proceed to bargaining on a mutual and harmonious accord.

The County clearly precipitated the instant dispute by insisting on the making of a verbatim record of the proceedings over AFSCME's strong objections. As we have earlier stated, we believe that this condition actually inhibits the free give-and-take necessary for effective negotiations and therefore the County violated Section 10(a)(4) of the Act by insisting on the stenographer's presence as a precondition to bargaining. Accordingly, we dismiss the County's charge against AFSCME because AFSCME had the right to proceed with bargaining in the stenographer's absence.

Additionally, the Hearing Officer found that the Sheriff did not commit a violation of the Act by its conduct at the September 29 meeting and no exceptions to this conclusion were filed. We decline to consider this matter on our own motion and, therefore, this conclusion of law stands as a non-precedential ruling of the Hearing Officer. [11] We further find the County's remaining exceptions without merit.

ORDER

IT IS HEREBY ORDERED that the County of Kane, its officers and agents shall:

1. Cease and desist from:

a. Failing and refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with AFSCME as the exclusive bargaining representative of its employees in the unit described below, by insisting to impasse on the presence of a stenographer to make a verbatim record of negotiations as a precondition for any further bargaining sessions:

All full-time sworn Patrol Deputies, Patrol Sergeants, Investigation Commander, Civil Process Sergeant, Correction Center Shift Supervisor, Lock-up and Transportation Supervisors, Warrants Sergeant, Security Sergeant and Juvenile Sergeant but excluding the Sheriff, Under Sheriff, Lieutenant/Administration, Lieutenant/Records, Patrol Commander, and Chief Communications Officer and all other employees of the Employer.

b. In any like or related manner, interfering with restraining or coercing its employees in the exercise of the rights guaranteed them under the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

a. Upon request, bargain with the American Federation of State, County and Municipal Employees, Council 31 over the wages, hours, terms and conditions of employment of the employees in the above-described unit, and, upon request, execute a written collective bargaining agreement evidencing any agreement reached.

b. Post, at all places where notices to the employees in the above-described unit are ordinarily posted, copies of the notice attached hereto [omitted] and marked "Appendix." Copies to this notice shall be posted, after being duly signed by a representative of the Kane County Board, in conspicuous places, and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken by the County to insure that the notices are not altered, defaced or covered by any other material.

c. Notify the Board in writing, within 20 days from the date of this decision, of the step Respondent has taken to comply herewith.

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HEARING OFFICER'S RECOMMENDED DECISION AND ORDER

On October 20, 1987, AFSCME filed reciprocal charges in Case No. S-CA-88-51 pursuant to the Rules and Regulations of the Illinois Labor Relations Boards (Rules), 80 Ill. Adm. Code Section 1200 et seq., alleging that the County and the Kane County Sheriff (Sheriff) have engaged in unfair labor practices within the meaning of Section 10 of the Illinois Public Labor Relations Act (Act), Ill. Rev. Stat. 1985, ch. 48 par. 1601 et seq. The charges were investigated in accordance with Section 11 of the Act. On December 10, 1987, the Illinois State Labor Relations Board (Board) issued Complaints for Hearing in Case Nos. S-CA-88-51 and S-CB-88-11 and consolidated the cases for hearing. A consolidated hearing on Case Nos. S-CA-88-51 as amended and S-CB-88-11 [1] was held on January 26, 1988, in Chicago, Illinois. All parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs. Briefs have been filed on behalf of the parties.

After full consideration of the parties' evidence, arguments, stipulations and briefs, and upon the entire record of this case, I make the following findings:

I. PRELIMINARY FINDINGS

1. The parties stipulated, and I find, that the County and the Sheriff are joint public employers of the unit described in paragraph 3 infra. within the meaning of Section 3(o) of the Act, and that the Board has jurisdiction over this matter.

2. The parties stipulated, and I find, that the AFSCME is a labor organization within the meaning of Section 3(i) of the Act.

3. The parties in both cases admitted, and I find that at all times material herein, AFSCME has been the exclusive representative of the following bargaining unit of employees of the County and the Sheriff, as certified by the Board on November 3, 1986 in Case No. S-RC-145:

Included:

All full-time sworn Patrol Deputies, Patrol Sergeants, Investigation Commander, Civil Process Sergeant, Correction Center Shift Supervisor, Lock-up and Transportation Supervisors, Warrants Sergeant, Security Sergeant and Juvenile Sergeant.

Excluded:

Sheriff, Under Sheriff, Lieutenant/Administration, Lieutenant/Records, Patrol Commander, and Chief Communications Officer and all other employees of the Employers.

4. The parties in both cases admitted and I find that at the scheduled September 29, 1987 bargaining session regarding the S-RC-145 bargaining unit, a court reporter [2] was present at the request of William Barrett, cheif negotiator for the County.

5. The parties in both cases admitted and I find that in answer to Harold Benedict's objection on September 29, 1987, to the presence of a court reporter at the bargaining session, William Barrett took the position that the County had a right to have a court reporter present on its bargaining team in order to take notes and that he would not instruct the court reporter to leave.

6. The parties in both cases admitted and I find that in response to the position of the County concerning the presence of a court reporter, as represented by William Barrett, Harold Benedict and the other members of the AFSCME negotiating team left the September 29, 1987 negotiating session.

7. The parties in both cases admit and I find that since the September 29, 1987 meeting, Respondent has refused to bargain with the Charging Party unless a court reporter was present to take notes.

II. ISSUES AND CONTENTIONS

The issue is whether the demand by a party for the presence of a court reporter to record negotiations is a mandatory subject of bargaining and whether insistence to impasse on this issue is a violation of the Act.

The County contends that Barrett hired a certified shorthand reporter to take notes for him at the negotiation sessions and that she was to be part of the County's negotiating team. The County further contends that it may have anyone it wants on its bargaining team and that the Union failed to bargain in good faith when its bargaining team walked out of the negotiating session after observing the shorthand reporter set up her stenographic machine.

The Sheriff contends that it was prepared to negotiate on September 29, 1987 and thereafter and that it was the County, not the Sheriff, which brought the shorthand reporter to the bargaining session.

The Charging Party contends that the County failed to bargain in good faith by insisting to impasse on the presence of a shorthand reporter, despite the ground rules agreed to by Charging Party and the Sheriff barring the making of a verbatim transcript of the bargaining sessions. The Charging Party makes no specific allegation that the Sheriff insisted on the presence of the court reporter.

III. FACTS

AFSCME Council 31 is the certified bargaining representative of the S-RC-145 bargaining unit, which consists of peace officers employed by the County of Kane and the Kane County Sheriff. In January 1987, the Sheriff, but not the County, began bargaining with AFSCME regarding both the S-RC-145 unit and the S-RC-95 unit,[3] also represented by AFSCME. From January to September 1987, representatives of AFSCME and of the Sheriff engaged in approximately 27 bargaining sessions. During the course of those sessions, AFSCME and the Sheriff agreed to certain ground rules for bargaining. One ground rule agreed to by AFSCME and the Sheriff stated as follows: "Transcription: There shall be no reproduction or tape recording or stenographic transcription of any negotiating session, unless otherwise mutually agreed. Personal note taking is acceptable."

Throughout the negotiations period, from January through September 29, 1987, AFSCME's bargaining team consisted of Harold Benedict, Assistant Director of AFSCME, Council 31,[4] Kay Argo, AFSCME staff representative for AFSCME, Council 31 and approximately six bargaining unit members.

The County first began to bargain with AFSCME and the Sheriff on September 4, 1987. Additional sessions were scheduled for September 17 and 29. The first two sessions were held during the day, the third was scheduled in the evening.

At the three scheduled sessions in September, David Akemann, a Kane County Assistant State's Attorney, and Lt. Peter Perez and Lt. David Wagner, comprised the Sheriff's negotiating team. The County's team consisted of William Barrett, also a Kane County Assistant State's Attorney and Carol Moyer, the County's Director of Personnel. Donald Clute, Kane County Auditor, was also present on behalf of the County briefly on September 4. Moyer took notes on September 4 and 17, but was not present on September 29.

On September 4, 1987 Barrett received a copy of the ground rules previously agreed to by the Sheriff and AFSCME and at the September 4 and 17 meetings, AFSCME representatives went through the ground rules one at a time and explained to the County its position with respect to each ground rule. At those meetings Barrett neither gave his position nor did he respond to AFSCME's position with respect to the ground rules.

On September 29, 1987 at approximately 7:00 p.m., Nancy Hopp, a shorthand reporter certified by the State of Illinois Department of Education and Registration, arrived at the Kane County government Center Building in Geneva. She is employed by Sonntag Reporter Service, Ltd. She had been informed by the Office Manager at Sonntag that she was hired by Barrett to attend the meeting but she was given no specific instructions. Upon her arrival at the meeting room, she set up her stenographic machine. Hopp usually identifies herself to people as a court reporter. Even though she does not work in court, she performs duties similar to those performed by a court reporter for non-court hearings. People are more familiar with the term court reporter than the term certified shorthand reporter; however, she did not specifically mention this to anyone in the meeting room.

Hopp always makes a record with the use of a stenograph machine which records everything that is said at a meeting. The machine she uses has a tape drive attached to it which magnetically records her strokes. After a meeting is recorded, the tape is read into a computer and the symbols are changed into English and a transcript is made. With the machine Hopp attempts to take a verbatim record. She can take a verbatim record of a meeting such as a bargaining session, where many people are present, so long as only one person speaks at a time.

On September 29, 1987, when Benedict arrived at the scheduled meeting room for the bargaining session, he observed a woman, later identified as Hopp, setting up her stenographic machine. Benedict is familiar with the operation of these machines because he is frequently called upon to provide testimony at depositions or other legal proceedings where transcriptions of testimony are made. Assistant State's Attorney Akemann, the main spokesperson for the Sheriff in negotiations, arrived at the meeting room before Barrett did and confirmed to Benedict that the court reporter was present at the request of Barrett. Barrett then arrived at the negotiation meeting room, at which time Benedict asked to meet privately with Barrett. A meeting took place elsewhere in the County building with Barrett, Akemann, Benedict and Argo present.

Returning to the meeting in the County Board room, Benedict informed Barrett that AFSCME would not negotiate with a court reporter present taking a verbatim record. [5] Barrett indicated that he needed somebody to take notes since he did not have a secretary. Benedict told Barrett that he had already explained his reasons for not proceeding with a stenographic/court reporter present. Barrett insisted that the court reporter would remain at the bargaining session or he would not bargain, whereupon the AFSCME representatives left the bargaining session.

Immediately following the departure of AFSCME's representatives, Barrett and Akemann made statements for the record about the aborted negotiation session. At Barrett's request, Hopp recorded these statements and prepared a typed transcript.

On October 5, 1987, Benedict telephone Barrett and asked him if it would be possible to set up a bargaining session without the presence of the court reporter. Barrett responded that it would not be possible because he needed someone to take notes. Benedict stated that he did not object to Barrett having someone take notes but that he did object to someone taking a transcript. Barrett responded that he needed someone to take notes *and* a transcript. [6]

On October 5, 1987 Barrett sent Benedict a letter in which he stated that the County's "objective is not to make a complete record of the bargaining proceedings but to have an effective note taken [sic] for the purpose of developing the County's positions."

On November 2, 1987, Thomas J. Edstrom, Counsel for AFSCME, responded to Barrett's letter of October 5. Edstrom reiterated AFSCME's position that it had no objection to the taking of notes but it objected to a court reporter or other person taking a transcript or other literal record of negotiations. AFSCME further stated that it was ready to negotiate so long as no verbatim record was made.

Barrett's written response to Edstrom dated December 8, 1987 stated:

Please be advised that the proper method of handling the procedural issues raised in these companion cases is for the union to dismiss its charge and stipulate, with ISLRB approval, of the right of the employer to select the members of its own bargaining team.

No further negotiations have taken place.

IV. DISCUSSION AND ANALYSIS

The United States Supreme Court divided subjects of bargaining into two mutually exclusive categories, mandatory and nonmandatory subjects of bargaining. It is "lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without." NLRB v. Wooster Division of Borg Warner, 356 U.S. 342, 349 (1958).

AFSCME contends that the issue of the presence of a stenographer at negotiations is merely a permissive, nonmandatory subject of bargaining and that the County has committed an unfair labor practice by insisting to impasse on this matter.

The County frames the issue differently. It does not contend that the presence of a court reporter is a mandatory subject of bargaining; rather it claims that pursuant to General Electric Company v. NLRB, 412 F.2d 512 (2nd Cir. 1969) it is entitled to select the members of its bargaining team. It argues that having a stenographer to take notes at the bargaining sessions has no "chilling effect" on the negotiations and that a stenographer may in fact assist the collective bargaining process. NLRB v. Southern Transport Inc., 355 F.2d 978 (8th Cir. 1966). [7]

The National Labor Relations Board (NLRB) has considered the precise issue presented here and concluded that the demand by one party for the presence of a court reporter to record negotiations is not a mandatory subject of bargaining and that insistence to impasse on this issue is a violation of the National Labor Relations Act (NLRA) 29 USC par. 151 *et seq.* 1985 Bartlett-Collins Co., 237 NLRB 770 (1978) *enf.* NLRB v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981), *cert. denied,* 452 U.S. 961 (1981).

In affirming the NLRB, the Court of Appeals for the Tenth Circuit agreed that the issue of the presence of a court reporter during negotiation does not

. . . fall within 'wages, hours, and other terms and conditions of employment.' Rather these subjects are properly grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours and other terms and conditions of employment'

Bartlett-Collins, supra, at 772.

The court found in Bartlett-Collins that there is "no significant relationship between the presence or absence of a stenographer or court reporter at negotiating sessions and the terms or conditions of employment of the employees." It was clear in the court's opinion that the presence of a court reporter is not the type of preliminary matter that is so inexorably interwoven with the substance of a contract that it constitutes a term or condition of employment, such as would require mandatory bargaining.

In Bartlett-Collins, supra the NLRB specifically reversed its previous rulings where it had applied a good faith standard to determine whether a party's insistence to impasse on the question of the presence of a stenographer constituted an unfair labor practice. *See, e.g.,* Reed & Prince Manufacturing Company, 96 NLRB 850 (1951), *enf'd on other grounds* 205 F. 2d 131 (1st Cir. 1953), *cert. denied* 346 U.S. 887 (1953). [8]

Based on the foregoing authorities, I recommend that the Board adopt the rationale expressed in Bartlett-Collins, supra, and hold that the County's demand for the presence of a court reporter during negotiations should be accorded the status and attendant characteristics of a nonmandatory subject of bargaining. Threshold issues, such as the presence of a court reporter, are nonmandatory subjects of bargaining and a party who insists to impasse on such issues commits an unfair labor practice. [9]

I further find the County's reliance on General Electric, supra without merit. The court in General Electric, supra found that the freedom to select representatives to a bargaining team is not absolute. Exceptions to the general rule are narrowly drawn and are found when a party's conduct is so infected with ill-will as to make good faith bargaining impractical. General Electric, supra. Therefore, the question of the County's bad faith becomes an issue to establish whether an exception to the General Electric rule applies here. [10]

The County's bad faith is evidenced by its insistence on the presence of a court reporter, when it knew of AFSCME's "personal note taking only" requirement. This conduct changed the ongoing bargaining relationship between the Sheriff and AFSCME without giving either the co-employer or the exclusive bargaining representative an opportunity to revise the preexisting ground rules that governed the bi-party negotiations. The County's conduct, when it entered the negotiations, placed AFSCME in the position of agreeing to the County's demand at the price of breaching the ground rules agreement with the Sheriff.

Therefore, the exception rather than the general rule of General Electric applies. The County's freedom to select its own bargaining team members must give way in this case to the other general rule that it is improper to insist to impasse on a nonmandatory subject of bargaining. [11]

Although AFSCME named the Sheriff as the joint employer with the County in Case No. S-CA-88-51, there is no evidence that the Sheriff played any active role in employing a court reporter. There is also no evidence that the Sheriff insisted on the presence of the court reporter. Therefore I do not find that the Sheriff violated the Act [12]

V. CONCLUSIONS OF LAW

1. The presence of a court reporter at a collective bargaining session is a nonmandatory subject of bargaining.

2. The insistence to impasse on the presence of a court reporter constitutes a refusal to bargain in good faith.

3. AFSCME did not fail to bargain in good faith when it refused to bargain with a court reporter present, therefore Case No. S-CB-88-11 is dismissed.

4. The Sheriff did not refuse to bargain in good faith, therefore the Sheriff is dismissed as a Respondent in Case No. S-CA-88-51.

5. The County, by insisting to impasse on the presence of a court reporter at a collective bargaining session, violated Sections 10(a)(4) and 10(a)(1) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent, the County of Kane, its officers and agents shall:

1. Cease and desist from:

a. Failing and refusing to bargain with the American Federation of State, County and Municipal Employees, Council 31 in good faith over the wages, hours, terms and conditions of employment of its employee.

b. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them under the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

a. Upon request, bargain with the American Federation of State County and Municipal Employees, Council 31 over the wages, hours, terms and conditions of employment of Respondent's employees, and, upon request, execute a written collective bargaining agreement evidencing the agreement reached.

b. Post, at all places where notices to Sheriff's department employees are ordinarily posted, copies of the notice attached [omitted] hereto and marked “Appendix.” Copies to this notice shall be posted, after being duly signed by Respondent, in conspicuous places, and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that the notices are not altered, defaced or covered by any other material.

c. Notify the Board in writing, within 20 days from the date of this decision, of the step Respondent has taken to comply herewith.

VII. EXCEPTIONS

Pursuant to Section 1220.60(a) of the Rules and Regulations of the Board, parties may file exceptions of the Hearing Officer's Recommendation, and briefs in support of those exceptions, no later than 30 days after service of this recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. Exceptions and Responses must be filed with the Board's General Counsel, Jacalyn J. Zimmerman, 111 North Canal Street, Suite 940, Chicago, Illinois, 60606-7255. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

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1 The Board found appropriate the following bargaining unit:
Included:
All full-time sworn Patrol Deputies, Patrol Sergeants, Investigation Commander, Civil Process Sergeant, Correction Center Shift Supervisor, Lock-up and Transportation Supervisors, Warrants Sergeant, Security Sergeant and Juvenile Sergeant.
Excluded:
Sheriff, Under Sheriff, Lieutenant/Administration, Lieutenant/Records, Patrol Commander, and Chief Communications Officer and all other employees of the Employers.

2 In these ground rules, AFSCME and the Sheriff agreed that no transcription of the bargaining sessions would be permitted unless the parties mutually agreed otherwise.

3 We note that the County excepted to the Hearing Officer's using of the terms “court reporter,” “certified shorthand reporter,” and “stenographer” interchangeably throughout her decision. Although we agree that the individual in attendance at the September 29 aborted bargaining session was not a “court reporter,” as defined by Ill.Rev.Stat.1987, ch. 37, par. 651, we agree with the Hearing Officer that the individual nonetheless identified herself to those present at the session as a “court reporter,” set up her stenographic equipment in the meeting room and was prepared to take a verbatim transcript of the negotiations. Therefore, we find the purported differences, for the purpose of this decision, inconsequential and deem the County's exception to be meritless.

4 The County argues that it was actually impossible for Hopp to have made a verbatim record of a negotiation session. We agree with the Hearing Officer's finding that Hopp was capable of making a verbatim record of the proceedings and find that the County's arguments to the contrary are speculative and unconvincing. For the sake of clarification, we correct the typographic error in footnote 11 of the Hearing Officer's decision (“The County's argument that it is impossible to make a verbatim record of a bargaining session is also *with* merit”) (emphasis added to show error). It is clear from the text of her decision and the remainder of footnote 11 that the Hearing Officer rejected the County's proposition that Hopp would not be able to make a verbatim record of negotiations. We, therefore, adopt the reasoning of the Hearing Officer as to this factual finding, correct the error and find the County's exception to be without merit.

5 The time spent away from the bargaining table litigating this matter is unfortunate, in our opinion, in light of our expeditious declaratory ruling process set forth in Section 1200.140 of the Rules. The declaratory ruling procedure was designed to effectuate the purposes and policies of the Act by resolving “scope of bargaining” disputes like this one in the quickest and most expeditious manner available. Rather than settling this threshold dispute by the easiest available means, the parties have delayed bargaining over the substantive terms and conditions of employment of a bargaining unit of public employees to litigate this preliminary matter. We encourage that any disputes which can be expedited by the declaratory ruling process are done so in order to limit delays in the negotiation of collective bargaining agreements.

6 The Act requires that parties bargain collectively with respect to wages, hours and other conditions of employment; hence, these are mandatory subjects of bargaining. If a party is required to bargain collectively over a subject, it is a mandatory subject of bargaining and, pursuant to Section 7 of the Act, the parties may bargain either to agreement or to impasse over the subject. In contrast, those topics within the ambit of Section 4 as "management rights" are examples of nonmandatory subjects of bargaining because a public employer is not obligated to bargain over them. However, because it is lawful only to insist to impasse over matters within the scope of mandatory bargaining, parties may not provoke an impasse over nonmandatory subjects of bargaining. See County of Cook, 3 PERI ¶ 3013 (Ill. LLRB 1987).

7 The County relies on N.L.R.B. v. Southern Transport, Inc., 355 F.2d 978 (8th Cir. 1966) to argue that its insistence upon a stenographer to obtain a record of the negotiation sessions was done in "good faith." We note that the NLRB initially analyzed this "stenographer" issue in terms of a "good faith" approach. See, e.g., Reed & Prince Manufacturing Co., 96 NLRB 850 (1951), *enf'd on other grounds,* 205 F.2d 131 (1st Cir. 1953), *cert. denied,* 346 U.S. 887 (1953). Relying on the United States Supreme Court's decision in NLRB v. Wooster Division of Borg Warner, 356 U.S. 342 (1958), the NLRB, however, altered its approach to this issue in Bartlett-Collins Co., 237 NLRB 770 (1978), and held that insisting on a stenographer's presence was not a mandatory subject of bargaining. Federal appellate courts have upheld this change in analysis. See, NLRB v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981), *cert. denied,* 452 U.S. 961 (1981); Latrobe Steel Co. v. NLRB, 630 F.2d 171 (3rd Cir. 1980), *cert, denied,* 454 U.S. 821 (1980).

8 Section 2 of the Act provides:
It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all.
This policy, which strives for harmonious and cooperative relationships between public employees and employers, clearly favors this result, which requires that any preconditions to bargaining be mutually agreed upon by the parties.

9 In Bartlett-Collins Co., 237 NLRB 770, 773, fn. 9, the NLRB stated:
In "Techniques of Mediation in Labor Disputes," (Oceana Publications, N.Y., 1971), p. 63, author Walter Maggiolo states that:
Experience has taught us that the presence of a stenographer or tape recorder does inhibit free collective bargaining. Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes overconscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered. The discussion generally becomes stultified.
And, as noted in "Practice of Collective Bargaining," by Biel, Wickersham and Kienast (Richard D. Irwin, Inc., Ill., 1976), p. 217, the presence of a stenographer tends to formalize proceedings and reduces the spontaneity and flexibility that are often manifested in successful bargaining.

10 Indeed the General Assembly recognized that the fundamental nature and characteristics of collective bargaining are distinct from the nature and characteristics other meetings involving a public employer by excluding such bargaining sessions from the coverage of the Open Meetings Act, Ill.Rev.Stat.1987, ch. 102, par. 41, et seq.

11 We must, however, comment upon the Hearing Officer's conclusion that the Sheriff "passively" acquiesced to the County's insistence upon the stenographer's presence. We find such a conclusion is inconsistent with her finding that no specific evidence was presented against the Sheriff. Indeed, had AFSCME presented any evidence or argument of the Sheriff's misconduct, passive or otherwise, the Sheriff might very well have been guilty of an unfair labor practice. Joint employers each have a duty under the Act to bargain collectively in good faith and one joint employer may not shield itself from liability merely because the other joint employer is more "active" in its misconduct. When, as here, the parties have arranged bifurcated bargaining sessions, at which only one joint employer is present at the bargaining table, negotiations are "chaotic at best" (See J. Baird, "Who Bargains for the Employer at the County Level?," *The Illinois Public Employee Relations Report,* Vol 3, No. 4, p. 8 (1986).). Bargaining in this manner does not promote the

policies of the Act and all parties who do so run the very real risk of being found in violation of their duty to bargain collectively in good faith.

On October 9, 1987, the County of Kane (County) filed a charge in Case No. S-CB-88-11, pursuant to the Rules and Regulations of the Illinois Labor Relations Board (Rules), 80 Ill. Adm. Code Section 1200 et seq., alleging that the American Federation of State County and Municipal Employees, Council 31 (AFSCME) has engaged in unfair labor practices within the meaning of Section 10 of the Illinois Public Labor Relations Act (Act), Ill. Rev. State. 1985, ch. 48, par 1601 et seq.

1 The complaint in S-CB-88-11 was amended at hearing pursuant to the County's motion and AFSCME's Answer was also amended.

2 For purposes of this Hearing Officer's Report the terms “certified shorthand reporter,” “court reporter” and “stenographer” will be used interchangeably. I note that term “court reporter” is defined in Ill. Rev. Stat. 1985, ch. 37 par. 651 “as a person appointed by the chief judge to make full reporting by means of stenographic hand or machine notes . . . of the evidence and such other proceedings in trials and judicial proceedings. . . . ‘ Certified shorthand reporters and stenographers perform similar functions outside of a court room at other types of proceedings where a verbatim record may be required.

3 S-RC-95 comprises bargaining units of the Sheriff's correction staff and nonsworn employees. 2 PERI par. 2012 (Ill. SLRB 1986)

4 Benedict has had over 20 years' experience as a union negotiator.

5 Barrett claims and Benedict denies that Benedict objected to the court reporter's presence regardless of the role the person was playing. I credit Benedict's version that he objected to a court reporter making a verbatim transcript. Despite Barrett's assurance that the court reporter was there only to take notes for him, Benedict's years of experience both in collective bargaining and with stenographic machines made it obvious that the stenographer had the capacity to make a verbatim record. Thus Benedict specifically objected to the transcription role of the stenographer. She was clearly not going to be making “personal notes.” Also see footnote 6 infra.

6 Barrett claims that he only stated to Benedict that he needed someone to take notes. Barrett had already ordered a verbatim transcript of statements made on September 29, 1987. Therefore I credit Benedict that Barrett did refer to needing someone to take notes and a *transcript.*

7 The Eighth Circuit in Southern Transport, supra. approved the stenographic recording of bargaining sessions based on whether the demand was made in “good faith.” The court considered whether the presence of the reporter created a “chilling effect” on the negotiations. This 1966 case was reversed by Bartlett-Collins, infra.

8 The use of a stenographer at bargaining sessions has been held to be a nomandatory subject of bargaining under the NLRA. Latrobe Steel Co. v. NLRB, 630 F.2d 171 (3rd Cir. 1980) *cert. denied* 454 U.S. 821 (1980); Quality Engineered Products Co. Inc., 267 NLRB 593 (1983). The insistence to impasse on making a verbatim recording of grievance meetings has also been found to be an unfair labor practice, based on the rationale of Bartlett-Collins under both the NLRA and the Act. NLRB v. Pennsylvania Telephone Guild, 799 F.2d 84 (3rd Cir. 1986) and County of Cook, 3 PERI par. 3013 (Ill. LLRB 1987).

9 The issue is not whether the presence of the reporter did create a “chilling effect” on the negotiations as suggested by the County, but whether the presence of a court reporter is a threshold matter and therefore not a mandatory subject of bargaining.

10 It appears to be the ultimate in bad faith to suggest that a certified shorthand reporter was hired to be a member of the County's bargaining team simply to take notes. It appears to me that a prerequisite of being a member of a bargaining team is knowledge of and an opportunity to accept or reject such an appointment. Hopp believed she was hired by Barrett

to take a verbatim transcript of an unspecified type of proceeding. These facts are inconsistent with the County's claim that Hopp was a member of its bargaining team. Further, I find it incredible that there was no one else in the County government who could assist Barrett in taking "personal notes."

11 The County's argument that it is impossible to make a verbatim record of a bargaining session is also with merit. The stenographer came to her job assignment without specific instructions from Barrett but with the intent to make a verbatim record of the meeting according to her usual practice. From an examination of the cases which have considered the issue of making either a stenographic or taped record of collective bargaining sessions, there is no doubt that verbatim records have been made of such sessions. If any meeting or hearing is unruly, it does become more difficult to record everything that is said. However, the County presented no evidence to support its contention that the bargaining sessions in question would be unruly.

12 Co-employers have a joint duty under the Act to negotiate in good faith. It obviously thwarts the entire collective bargaining process when one joint employer, in this case the County, breaches that duty and the Sheriff, with full knowledge passively acquiesces to the breach. Due to the breach, negotiations were halted. Although there was no specific evidence presented against the Sheriff, it is my opinion that both co-employers may be liable when one of them accepts the benefit of the other's breach of the duty to negotiate in good faith without making a good faith effort to conclude the collective bargaining process. It is critical that in negotiating this first collective bargaining agreement that both the Sheriff and the County cooperate with each other as well as with AFSCME by bargaining in good faith. See County of Kane v. Kane County Sheriff, 4 PERI par. 2012 (Case Nos. S-CA-88-40, S-CA-88-63, Ill. SLRB March 1988)

End of Document

43 PERC ¶ 73, 43 Pub. Employee Rep. for California ¶ 73, 2018 WL 6499748

California Public Employment Relations Board

Orange County Employees Association, et al., Charging Parties, v. County of Orange, Respondent
No. LA-CE-934-M
No. LA-CE-935-M
No. LA-CE-944-M
PERB No. 2594-M
BANKS, WINSLOW, SHINERS, KRANTZ
November 6, 2018

Related Index Numbers
3.342 Other State Legislation, Municipal, Ordinances
15.32 Administrative Service Employees, County
41.63 Meet and Discuss, Duties and Obligations of Parties
72.74 Other Unfair Practices, Refusal to Meet and Discuss
72.617 Unilateral Change in Term or Condition of Employment, Bargaining Over Effects
74.31 Types of Orders, Cease and Desist
74.321 Types of Orders, Restoration of Status Quo Ante, Specific Affirmative Action
ALJ's decision, 40 PERC 5, affirmed in part and reversed in part by PERB

Appearances:
Donald L. Drozd, General Counsel, for the Orange County Employees Association
Marianne Reinhold, Attorney, for the Orange County Attorneys Association, Reich, Adell & Cvitan
Laurence S. Zakson, Attorney, for the Orange County Attorneys Association, Reich, Adell & Cvitan
Aaron G. Lawrence, Attorney, for the Orange County Attorneys Association, Reich, Adell & Cvitan
Adam N. Stern, Attorney, for International Union of Operating Engineers Local 501, The Meyers Law Group
Adrianna E. Guzman, Attorney, for the County of Orange, Liebert Cassidy Whitmore
Before Banks, Winslow, Shiners, and Krantz, Members.

Judge / Administrative Officer
BANKS
WINSLOW
SHINERS
KRANTZ

Ruling

A PERB majority decided that a county employer violated MMBA provisions by adopting certain provisions of a "Civic Openness in Negotiations" ordinance without affording three unions an opportunity to meet and confer of the decision or the effects of the proposed ordinance. The PERB majority refused to alter its long-held rule that ground rules must be bargained over just as any other mandatory subject of bargaining. Upon determining that several ordinance provisions were void and unenforceable in the employer's negotiations with the unions, the PERB majority issued a cease and desist order.

Ground rules for negotiations constitute mandatory bargaining topic

Meaning

The PERB majority followed almost 38 years of its own case law, which treats ground rules as a mandatory subject of bargaining. That case law provides that there is no legal basis for distinguishing between negotiations on ground rules from negotiations on substantive issues.

Case Summary

Three unions brought unfair practice charges against the county employer. They alleged that the employer violated MMBA provisions by unilaterally adopting an ordinance entitled "Civic Openness in Negotiations." In a proposed decision reported at 40 PERC 5, PERB's Chief ALJ decided that the employer's unilateral adoption of the COIN ordinance, without notice to the unions and an opportunity to meet and confer over that adoption or its effects, violated MMBA Section 3505 and PERB Regulation 32603(c). Upon considering the unions' exceptions, PERB partly affirmed and partly reversed the Chief ALJ's decision. It declined to follow the NLRB rule that ground rules constitute a permissive subject of bargaining. The PERB majority refused to alter its long-held rule that ground rules must be bargained over just as any other mandatory subject of bargaining. However, the PERB majority disavowed the holding of *Alhambra Firefighters Association, Local 1578,* 34 PERC 160 (PERB 2010), to the extent *Alhambra* suggested that the Claremont test always applies to determine whether a matter falls within the scope of representation under the MMBA. The PERB majority decided that an ordinance provision concerning fiscal reports fell outside the scope of representation and was not subject to statutory consultation requirements. It upheld the ALJ's conclusion that several other ordinance provisions fell within the scope of representation. The PERB majority decided that the county employer violated MMBA provisions by adopting certain provisions of the COIN ordinance without affording the unions an opportunity to meet and confer of the decision or the effects of the proposed ordinance. Upon determining that several ordinance provisions were void and unenforceable in the employer's negotiations with the unions, the PERB majority issued a cease and desist order. The partly dissenting PERB member argued that all of the COIN ordinance provisions at issue fell outside the scope of representation and, therefore, that the unfair practice complaints should be dismissed.

Full Text

Decision

WINSLOW, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions by the Orange County Attorneys Association (OCAA), the Orange County Employees Association (OCEA), and the County of Orange (County) to a proposed decision by an administrative law judge (ALJ) [see 40 PERC 5]. The complaints alleged that the County violated the Meyers-Milias-Brown Act (MMBA) [1] by adopting what is referred to as the Civic Openness in Negotiations (COIN) ordinance, without giving the charging parties—OCAA, OCEA, and the International Union of Operating Engineers, Local 501 (Local 501)—notice and an opportunity to meet and confer. The ALJ concluded that some of the disputed provisions of the ordinance fell within the scope of representation and were therefore unlawfully adopted without giving OCAA, OCEA, or Local 501 notice and an opportunity to bargain. The ALJ also considered, but rejected, OCAA's theory that MMBA section 3507 required the County to consult in good faith before adopting the ordinance.

The Board itself has reviewed the record in its entirety and considered the parties' exceptions and responses thereto. Based on that review, we affirm in part and reverse in part the ALJ's decision.

Summary of Facts

OCEA, OCAA, and Local 501 are the exclusive representatives of appropriate units of employees within the meaning of PERB Regulation 32016, subdivision (b), [2] and are recognized employee organizations within the meaning of MMBA 3501, subdivision (b). [3] The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016 subdivision (a).

On May 14, 2014, the County posted the agenda for its May 20, 2014 Board of Supervisors meeting. One of the agenda items was consideration of the first reading of the proposed COIN ordinance.

At the May 20, 2014 meeting, representatives of OCEA, OCAA, and Local 501 objected to the County's failure to give notice and an opportunity to bargain before adopting the ordinance. The first reading was continued to a meeting in June. Meanwhile, the parties exchanged correspondence in which OCEA, OCAA, and Local 501 continued to demand bargaining over the ordinance. The County maintained that the ordinance was outside the scope of representation and refused to bargain.

The proposed COIN ordinance was amended over the course of several Board of Supervisors meetings in June and July. At the August 5, 2014 meeting, the Board of Supervisors approved the ordinance, which added section 1-3-21 to the County's codified ordinances, with the following provisions:

· *Prospective Application*: The ordinance shall not apply to labor contract negotiations which had already commenced prior to the adoption of the ordinance. (Subd. (a)(1).) [4]

· *Independent Principal Negotiator*: The County's principal negotiator shall not be an employee of the County. The use of the principal negotiator may only be waived by a majority vote of the Board of Supervisors. (Subd. (a)(2).)

· *Description of Negotiable Ground Rules*: The ordinance shall not prevent the negotiation of ground rules to any MMBA labor contract negotiations. Consistent with the MMBA, the parties may, but are not required to, negotiate preliminary procedural matters governing the conduct of negotiations, including, but not limited to, the time and place of bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals. (Subd. (a)(3).)

· *Independent Economic Analysis—Opening Proposal*: The County Auditor-Controller shall prepare an independent economic analysis or report which describes and summarizes the fiscal costs to the County of benefits and pay currently provided to bargaining unit members in comparison to the costs of each term and condition offered in negotiations or set forth as a supposal in negotiations. The report will itemize the annual and cumulative costs which would result from the adoption or acceptance of any initial meet and confer proposal. (Subd. (b)(1).)

· *Public Disclosure of Economic Analysis of Opening Proposal—30 Days Before Consideration by the Board of Supervisors*: The report shall be made available for review by the Board of Supervisors and the public at least 30 days before consideration by the Board of Supervisors of an opening proposal to be presented to a recognized employee organization of an amended, extended, successor or original Memorandum of Understanding (MOU). (Subd. (b)(2).)

· *Independent Economic Analysis—Ongoing proposals*: The County Auditor-Controller shall prepare an updated report itemizing annual and cumulative costs which would result from the adoption or acceptance of each meet and confer proposal from the recognized employee organization or County. Such updates shall compare the compensation elements with the prior year as well as to prior proposals made. Reports and updates shall include best estimates as to the change from currently computed pension unfunded actuarial accrued liability and retiree medical unfunded actuarial accrued liability. (Subd. (b)(3).)

· *Reporting Out of Closed Session-Prior Formal Offers, Counteroffers and Supposals*: The Board of Supervisors shall timely report out from closed session any and all prior formal offers, formal counteroffers and supposals made by either the County or the recognized employee organization which were communicated to the County during closed session. Such report shall also include the release of the names of persons in attendance at, and locations of, and any pertinent facts regarding the negotiations sessions. (Subds. (c)(2) and (c)(3).)

· *Duty to Advise During Closed Session*: The Board of Supervisors' representatives have a duty to advise the Board of Supervisors during any closed session of offers, counteroffers, information provided, statements of position by recognized employee organization and County representatives since the last closed session. (Subd. (c)(4).)

· *Disclosure of all Offers, Counteroffers and Supposals within 24 hours to the Board of Supervisors and the Public*: All offers, counteroffers and supposals made by either the County or the recognized employee organization(s) shall be disclosed to the Board and the public within 24 hours of the making of such proposal. (Subd. (c)(6).)

· *Adoption of Agreement Only After a Minimum of Two Board Meetings where Public has opportunity to Review and Comment*: The adoption of an agreement between the County and the recognized employee organization shall only take place after the matter has been heard at a minimum of two board meetings and the public has had an opportunity to review and comment on the matter. The agreement shall be posted on the County website along with the final report and updates made by the County Auditor-Controller. (Subd. (d).)

· *Severability Clause*: If any provision or clause of the ordinance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity will not affect the other provisions or clauses. (Subd. (f).)

Proposed Decision

The ALJ considered five of the COIN ordinance's requirements: (1) that the County Auditor-Controller prepare a pre-negotiations report of the cost of employee wages and benefits and the cost of any initial proposals to be considered by the Board of Supervisors (subd. (b)(1)); (2) that the Auditor-Controller's report be available to the Board of Supervisors and the public for 30 days before the Board of Supervisors considers its opening bargaining proposal (subd. (b)(2)); (3) that the report be updated to include the cost of all proposals throughout negotiations (subd. (b)(3)); (4) that all offers, counteroffers, and supposals made during negotiations be publicly reported within 24 hours, and that the Board of Supervisors publicly report out of its closed sessions all offers, counteroffers, and supposals (subds. (c)(2), (c)(3), (c)(6)); and (5) that the Board of Supervisors may not adopt a tentative agreement until it has held two public meetings (subd. (d)).

The ALJ analyzed these requirements under the test for negotiability articulated in Claremont Police Officers Association v. City of Claremont (2006) 39 Cal.4th 623 (Claremont) and applied by the Board in City of Alhambra (2010) PERB Decision No. 2139-M (*Alhambra*). He concluded that the requirement of subdivision (b)(2)—which he termed a "30-day non-negotiations period"—fell within the scope of representation, because it potentially interferes with section 3505's command to meet and confer "promptly." The ALJ also concluded that the requirements of subdivisions (c)(2), (c)(3), and (c)(6), fell within the scope of representation, because they preclude an agreement to keep negotiations confidential. He concluded that the remaining requirements did not fall within the scope of representation, as they pertained to the County's internal processes.

As for OCAA's allegation that the County was required to consult in good faith over the COIN ordinance pursuant to MMBA section 3507, even if it was not within the scope of representation, the ALJ considered this allegation under the unalleged violation test, rather than as a motion to amend the complaint. The ALJ concluded that this allegation met the test for an unalleged violation, but that it failed on the merits. He determined that "[t]he restriction[s] on ground rules in COIN do not fall into the same category of dispute resolution procedures set forth in MMBA section 3507, subdivision (a)(5), which would most likely include: mediation, factfinding, or interest arbitration" and that "[i]t also does not fall under the catchall subsection of MMBA section 3507, subdivision (a)(9), as it does not concern employee organization/employer 'representation' matters (recognition, etc.) which is the focus of MMBA section 3507."

As a remedy for the County's failure to bargain, the ALJ ordered that the County rescind the unlawfully adopted portions of the ordinance and post a notice of its violation by physical and electronic means "customarily used by the County to communicate with its employees in the bargaining units represented by OCEA, OCAA, and [Local 501]."

The Parties' Exceptions

OCEA and OCAA except to the ALJ's conclusions regarding subdivisions (b)(1) and (b)(3) of the ordinance. OCAA also excepts to the ALJ's conclusion regarding subdivision (b)(2) as being too narrow, and to the scope of the proposed order. The County excepts to the ALJ's conclusions that subdivisions (b)(2) and (c)(2), (c)(3), and (c)(6) are within the scope of representation. [5]

Discussion

I. Unilateral Change

The ALJ determined that the only element of PERB's unilateral change test at issue in this case is whether the COIN ordinance concerned a matter within the scope of representation. (See County of Santa Clara (2013) PERB Decision No. 2321-M, pp. 18-19.) This is also the only element raised by the parties' exceptions.

The scope of representation under the MMBA includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) This case does not directly involve wages, hours, or other terms and conditions of employment, but rather aspects of the COIN ordinance that are claimed to be negotiable because they constitute ground rules for negotiations.

The Board has long held that "the parties must bargain collectively about the preliminary arrangements for negotiations in the same manner they must bargain about substantive terms or conditions of employment." (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 23 (*Stockton*), citing General Electric Co. (1968) 173 NLRB 253; see also *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 10 (*Anaheim*), citing Borg-Warner Corp. (1972) 198 NLRB 726; St. Louis Typographical Union No. 8 (1964) 149 NLRB 750 [no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues]; *Gonzales Union High School District* (1985) PERB Decision No. 480, adopting proposed decision, p. 47.) Thus, ground rules are "equivalent to a mandatory subject of bargaining." (*Compton Community College District* (1989) PERB Decision No. 728, adopting proposed decision, p. 56.) We see no reason not to apply this precedent when interpreting the MMBA. (See Coachella Valley Mosquito & Vector Control Dist. v. PERB (2005) 35 Cal.4th 1072, 1090.)

Arguing a point not raised by any party in this case, our dissenting colleague would overrule our longstanding case law holding that ground rules are a mandatory subject of bargaining and follow the National Labor Relations Board (NLRB) and some other jurisdictions in treating ground rules as a permissive subject. As we have consistently noted, PERB may take guidance from the NLRB, but we are not compelled to follow every turn of the private sector case law, especially where we conclude that it does not effectuate the purposes of the statutes we are charged with enforcing. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 13; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 28.) In this case, we decline to follow the NLRB rule for several reasons.

At the outset, we note that this Board has treated ground rules as a mandatory subject of bargaining for 38 years. (*Stockton*, *supra*, PERB Decision No. 143.) In *Anaheim*, *supra*, PERB Decision No. 177, pp. 8-12, the Board explained:

It is essential to the negotiating scheme of things that neither side be afforded, by law, dominance over the process, thus negating the concept of mutuality and good faith. Allowing the employer to unilaterally dictate the matter of released time, including the number of employee negotiators, amounts of compensation and scheduling of sessions, would give to the employer precisely that objectionable form of dominance. . . .

. . . . To permit the employer to decide at the outset how many hours or days will finally be required and at what times negotiations shall take place and over what duration per session is to apply an inherently unrealistic formula to these arrangements and, by definition, to establish an unreasonably inflexible and mechanistic policy.

[¶ . . . ¶]

[T]here is no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues. The duty to bargain means just that. The employer ' s position on procedural issues, as its position on wages, hours or terms and conditions of employment, is to be expressed through its own proposals or counterproposals.

(Emphasis added.) The Board has reaffirmed this rule time and again. (*Gonzales Union High School District*, *supra*, PERB Decision No. 480, p. 47-48; *Compton Community College District*, *supra*, PERB Decision No. 728, adopting proposed decision, p. 56; *Sierra Joint Community College District* (1981) PERB Decision No. 179, p. 6 [neither party may unilaterally dictate scheduling of negotiations]; State of California (Board of Equalization) (1997) PERB Decision No. 1235-S, p. 3; *Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 26 [ignoring proposal for ground rules considered a flat refusal to bargain].) This consistent treatment of ground rules as a mandatory subject of bargaining has established a settled expectation among PERB's constituents. To upset that expectation in a case in which the issue was not raised by the parties and therefore not briefed by them would be a disservice to rational adjudication.

These four decades of treating ground rules as a mandatory subject belie the dissent's belief that PERB's rule makes it more likely that a party will insist to impasse on a ground rule and thereby stifle negotiations in their inception. Our case law discloses no such adverse consequences. In contrast, one of the cases the dissent cites reveals exactly this consequence occurring under the rule the dissent proposes. (Lincoln County, 2018 WL 4292910 [Washington Public Employment Relations Commission].) During the term of a collective bargaining agreement, the employer unilaterally adopted a COIN-type resolution declaring, among other things, that it would "conduct all collective bargaining contract negotiations in a manner that is open to the public." (*Id*. at p. 1). Thereafter, when the employer and an employee organization began negotiating a new contract, they vehemently disagreed on whether to bargain in private as they had in the past, or to follow the employer's newly passed resolution and invite the public to negotiations. Each party refused to negotiate unless the other conceded this ground rule issue, and each filed an unfair practice charge averring that the ground rule was a permissive subject of bargaining, and that the other party was unlawfully refusing to negotiate while insisting to impasse on a permissive subject. Twenty months after the parties' contract had expired, with the parties still unable to begin negotiations, the Commission ruled that the topic was a permissive subject of bargaining and that both parties had therefore unlawfully insisted to impasse on a permissive topic. The Commission then considered the appropriate remedy. The hearing examiner's order had directed that the parties must return to the table and work it out, leading one of the parties to indicate, on appeal, that such an order "begs the question, 'What do we do now?"' (*Id*. at p. 8). The Commission answered as follows: "What the parties do now is . . . [t]he parties must bargain." (Ibid.) Thus, faced with each side refusing to bargain over a ground rule, the Commission concluded that the proper remedy was to treat the ground rule as essentially a mandatory topic, even while labeling it permissive. (*Id*. at p. 10.) Indeed, the extent to which the Commission fell back on treating the issue as essentially a mandatory topic is evident throughout the decision, especially where the Commission indicates that parties are out of compliance if they "respond[] to the other party's proposals on how to conduct the negotiations by simply saying 'no."' (Ibid.) Equally importantly, the Commission recognized that no matter how it labeled the issue, and no matter how much the parties might try to negotiate, they might still end up disagreeing. Accordingly, the Commission ordered that if the parties could not reach agreement on public versus private bargaining during two additional bargaining sessions, they must engage a mediator, and if they still could not reach agreement at the close of mediation, then the union's position would prevail and bargaining would occur in private. (*Id*. at p. 10.)

Lincoln County, supra, 2018 WL 4292910, thus demonstrates why a bargaining break down over ground rules is at least as likely, if not more likely, to occur if such topics are labeled as permissive. The case also highlights that for bargaining parties, the most important issue may not be whether a topic is mandatory or permissive, but whether there is a default position established by statute or precedent that impacts parties' ability to impose or insist upon their position at various stages. Indeed, for some

permissive topics, one side has a prerogative to make a unilateral change or to insist that none be made, while as to other permissive topics both parties have the right to insist that no change be made. For instance, if the parties cannot agree on the permissive topic of unit scope, or one party declines to negotiate on that topic, then neither side may alter the status quo. (Aggregate Industries v. NLRB (D.C. Cir. 2016) 824 F.3d 1095, 1099.) But if the parties cannot agree on a permissive matter involving internal union affairs, or a union declines to negotiate on that topic, then the union has full prerogative to make changes. (Id. at p. 1099, fn. 4.) The same is true as to certain mandatory topics. (See, e.g., *City of San Ramon* (2018) PERB Decision No. 2571-M, pp. 13-14 [contract duration is a mandatory subject, but after impasse employer may not impose duration for new terms of employment]; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, pp. 23-24 [although no-strike clause is a mandatory subject, after impasse an employer may not impose a no-strike clause or other waivers of statutory rights].)

In declaring that bargaining in private should be the default, Washington's Commission is not alone. PERB and other labor agencies have established similar defaults—irrespective of whether those agencies treat the topics as mandatory or permissive—in order to provide guidance that supports sound labor relations, and to prevent negotiations from stalling over preliminary topics. (See, e.g., *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 28-29 & 33-34 (*Petaluma*) [although presence of observers at bargaining is negotiable, the legislative scheme provides a default rule under which there are no such observers, absent agreement, meaning neither party is entitled to insist on the presence of observers, nor to impose such a condition after impasse].)

Along the same lines, the dissent cites a series of non-California cases holding that a party may not insist on observers at bargaining, and also may not insist that the other party agree to audio or stenographic recording of negotiations. (Bartlett-Collins Co. (1978) 237 NLRB 770, 773 & fn. 9, enf. (10th Cir. 1981) 639 F.2d 652 [finding that recording inhibits free bargaining, the default should therefore be no recording, and any party's proposal to change that default is permissive and may not be insisted upon]; Latrobe Steel Co. v. NLRB (3d Cir. 1980) 630 F.2d 171, 176 [employer unlawfully insisted on presence of stenographers as a precondition to bargaining]; Local 342-50, United Food and Commercial Workers Union (2003) 339 NLRB 148, 155 [applying the Bartlett-Collins Co. default rule to grievance meetings]; Washington County Consolidated Communications Agency, 2014 WL 3339216, p. 8 [Oregon Employees Relations Board] ["[W]e have decided to adopt the approach taken by the NLRB on the subject of recording bargaining sessions"]; *County of Kane* (1988) 4 PERI ¶ 2031 [Illinois State Labor Relations Board] [employer had no right to insist on verbatim record of negotiations]; City of Deerfield Beach (1981) 7 FPER ¶ 12438 [Florida Public Employees Relations Commission] [tape recording is permissive subject of bargaining]; *Town of Shelter Island* (1979) 12 PERB ¶ 3112 [New York Public Employment Relations Board] [parties may propose having observers at bargaining, and may seek mediation on the issue, but may not insist to impasse on that issue].) [6]

We have no quibble with the above-stated default rule that no party may unilaterally impose or insist on negotiations being recorded or on inviting observers to bargaining. However, based on our precedent, including *Petaluma*, *supra*, PERB Decision No. 2485, we reach that result not by artificially labelling ground rules issues as permissive. As noted above, labeling a topic as mandatory or permissive does not resolve whether one party may or may not impose or insist on a particular position. In other words, even as to ground rule issues for which there is an established default, such as recording negotiations or allowing observers at negotiations, it makes sense for PERB to maintain its longstanding rule that such topics are mandatory rather than permissive. Either party must negotiate in good faith regarding such issues at the other party's request, but there is a default that applies in the absence of agreement. This arrangement has worked well in California for decades, and we continue to believe it serves the parties best in avoiding the consequences the dissent fears.

As to some ground rule topics, there is no default in the absence of an agreement. For instance, there is no established default that prescribes particular days of the week, times, intervals, durations, frequencies, topic sequences, or locations for bargaining. As to these topics, too, we find it preferable to label them as mandatory. Indeed, even in jurisdictions that label all ground rules as permissive, it is rare to find a decision suggesting that any party may decline to negotiate over these standard topics. [7]

There are other flaws in the dissent's belief that our rule of the last four decades will suddenly begin to cause contract negotiations to be hung up on ground rules. A disagreement over ground rules would not privilege either side to declare an overall impasse or to refuse further meetings. There is no impasse absent an overall deadlock, meaning that a party cannot separate out just one negotiable subject and declare impasse on that topic alone. (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 33.) In order for an overall impasse to occur based on a single disagreement, the subject of disagreement must be of overriding importance. (Ibid.) For that reason, and given that the duty to meet and confer in good faith does not permit a party to insist, for instance, on unreasonably narrow windows in which to bargain,[8] it is not surprising that California bargaining parties have adapted to the PERB rule and avoided the ills that the dissent predicts.

Moreover, the dissent ignores that in many cases, including this one, a ground rules issue arises not during contract negotiations, but rather as part of an employer's mid-contract effort to legislate new procedures for the future. (See, e.g., Lincoln County, 2018 WL 1833319, pp. 2, 7, fn. 4 [discussing how employer came to believe it would gain a strategic bargaining advantage by unilaterally passing a resolution requiring public negotiations].) While the dissent urges us to overrule longstanding precedent and label ground rules as a permissive subject of bargaining, it is unclear if the dissent assumes that under such a revised rule employers would enjoy the right to legislate new ground rules unilaterally.[9] However, two things are clear to us regarding an employer's mid-contract desire to alter the parameters of future negotiations. First, treating ground rules as a mandatory topic is the most straightforward path to improving communication between parties, maximizing their opportunities to achieve a strong relationship, and preventing unilateral self-help designed to create a more favorable playing field for one side in future negotiations. Second, such discussions are a stand-alone negotiation occurring at a time that does not necessarily delay other negotiations.

In sum, as a matter of policy, we believe treating the general subject of ground rules as a mandatory subject of bargaining better effectuates the purposes of the MMBA and the other statutes we administer. The MMBA declares dual purposes in section 3500: “to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employers and public employee organizations,” and to promote the improvement of employer-employee relations. These purposes are best served by collective bargaining. We therefore decline to alter our long-held rule that ground rules must be bargained over just as any other mandatory subject of bargaining.

The ALJ acknowledged the Board's precedent on the negotiability of ground rules, but noted that it has not been specifically determined whether ground rules are negotiable under the MMBA. To answer this question, and to determine whether the specific aspects of the COIN ordinance were negotiable, the ALJ turned to the three-part test applied by the Board in *Alhambra*, *supra*, PERB Decision No. 2139-M, which is derived from the Supreme Court's decision in Claremont, supra, 39 Cal.4th 623. We believe this was an unnecessary analytical step, and not well-suited to determine whether matters within the general topic of ground rules are negotiable.

*Claremont*prescribes a three-step balancing test “to determine whether management must meet and confer with a recognized employee organization . . . when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions.” (Claremont, supra, 39 Cal.4th 623, 637.) The California Supreme Court explained the test as follows:

First, we ask whether the management action has “a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.” . . . If not, there is no duty to meet and confer. . . . Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then . . . the meet-and-confer requirement applies. . . . Third, if both factors are present . . . we apply a balancing test. The action “is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.”

(Id. at p. 638, citations omitted.) Claremont acknowledged that First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 (First National Maintenance) "applied a similar balancing test." (Claremont, supra, at p. 637.)

In *Alhambra*, *supra*, PERB Decision No. 2139-M, the Board described Claremont as establishing the "test to determine whether a matter is within the scope of representation under the MMBA." (*Id*. at p. 13.) In that case, the issue was whether the minimum qualifications for a bargaining unit position was within the scope of representation. Applying Claremont, the Board determined it was not.

A year after *Alhambra* issued, the California Supreme Court again clarified the test for determining the scope of bargaining under the MMBA. (International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).) The Court observed that there are three distinct categories of managerial decisions, each with its own implications for the scope of representation: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "*always* mandatory subjects of bargaining" (emphasis added); and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (Ibid.) The Court explained that the First National Maintenance balancing test applies only to the third category of managerial decisions:

To determine whether a particular decision in this third category is within the scope of representation, the high court [in First National Maintenance] prescribed a balancing test, under which "in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."

(Richmond Firefighters, supra, at p. 273, quoting First National Maintenance, supra, 452 U.S. 666, 679.)

By explaining that decisions directly defining the employment relationship are always mandatory subjects of bargaining, Richmond Firefighters provides an important clarification of the limits of Claremont. It is not necessary to ask whether such a decision has a "significant and adverse effect" on wages, hours, or other terms and conditions of employment, nor is it necessary to balance that effect against the employer's need for unencumbered decisionmaking. This is consistent with our own case law. (See *Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 8-9 [when the Legislature expressly places a subject within the scope of representation, it is "neither necessary nor proper to . . . balance[] the potential benefits of negotiating a particular item against the employer's management prerogatives"].) And indeed, the literal application of the Claremont test to decisions directly defining the employment relationship would conflict with decades of settled labor law. Because a decision to increase employee wages or benefits would not have an adverse effect on employees, those decisions would be withheld from the scope of representation. But "[w]hether a change is beneficial or detrimental to the employees is a decision reserved to the employees as represented by their union." (Solano County Employees ' Assn. v. County of Solano (1982) 136 Cal.App.3d 256, 262.) Increases in wages and benefits are fully negotiable. (See, e.g., NLRB v. Katz (1962) 369 U.S. 736, 743; Ruline Nursery Co. v. Agricultural Labor Relations Bd. (1985) 169 Cal.App.3d 247, 266; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 47-48.) Richmond Firefighters confirms that Claremont did not signal a departure from this longstanding principle.

Thus, under Richmond Firefighters, a balancing test applies only to employer decisions that directly affect employment, such as eliminating jobs, but also involve "'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (Richmond Firefighters, supra, 51 Cal.4th 259, 273; see also International Assn. of Firefighters, Local 230 v. City of San Jose (2011) 195 Cal.App.4th 1179, 1210 ["The scope of representation includes, among other things, management decisions 'directly defining the employment relationship, such as

wages, workplace rules, and the order of succession of layoffs and recalls"' (quoting Richmond Firefighters)].) To the extent *Alhambra*, *supra*, PERB Decision No. 2139-M, conflicts with Richmond Firefighters on this point—specifically, by suggesting that the Claremont test *always* applies to determine whether a matter is within the scope of representation under the MMBA—we disavow it. [10]

Applying the proper framework, our first inquiry in this case is whether the disputed provisions of the COIN ordinance constitute ground rules. Ground rules may include "the time and place for bargaining to start, the order of issues to be discussed, the final settlement conditions that may be imposed, questions of ratification and approval . . ., and a variety of similar procedural matters." (*Anaheim*, *supra*, PERB Decision No. 177, p. 9.) [11] As another example, parties sometimes propose that negotiations should remain confidential. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 3; *King City Joint Union High School District* (2005) PERB Decision No. 1777, adopting proposed decision, p. 5.) In short, ground rules directly regulate the bargaining relationship between the parties. If the provisions of the COIN ordinance qualify as ground rules, they are negotiable like any other mandatory subject (*Stockton*, *supra*, PERB Decision No. 143, p. 23), regardless of any managerial interest the County might assert (*Richmond* Firefighters, supra, 51 Cal.4th 259, 272).

If the ordinance's provisions do not directly regulate the bargaining relationship, however, they may still be negotiable if they have a direct impact on the negotiating process, and if the benefit of negotiations outweighs the County's need for unencumbered decisionmaking. (Richmond Firefighters, supra, 51 Cal.4th 259, 272.) On the other hand, if their impact is indirect and attenuated, they are not negotiable. (Ibid.)

Some fundamental matters related to negotiations are reserved to the parties and excluded from negotiations, such as the identity of a party's bargaining representatives. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, p. 16.) Moreover, while ground rules must be negotiated in good faith, for certain ground rules there are, as noted above, established defaults that neither party may insist on changing. (See, e.g., *Anaheim*, *supra*, PERB Decision No. 177, pp. 13-14 [proposal to charge union for the cost of statutory released time]; Bartlett-Collins Co., supra, 237 NLRB 770 [stenographic recording of negotiations]; cf. *Petaluma*, *supra*, PERB Decision No. 2485, pp. 33-34 [observers at negotiations].) Proposed ground rules that conflict with the purpose of the MMBA or any specific obligation imposed or right secured by the statute would also be considered non-mandatory. [12]

With these principles in mind, we next consider whether the challenged provisions of the County's ordinance are ground rules over which the County had a duty to negotiate.

Subdivision (b)(1)

Subdivision (b)(1) of the ordinance requires that before the County makes an opening proposal, the Auditor-Controller must provide a report of the fiscal costs of the current compensation and benefits received by the bargaining unit in question, as well as the costs of possible opening proposals by the County. The ALJ concluded that this provision concerns the County's fundamental managerial prerogative and is outside the scope of representation. OCEA excepts to this conclusion.

We do not believe subdivision (b)(1) is a ground rule that directly regulates the bargaining relationship between the parties or has any direct impact on procedures for negotiations. Although it mandates certain actions that must occur before negotiations begin, these actions have to do with the County's internal process for arriving at its opening proposal. Certainly, in the absence of an ordinance, nothing would prevent the County from adhering to this procedure. An employer is entitled to deliberate privately and fully develop a proposal affecting negotiable subjects before presenting it to the employees' representative. (City of Sacramento (2013) PERB Decision No. 2351-M, p. 30, fn. 15.) We therefore agree with the ALJ's conclusion that such matters are within the employer's managerial prerogative, just as a proposal that intrudes on a union's process for formulating its own opening proposals—such as by surveying their members, researching the existing terms and conditions of employment,

and analyzing the costs of possible proposals—would be within the union's exclusive purview. (NLRB v. Wooster Div. of Borg-Warner Corp. (1958) 356 U.S. 342, 350.)

In its exceptions, OCEA argues that this provision is negotiable because the entire COIN ordinance was "deliberately calculated to inhibit" the meet-and-confer process. The County's intent, however, is not our concern in determining whether it has committed a per se violation of the duty to bargain. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 10.) Our concern is with the effect of the provision on the statutory bargaining process. (*Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M, p. 13.) Because it merely prescribes the County's internal process for deciding on an initial proposal, subdivision (b)(1) is consistent with the MMBA's collective bargaining process.

OCEA also argues that "in the Orange County environment," this provision "*could* conflict with the parties' obligation to meet and confer in good faith, and *could* lend to the domination of the bargaining process or unduly delay negotiations." (Emphasis in original.) OCEA offers no further argument on this point, and cites no facts in the record regarding the "Orange County environment." If these provisions are in fact employed in a way that inhibits good faith bargaining, the remedy is a surface bargaining charge.

Therefore, we reject OCEA's exceptions and agree with the ALJ that subdivision (b)(1) of the ordinance is not within the scope of representation.

Subdivision (b)(2)

Subdivision (b)(2) of the ordinance establishes that the report prepared by the Auditor-Controller must be made public for 30 days before the Board of Supervisors decides on its opening proposal for "negotiation of an amended, extended, successor, or original memorandum of understanding." The ALJ termed this a "non-negotiations" period, and compared it to the "sunshine" provisions found in other statutes under PERB's jurisdiction, e.g., the Educational Employment Relations Act (EERA), the Higher Education Employer-Employee Relations Act (HEERA), and the Ralph C. Dills Act (Dills Act).[13] The Dills Act prescribes a 7-day period of non-negotiations, during which the public has an opportunity to comment on initial proposals, while EERA allows for a "reasonable" period of time for public comment before negotiations begin. The MMBA requires the parties to meet "promptly" upon written request by either party and has no "sunshine" provision. Given the disparity between a seven-day non-negotiations period and a 30-day period, the ALJ determined the 30-day period was inconsistent and contrary to the obligation to meet "promptly." The ALJ further noted:

The MMBA's requirement to meet "promptly" upon request creates an even greater impetus for the parties to decide together how soon the parties should meet after an opening proposal is sunshined. Such bilateral negotiation of a reasonable non-negotiations period satisfying the "promptly" requirement would be an example where the benefit to employer-employee relations of bargaining over this non-negotiations time period would outweigh the employer's need for unencumbered decision-making. . . . Such negotiations would eliminate disputes in the future as to when bargaining should commence. Therefore, the non-negotiations time period after the sunshine of an opening proposal falls within the scope of representation.

We agree with the ALJ. A period of non-negotiations is a procedure that affects the bilateral negotiations process, and in the absence of a statutory prescription, the parties must determine bilaterally whether negotiations should be placed on hold while the public has an opportunity to comment on initial proposals, and if so, for how long. (Cf. Santa Clara County Correctional Peace Officers ' Assn. v. County of Santa Clara (2014) 224 Cal.App.4th 1016, 1038-1039 [the MMBA does not specify how long parties must meet and confer, but parties may "agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement"].) By banning negotiations on wages, hours and working conditions for at least 30 days, the County unilaterally dictated this important procedural issue in violation of its duty to negotiate in good faith over ground rules. (*Stockton*, *supra*, PERB Decision No. 143, pp. 8-12.)

The County excepts to the ALJ's characterization of this 30-day period as one of "non-negotiations," arguing that not all negotiations are prohibited during this time. For example, according to the County, the parties could discuss "ground rules" and information requests, and explain or clarify initial bargaining requests. We reject this exception. The provision prohibits the County from submitting its opening proposal for at least 30 days. Without seeing an opening proposal, the unions are unduly hampered in making information requests. There are no initial proposals to explain or clarify. A moratorium on presenting an opening substantive proposal on wages, hours and working conditions is a "non-negotiations" period for all intents and purposes, and the ALJ did not err in naming it as such.

Subdivision (b)(3)

Subdivision (b)(3) of the ordinance requires the Auditor-Controller to regularly update the report to "itemize the annual and cumulative costs that would or may result from adoption or acceptance of each meet and confer proposal." We presume this includes proposals made by either the County or the unions. The ALJ noted the unions' concerns that this requirement would lead to delays in bargaining, but determined that the lawfulness of those delays would be best addressed on a case-by-case basis through a surface bargaining analysis. The ALJ also determined that there was no requirement that these on-going updated reports from the Auditor-Controller be made public. OCAA excepts to these conclusions.

OCAA's exceptions raise several concerns about how subdivision (b)(3) will operate in practice. It argues that the provision can be read to require: (1) publication of the report; (2) a cessation of bargaining after every proposal, to allow the Auditor-Controller's report to be updated and publicized; and (3) a particular level of specificity in the parties' proposals, which would prevent them from adopting an interest-based bargaining approach, which typically generates less specific proposals. Although, as the County points out, the plain language of subdivision (b)(3) does not require any of these actions, neither are OCAA's concerns unreasonable. The overall purpose of the ordinance supports OCAA's reading of subdivision (b)(3). For instance, the ordinance's hortatory preamble refers at least four times to the need for enhanced transparency in negotiations between employees and public agencies: it praises the "transparency of th[e] methods of communication" used by employees and public agencies, mentions the County's duty as a public agency to its residents of "transparency in its decision-making," declares that information and knowledge is enhanced "by virtue of employees and public agencies undertaking their duties and obligations pursuant to the Act [MMBA] in an open and transparent manner," and adopts the finding "that the communication between the County and its employees required by the Act regarding changes in wages, hours and other terms and conditions of employment would benefit from public scrutiny."

The County asserts in response that nothing in subdivision (b)(3) requires the Auditor-Controller's updates to be publicly disclosed throughout the course of the negotiations. It points to subdivision (d) concerning the adoption of the MOU, which provides in relevant part: "Not less than seven (7) days prior to the first board meeting where the matter shall be heard, the County shall post on its website the memorandum of understanding under consideration for adoption, along with any final report and updates made by the Auditor-Controller pursuant to subsection (b) herein." According to the County, this section means that the Auditor-Controller updates are not made public during negotiations. We are not persuaded by this attempted post-hoc interpretation. Simply because the updates must be placed on the website when the MOU is being considered for adoption, does not preclude those updates from being disclosed throughout the process. One act is not mutually exclusive of the other.

The County further asserts that subdivision (b)(3) is an exercise of managerial prerogative, one that it is entitled to implement "to gather all possible information and to make the best decisions to ensure the County's financial well-being."

In light of this emphasis on public scrutiny and transparency, it is entirely foreseeable that the County could interpret subdivision (b)(3) in the manner OCAA fears—to require a public reporting of each updated report and a hiatus in negotiations until the report is made public and/or until the public has commented on the report. However, we are still left with no clear evidence of how the County will implement this particular rule.

The ambiguity of subdivision (b)(3) demonstrates why negotiations over its terms might have solved this dilemma. It is well settled that the parties have a duty to utilize the bargaining process to resolve any ambiguities in their bargaining proposals. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 7; *Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 5 [refusing demand to bargain without attempting to clarify ambiguities and whether matters fall within scope of representation violates duty to bargain in good faith]; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 9 (*Healdsburg*).) An employer has a duty to "voice its reasons for believing that a proposal is outside scope, and to enter into negotiations on those aspects of proposals which it finally views as [within scope]." (*Jefferson School District* (1980) PERB Decision No. 133, p. 11 (*Jefferson*).) Proscribed "is the perfunctory refusal to consider matters which are not patently negotiable without affording the opportunity for clarification or explanation. The obligation to negotiate includes the obligation to express one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (Ibid.) [14]

Depending on how the County implements subdivision (b)(3), it may be negotiable because it would affect the bilateral process of negotiations over substantive terms by potentially impeding the flow of negotiations, restricting the authority of the County's bargaining representatives, and preventing any agreement regarding confidentiality of the bargaining process. On the other hand, if this provision is implemented as the County implies it will be—as merely a directive to the Auditor-Controller similar to subdivision (b)(1), and not to require publication of the updates or a hiatus in negotiations while the updates are prepared—we would agree with the County that the provision is not negotiable for the same reasons we conclude that subdivision (b)(1) is not negotiable. But by outright refusing the unions' demands to bargain over COIN, the County did exactly what *Jefferson*, *supra*, PERB Decision No. 133, and its progeny prohibit—precluding the possibility of either party clarifying or inquiring about the parameters of the negotiable aspects of the ordinance. As we have said in *Healdsburg*, *supra*, PERB Decision No. 375 and County of Santa Clara, supra, PERB Decision No. 2321-M, such conduct is itself a refusal to bargain in good faith and the employer acts at its own peril when it acts unilaterally.

Subdivision (c)

Subdivision (c) of the ordinance is titled "Civic Openness in the Meet and Confer Process." Subdivisions (c)(2) and (c)(3) require that after the Board of Supervisors meets in closed session with its labor negotiators, the Board of Supervisors must report to the public all offers, counteroffers, and supposals made by the parties during negotiations. Subdivision (c)(6) further requires that the County disclose to both the Board of Supervisors and the public all offers, counteroffers, and supposals made during negotiations, within 24 hours. The ALJ determined that these provisions were negotiable because they prevent the parties from agreeing to keep negotiations confidential.

As we noted above, parties sometimes propose a confidentiality arrangement, and other times propose inviting observers to bargaining. (See, e.g., *King City Joint Union High School District*, *supra*, PERB Decision No. 1777, adopting proposed decision, p. 5; *San Ysidro School District* (1980) PERB Decision No. 134, pp. 7, 15; *Muroc Unified School District*, *supra*, PERB Decision No. 80, p. 3.) Because one party cannot unilaterally insist on either of these arrangements, the default is that observers are not permitted, but the parties are permitted to report to the public or the press regarding what occurred in negotiations, absent an agreement to the contrary. (See, e.g., *Ross School District Board of Trustees* (1978) PERB Decision No. 48, adopting proposed decision, p. 9 (*Ross*); *Petaluma*, *supra*, PERB Decision No. 2485, pp. 27-29 [negotiations are to occur solely between parties' representatives, absent agreement to the contrary; union cannot insist on negotiations being open to members who are not on the bargaining team].) These two cases arose under EERA, which expressly exempts negotiations from the open meeting requirements of the Ralph M. Brown Act (Brown Act), [15] an exemption absent from the MMBA. However, their reasoning was also grounded in more general principles, not just the express open-meeting exemption. In particular, *Ross* cited several authorities from other jurisdictions noting the disruptive effect outsiders could have on bargaining by inhibiting the give and take necessary for successful bargaining. (*Ross*, *supra*, adopting proposed decision, pp. 7-8; see also Bartlett-Collins Co., supra, 237 NLRB 770.) [16]

While subdivision (c) of the COIN ordinance does not literally invite the public into bargaining sessions, requiring disclosure of every proposal, counterproposal and supposal to the public within 24 hours, has a very similar effect to the practices condemned in *Ross*, *supra*, PERB Decision No. 48, and *Petaluma*, *supra*, PERB Decision No. 2485. Mandating that every step of the negotiating process be made public invites the same potential disruption to negotiations that having outside observers present during negotiations sessions, viz., inhibiting the free flow of frank discussions, encouraging "grandstanding" for the benefit of perceived interest groups, and stifling informal exploration of ideas that could lead to mutual agreement.

While nothing in our holding prevents a party from reporting to the public what occurs in negotiations if there is no applicable confidentiality agreement, in this case the County unilaterally tied its own hands before bargaining, thereby preventing the parties from ever discussing confidentiality. Indeed, it is often the case that parties agree to a temporary media blackout when negotiations get serious near their close, and the County permanently took that possibility off the table before bargaining even began. In other words, the County preemptively refused to bargain over a mandatory topic.

Because the ordinance directly regulates the bargaining process by precluding the parties from bargaining over or mutually agreeing to keep negotiations confidential, we agree with the ALJ that subdivisions (c)(2), (c)(3), and (c)(6) are negotiable. (Richmond Firefighters, supra, 51 Cal.4th 259, 272; Huntington Beach Police Officers ' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492 [local agency cannot use rulemaking power to remove a negotiable subject from the scope of representation].)

The County argues that this conclusion conflicts with the Brown Act. The Brown Act generally requires a local agency's governing body to conduct its business in an open, public meeting. (Brown Act, § 54953.) But it provides an exception allowing that the governing body "may" meet in closed session with its designated representatives "regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits . . . and . . . any other matter within the statutorily provided scope of representation." (*Id*., § 54957.6.)

Emphasizing the permissive nature of Brown Act section 54957.6, the County argues that its Board of Supervisors "has the legislative authority to determine for itself whether to meet with its labor negotiators in open session." This may be true under the Brown Act. But such authority does not mean confidentiality is outside the scope of representation. Where external law touches upon matters within the scope of representation, those matters "remain negotiable to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or insure immutable provisions.'" (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 13, quoting San Mateo City School Dist. v. PERB (1983) 33 Cal.3d 850, 864-865.) Here, the Brown Act allows, but does not require, the Board of Supervisors to hold open sessions with its designated representatives. Simply because the Brown Act gives the Board of Supervisors discretion, does not remove confidentiality ground rules from the scope of representation.

The County also argues that the Board of Supervisors itself could serve as the County's negotiating team, in which case the Brown Act would require the negotiations to be held in open session. We need not determine whether a confidentiality ground rule would be negotiable in this scenario, because it is not contemplated by the COIN ordinance. Instead, subdivision (a)(2) of the ordinance specifically requires that the Board of Supervisors appoint a "principal negotiator," who is not a County employee and who has demonstrated expertise in negotiating labor agreements on behalf of public entities. [17]

The dissent argues that subdivision (c) does not prevent the parties from entering into a confidentiality agreement because it does not prohibit, for instance, a mutual agreement not to issue press releases or disclose "bargaining table conversations." While the ordinance does leave some interstitial space for narrow confidentiality agreements in certain respects, this does not change the ordinance's broad requirements to publicly disclose all offers, counteroffers, and supposals—the essence of negotiations. In doing so, the ordinance substantially restricts the flexibility of negotiations and reduces the range of ground rules that may be mutually agreed upon.

Therefore, we conclude that subdivisions (c)(2), (c)(3), and (c)(6) are negotiable.

II. Violation of Section 3507

Because we have concluded that the County had no duty under MMBA section 3504 to meet and confer over subdivision (b)(1), which requires the Auditor-Controller to prepare a pre-negotiations report on the cost of current benefits and pay, we turn to OCAA's argument that this provision is within the scope of consultation under section 3507. [18]

Section 3507, subdivision (a) provides that "[a] public agency may adopt reasonable rules and regulations *after consultation in good faith* with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter." (Emphasis added.) The broad range of subjects that may be addressed in these rules and regulations include:

(1) Verifying that an organization does in fact represent employees of the public agency.

(2) Verifying the official status of employee organization officers and representatives.

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

(6) Access of employee organization officers and representatives to work locations.

(7) Use of official bulletin boards and other means of communication by employee organizations.

(8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.

(9) Any other matters that are necessary to carry out the purposes of this chapter.

(Ibid.) These "'mandatory subjects' for consultation" are distinct from the mandatory subjects of bargaining under section 3504. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 30.)

The ALJ rejected OCAA's argument that any provision of the COIN that was not within the scope of negotiations under MMBA section 3504 must also be considered under MMBA section 3507. According to the ALJ, subdivision (a)(5) of section 3507 is limited to procedures such as mediation, factfinding, or interest arbitration, while subdivision (a)(9) includes only rules governing representation matters.

We disagree with this overly narrow reading of MMBA section 3507, subdivisions (a)(5) and (a)(9). The meet-and-confer process is itself a procedure for resolving disputes regarding wages, hours, and other terms and conditions of employment. This is reflected in the MMBA's primary purpose "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (MMBA, § 3500, subd. (a).) When the MMBA was enacted with this language, meeting and conferring in good faith was the only dispute resolution process mandated. Mediation was permitted but not required, and there were no provisions for factfinding or interest arbitration. (Stats. 1968, ch. 1390, pp. 2725-2729.) Thus, rules that regulate the meet-and-confer process would fall within the scope of section 3507, subdivisions (a)(5) and (a)(9), assuming they are not within the scope of sections 3504 and 3505. (*City of Palo Alto*, *supra*, PERB Decision No. 2388a-

M, p. 30.) Such rules adopted pursuant to MMBA section 3507 would also be subject to review for reasonableness. (County of Monterey (2004) PERB Decision No. 1663-M; *City and County of San Francisco* (2017) PERB Decision No. 2536-M.)

Nevertheless, subdivision (b)(1) does not constitute a "procedure for the resolution of disputes involving wages, hours, and other terms and conditions of employment." This provision solely concerns how the County analyzes and reports the costs of current benefits and of ongoing meet-and-confer proposals. This provision does not place any restrictions on recognized employee organizations or on the interactions between the parties in the negotiating process. Therefore, we deem it beyond the scope of MMBA section 3507, and the County was not required to consult with OCAA in good faith before enacting it.

III. The Remedy

A. Severability

We next turn to OCAA's exceptions concerning whether the negotiable provisions of the COIN ordinance are severable from those that are non-negotiable. We conclude they are.

OCAA argues that the ordinance's severability clause does not contemplate severability in the event of invalidation by an administrative agency such as PERB, but only by a "court of competent jurisdiction." (Subd. (f).) Although PERB is not a court, it is the quasi-judicial agency with exclusive initial jurisdiction over the MMBA. There is no reason to believe the County's Board of Supervisors intended that a court could sever any invalid provisions of the ordinance, but that an administrative agency must invalidate the whole thing. Moreover, invalid legislative provisions may be found severable even in the absence of a severability clause. (County of Sonoma v. Super. Ct. (2009) 173 Cal.App.4th 322, 352.) Therefore, we reject the argument that we may not find portions of the ordinance severable.

To be severable, "the invalid provision must be grammatically, functionally, and volitionally separable." (Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 821 (Calfarm).) The first requirement, grammatical severability, means that the invalid provision may be removed without affecting the wording of the remaining provisions. (Id. at p. 822.) This requirement is met here. Subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) are distinct provisions. Their removal does not alter the wording of any remaining provisions.

The requirement of functional severability means that the remaining provisions can operate without the excised ones. (Calfarm, supra, 48 Cal.3d 805, 822.) This requirement is also met. Subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) concern the non-negotiations period, the Auditor-Controller's ongoing updates to the cost report, and the County negotiator's obligation to report proposals, counter-proposals, and supposals to the public and to the Board of Supervisors. [19] The remainder of the ordinance, including its provisions for an initial cost report, an outside principal negotiator, and approval of a tentative agreement after two public meetings, are not affected by the removal of the negotiable provisions.

The final requirement, volitional severability, is also met. This means the remaining provisions "would likely have been adopted" had the legislative body foreseen the partial invalidity of the enactment. (Calfarm, supra, 48 Cal.3d 805, 822; see also Santa Barbara School Dist. v. Super. Ct. (1975) 13 Cal.3d 315, 331.) OCAA argues that the removal of the invalid portions undermines the fundamental purpose of the ordinance so substantially that the Board of Supervisors would not have adopted the remainder, but we disagree. The purpose of increasing public transparency is served by the disclosure of the Auditor-Controller's initial report, reflecting the current costs as well as the costs of possible opening proposals by the County. That purpose is also served by the requirement of two public meetings before the adoption of a tentative agreement by the Board of Supervisors. Other provisions of the ordinance serve purposes not directly related to transparency, including the use of an outside negotiator, which is claimed to reduce the potential for conflicts of interest.

OCAA argues that the County did not need to enact an ordinance to implement these remaining provisions. Presumably, OCAA means that the County could have enacted these policies by resolution instead. That may be true, but we are not concerned

with the form of the County's legislative action, but with whether it took those actions in accordance with the process required by the MMBA.

Therefore, we conclude that subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) are severable from the remainder of the ordinance.

B. Scope of the Remedy

The ALJ ordered the County to rescind the various provisions of the COIN ordinance he determined were within the scope of representation. We amend this portion of the remedy to declare void and unenforceable those portions of the COIN ordinance which we have concluded are unlawful.

At the time he issued the proposed decision, the ALJ did not have the benefit of our decision in *City of San Luis Obispo* (2016) PERB Order No. Ad-444-M, concerning the scope of the remedy in a unilateral change case such as this one. We explained that:

When an employer's conduct is alleged to constitute a unilateral change or other bargaining violation simultaneously affecting more than one bargaining unit, the exclusive representative of each unit must file a charge and litigate on behalf of the employees in its respective unit. [Citations.] In such circumstances, the Board's usual practice is to limit the remedy to only the unit or units where the designated representative has successfully litigated the case. [Citations.] This approach is necessary to protect the rights of the respondent to notice of the allegations against it and to protect the rights of other employee organizations who, for whatever reason, may prefer to acquiesce to an employer's conduct rather than file and litigate unfair practice charges.

(*Id*. at p. 6.)

The County's unilateral change in this case primarily affects the rights of the exclusive representatives of County employees to meet and confer in good faith. (MMBA, §§ 3505, 3506.5, subd. (c).) We are aware of at least three exclusive representatives of County bargaining units that are not parties to these consolidated cases.[20] Although there may be grounds for those exclusive representatives to challenge the COIN ordinance in the future,[21] by this decision we conclude only that the County violated the MMBA by failing to give OCAA, OCEA, and Local 501 the opportunity to meet and confer over the negotiable provisions of the ordinance. Therefore, we confine our remedy to declaring those provisions void and unenforceable as to OCEA, OCAA, and Local 501. As our remedy affects only OCEA, OCAA, and Local 501, we order that the electronic distribution of the notice to employees be confined to the employees represented by those employee organizations and deny OCAA's request for a broader posting order directed at all County employees.

Order

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c), by adopting subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the Civic Openness in Negotiations (COIN) ordinance, without affording the Orange County Employees Association (OCEA), the Orange County Attorneys Association (OCAA) and the International Union of Operating Engineers Local 501 (Local 501), an opportunity to meet and confer over the decision or effects of the proposed ordinance. By this conduct, the County also interfered with the right of unit employees to participate in the activities of OCEA, OCAA, and Local 501, in violation of Government Code sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), and denied OCEA, OCAA, and Local 501 the right to represent employees in their employment relations with a public agency in violation of Government Code sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a), of the Government Code, it is hereby ORDERED that subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the COIN ordinance are void and unenforceable in the County's negotiations with OCEA, OCAA, and Local 501, and that the County, its governing board, and representatives shall:

A. CEASE AND DESIST FROM:

1. Enforcing subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the COIN ordinance.

2. Implementing an unlawful unilateral change and refusing to meet and confer with OCEA, OCAA, and Local 501 prior to adopting a proposed ordinance concerning matters within the scope of representation.

3. Interfering with the right of bargaining unit employees to be represented by OCEA, OCAA, and Local 501.

4. Denying OCEA, OCAA, and Local 501 their right to represent employees in their employment relations with the County.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays after this decision is no longer subject to appeal, post at all work locations in the County, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining units represented by OCEA, OCAA, and Local 501. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M.) Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be served concurrently on OCEA, OCAA and Local 501.

Members Banks and Krantz joined in this Decision.

Member Shiners' concurrence and dissent follows.

SHINERS, Member, concurring and dissenting: I agree with my colleagues that Section 1-3-21, subdivision (b)(1), of the County of Orange's Civic Openness in Negotiations (COIN) ordinance is not within the scope of representation under section 3504 of the Meyers-Milias-Brown Act (MMBA), [22] and not subject to the consultation requirement in MMBA section 3507. I respectfully but strongly dissent, however, from the majority's conclusions that subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) of the COIN ordinance are within the scope of representation, and that the County violated its duty to meet and confer in good faith by not bargaining with Charging Parties over those subdivisions, as well as subdivision (b)(3), before adopting the ordinance. [23] As explained below, I would find all of the COIN ordinance provisions at issue to be outside the scope of representation, and accordingly would dismiss the complaints in these consolidated cases.

1. Ground Rules and the Scope of Representation

The scope of representation under the MMBA includes “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.” (MMBA, § 3504.) The

majority admits that the provisions of the COIN ordinance at issue do not involve "wages, hours, or other terms and conditions of employment." (Maj. Opn. p. 7.) Nevertheless, the majority finds subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) to be within the scope of representation as ground rules for negotiations. The majority is wrong for two reasons.

First, these subdivisions are not ground rules. Ground rules typically cover such topics as "the time and place for bargaining to start, the order of issues to be discussed, the final settlement conditions that may be imposed, questions of ratification and approval of [agency] officials, and a variety of similar procedural matters." (*Anaheim Union High School District* (1981) PERB Decision No. 177, p. 9 (*Anaheim*).) Similarly, subdivision (a)(3) of the COIN ordinance itself defines ground rules as "preliminary procedural matters governing the conduct of negotiations including, but not limited to, the time and place for bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals." The COIN provisions at issue are not akin to the "procedural matters" described above because they do not govern how negotiations will proceed.

Subdivision (b)(2) requires that a financial report be available for review at least 30 days before the Board of Supervisors considers its opening bargaining proposal. This requirement applies only to the County before negotiations commence; it does not govern the parties once negotiations begin and therefore is not a ground rule.

Subdivisions (c)(2), (c)(3), and (c)(6) require public disclosure of proposals made in bargaining and certain facts about each bargaining session, such as location, attendees, etc., within a certain time after each negotiating session. Although these provisions obviously apply during negotiations, they do not determine the procedure by which negotiations will take place. Instead, they merely require the County's negotiator to provide the Board of Supervisors and the public with objective data about negotiations. These after-the-fact reports are not ground rules governing how the parties' negotiations must proceed.

Second, the authority the majority relies upon to find subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) to be within the scope of representation is based on long-overruled law and is out of step with every other jurisdiction. The majority cites *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*) and *Anaheim*, *supra*, PERB Decision No. 177 for the proposition that ground rules are within the scope of representation. (Maj. Opn. pp. 8-9.) Both decisions cited to National Labor Relations Board (NLRB) precedent in support of this proposition: *Stockton* to General Electric Co. (1968) 173 NLRB 253, and *Anaheim* to St. Louis Typographical, Local 8 (Graphic Arts Ass ' n) (1964) 149 NLRB 750. But in Bartlett-Collins Co. (1978) 237 NLRB 770, the NLRB overruled those two decisions and held that "threshold matter[s], preliminary and subordinate to substantive negotiations," i.e., ground rules, are outside the scope of representation. (Id. at pp. 772-773; see Latrobe Steel Co. v. NLRB (3d Cir. 1980) 630 F.2d 171, 176 (Latrobe Steel Co.) [acknowledging and approving NLRB's overruling of General Electric and *St. Louis Typographical*].)

The doctrinal foundation for the rule that ground rules are a mandatory subject of bargaining was demolished 40 years ago—two and three years, respectively, *before Stockton* and *Anaheim* relied on these overruled NLRB decisions without explaining why it was appropriate for PERB to adopt this rejected rule. [24] I cannot support the majority's imposition of a duty to bargain over ground rules based on long-overruled precedent.

Instead, I find persuasive the NLRB's reasons for deeming ground rules to be outside the scope of representation. The NLRB's reasoning for changing the law 40 years ago was based, in part, on the fact that ground rules do not affect "wages, hours, and other terms and conditions of employment." (Bartlett-Collins Co., supra, 237 NLRB at p. 772.) But perhaps more importantly, the NLRB recognized that if ground rules were a mandatory subject, either party could insist to impasse on them, thereby "stifl[ing] negotiations in their inception over such a threshold issue." (Id. at p. 773.) In upholding the Bartlett-Collins rule, one court of appeal noted: "It would be contrary to the policy of the Act, which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to break down over [the] preliminary procedural issue." (Latrobe Steel Co., supra, 630 F.2d at p. 177.)

Today, a majority of jurisdictions deem ground rules to be outside the scope of representation. (E.g., Local 342-50, United Food and Commercial Workers Union (Pathmark Stores, Inc.) (2003) 339 NLRB 148, 155; Lincoln County, 2018 WL 4292910, p. 5 [Washington Public Employment Relations Commission]; *University of Illinois, Chicago* (2018) 34 PERI ¶ 173 [Illinois Educational Labor Relations Board]; Washington County Consolidated Communications Agency, 2014 WL 3339216, p. 8 [Oregon Employees Relations Board]; *County of Kane* (1988) 4 PERI ¶ 2031 [Illinois State Labor Relations Board]; City of Deerfield Beach (1981) 7 FPER ¶ 12438 [Florida Public Employees Relations Commission]; *Town of Shelter Island* (1979) 12 PERB ¶ 3112 [New York Public Employment Relations Board].) A small number of jurisdictions hold that ground rules are presumptively within the scope of representation but the presumption may be rebutted by showing the proposed ground rule would impede the bargaining process. (U.S. Food & Drug Administration (1998) 53 FLRA 1269, 1291-1292 [Federal Labor Relations Authority]; University of the District of Columbia, 1992 WL 12601368, p. 2, fn. 3 [District of Columbia Public Employee Relations Board].) California thus is the *only* jurisdiction with a categorical rule that ground rules are a mandatory subject of bargaining. I see no compelling reason for PERB to remain out of step with other jurisdictions on this issue. Consequently, the categorical rule should be abandoned. The majority devotes many pages to criticizing the above legal authority but ultimately decides to retain the categorical rule for policy reasons. [25] I agree that it is beneficial for parties to discuss and try to reach mutual agreement on ground rules. Unlike my colleagues, I do not believe this policy is best served by deeming ground rules a mandatory subject of bargaining. Rather—as every other federal and state labor board that has addressed the issue in a reported decision has done—I would hold that ground rules are outside the scope of representation. [26] Of course, a party's refusal or failure to discuss ground rules could still be evidence of bad faith bargaining. (*Oakland Unified School District*, *supra*, PERB Decision No. 326, pp. 33-34.) Thus, if a party's intransigence over ground rules impedes negotiations, the other party still would have a remedy under our extant decisional law.

In sum, I do not find the COIN ordinance provisions at issue to be ground rules. I also would overrule *Stockton* and *Anaheim*, and adopt the Bartlett-Collins rule that ground rules are outside the scope of representation—as most other jurisdictions have done. Either way, I would find the disputed provisions of the COIN ordinance to be outside the scope of representation and thus would conclude that the County had no obligation to meet and confer with Charging Parties before adopting them.

2. Application of the Claremont Test

I agree with the majority's harmonization of the California Supreme Court's decisions in Claremont Police Officers Assn. v. City of Claremont (2006) 39 Cal.4th 623 (Claremont), and International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB (2011) 51 Cal.4th 259 (Richmond Firefighters). I disagree, however, with the majority's conclusion that Claremont does not apply in this case. [27]

In Richmond Firefighters, the Court identified three categories of managerial decisions: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "always mandatory subjects of bargaining"; and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (Richmond Firefighters, supra, 51 Cal.4th at pp. 272-273.) The majority finds ground rules to be in the second category of decisions that are always within the scope of representation. But that category consists of "decisions directly defining the employment relationship." As indicated by the examples the Court cited, i.e., "wages, workplace rules, and the order of succession of layoffs and recalls," the "employment relationship" is *between employees and their employer*, not between the union and the employer. (Id. at p. 272.) Thus, ground rules do not fall within the second category.

Instead, ground rules fall into the third category—decisions that may be negotiable under certain circumstances—which requires application of the Claremont test. Under that test, a management action is negotiable when (1) it has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees"; (2) that effect does not "arise

[] from the implementation of a fundamental managerial or policy decision"; and (3) "the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (Claremont, supra, 39 Cal.4th at p. 638.) The provisions of the COIN ordinance at issue here fail to meet the first prong because they do not affect wages, hours, or working conditions *in any way*, much less in a significant or adverse way. Thus, the challenged provisions are not within the scope of representation.

3. Effect of Disputed Provisions on the Bargaining Process

The majority concludes that subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) are within the scope of representation because they either "directly regulate the bargaining relationship" or "have a direct impact on the negotiating process." The majority's erroneous conclusion that these subdivisions are ground rules which "directly regulate the bargaining relationship" was addressed in section 1 above. Before addressing why these subdivisions do not directly impact the negotiating process, I must point out that the majority offers no direct legal authority for its statement that proposals which "have a direct impact on the negotiating process" are within the scope of representation. In support of this proposition, the majority cites only Richmond Firefighters. (Maj. Opn. p. 21.) But that decision categorizes subjects of negotiations based on their impact on the "employment relationship" (Richmond Firefighters, supra, 51 Cal.4th at pp. 272-273)— which necessarily is *between employees and their employer*, not between the union and the employer. Thus, Richmond Firefighters provides no support for the majority's new rule. Furthermore, jurisdictions that deem ground rules to be presumptively within the scope of representation allow the presumption to be rebutted by a showing that the proposed ground rule would impede the bargaining process. (U.S. Food & Drug Administration, supra, 53 FLRA at pp. 1291-1292; University of the District of Columbia, 1992 WL 12601368, p. 2, fn. 3.) The majority's rule is just the opposite: a proposal is within scope if it would impede negotiations. Because it lacks any foundation in existing precedent, I cannot accept the majority's proffered rule.

I also disagree with the conclusions the majority reaches by applying its newly-created rule to the COIN ordinance provisions in dispute. The majority finds that subdivision (b)(2) is within scope because it creates a 30-day "non-negotiations period" before bargaining can begin. (Maj. Opn. pp. 24-25.) Subdivision (b)(2) states:

The [County Auditor-Controller's] report shall be completed and made available for review by the Board of Supervisors and the public at least thirty (30) calendar days before consideration by the Board of Supervisors of an opening proposal to be presented to any recognized employee organization regarding negotiation of an amended, extended, successor, or original memorandum of understanding.

Nothing in this language says that during the 30-day period the parties cannot engage in aspects of the negotiation process such as discussing ground rules, propounding and responding to information requests, or even meeting and conferring over union proposals. In contrast, many of the statutes under PERB's jurisdiction clearly preclude negotiations for a certain period of time after the parties' initial proposals have been made public. (E.g., Gov. Code, §§ 3523, subd. (b) [Dills Act; "not less than seven consecutive days"]; 3547, subd. (b) [EERA; "a reasonable time"]; 3595, subd. (b) [HEERA; "a reasonable time"]; Pub. Util. Code, § 99569, subd. (b) [TEERA; "a reasonable time"].) There is no such prohibitory language in subdivision (b)(2). Moreover, the record before us does not contain facts showing the County intended subdivision (b)(2) to preclude all negotiation activity during the 30-day period or has applied the subdivision in such a manner. Absent clear language or extrinsic evidence showing that subdivision (b)(2) would in fact prohibit any negotiating activity for 30 days, the majority's conclusion is based on mere speculation.

Additionally, under the statutes that provide a "reasonable time" for public consideration of initial proposals before negotiations begin, PERB has found anywhere from eight days to three weeks to be reasonable. (E.g., *Los Angeles Unified School District* (1993) PERB Decision No. 1000, pp. 12-13 [eight days]; *Los Angeles Unified School District* (1990) PERB Decision No. 852, p. 4 [two weeks]; *Los Angeles Unified School District* (1994) PERB Decision No. 1044, p. 6 [three weeks].) It is difficult to see how allowing the public 30 days to review the County Auditor-Controller's report before the County makes its initial proposal crosses the line into unreasonableness. Thus, even if subdivision (b)(2) does prohibit negotiations for 30 days, that in itself is

insufficient to show a significantly adverse impact on negotiations to bring the subdivision within the scope of representation under the majority's newly-minted rule.

Turning to the disclosure provisions, subdivisions (c)(2) and (c)(3) require the Board of Supervisors to report during an open public meeting all offers, counteroffers, and supposals which were communicated to the Board during the closed session portion of that same meeting. The report also must include the names of persons who attended the negotiations, the location of negotiations, "and any pertinent facts regarding the negotiations [sessions]." Subdivision (c)(6) further requires that all offers, counteroffers, and supposals made during negotiations shall be disclosed to the Board and the public within 24 hours of being presented at the bargaining table.

The majority finds these provisions negotiable on the ground that they prevent the parties from entering into a confidentiality agreement as part of their ground rules. (Maj. Opn. p. 31.) This conclusion is based on an overly broad reading of subdivisions (c)(2), (c)(3), and (c)(6). These subdivisions require public disclosure only of (1) proposals, counterproposals and supposals, (2) who attended a bargaining session, and (3) where the session took place. Disclosure of what was said during negotiations is not required, and the parties therefore could mutually agree not to publicly disclose bargaining table conversations. Similarly, nothing in subdivisions (c)(2), (c)(3), or (c)(6) precludes the parties from agreeing not to issue press releases or otherwise publicly comment upon ongoing negotiations. (See, e.g., *Muroc Unified School District* (1978) PERB Decision No. 80, p. 3 [parties agreed not to issue press releases during negotiations].) Thus, although these subdivisions require public disclosure of proposals themselves and certain factual details about each bargaining session, the parties still would be free to mutually agree to prohibit or limit public disclosure of all other aspects of negotiations. Subdivisions (c)(2), (c)(3), and (c)(6) therefore do not, as the majority claims, prevent the parties from entering into a confidentiality agreement.

The majority also characterizes the disclosure provisions as akin to conducting negotiations in public (Maj. Opn. p. 30), but this comparison is inapt. As the majority notes, the presence of outside observers during negotiation sessions potentially inhibits the free exchange of ideas that could lead to mutual agreement, as negotiators may feel obligated to conform their statements to the observers' expectations or desires. But requiring public disclosure of the parties' proposals does not make the public privy to the give and take of bargaining table discussions; it merely allows the public to see what has already been proposed. The parties remain free to confidentially discuss the proposals and explore possible areas for compromise and agreement away from the public eye. Subdivisions (c)(2), (c)(3), and (c)(6) consequently do not open the County's labor negotiations to the public. As a result, the authority the majority cites to strike down the disclosure provisions is inapposite. [28]

In sum, neither the COIN ordinance's 30-day initial report review provision (subdivision (b)(2)), nor its disclosure provisions (subdivisions (c)(2), (c)(3), and (c)(6)), "have a direct impact on the negotiating process." None of these provisions necessarily delays negotiations nor poses an impediment to full and frank discussion between the parties of their bargaining positions and potential compromises. Nothing in the record supports the majority's speculation that these provisions will prevent the County from engaging in meaningful negotiations with its employee organizations. Of course, if problems arise from application of these provisions in the future, PERB can address those problems on the basis of the record before it at that time. But I cannot find that on their face subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) have a direct impact on negotiations such that they would fall within the scope of representation under the majority's newly-minted legal standard.

4. Failure to Bargain over Subdivision (b)(3)

Finally, the majority concludes that the County violated its duty to meet and confer with Charging Parties over subdivision (b)(3), which requires the County Auditor-Controller to prepare updated financial reports as the parties make proposals in negotiations. The majority admits that it cannot determine whether subdivision (b)(3) is within scope, but nonetheless imposes liability on the County under the theory that it had a duty to meet and confer with Charging Parties over whether the provision is within the scope of representation. (Maj. Opn. pp. 28-29.)

Again, the majority's conclusion is not supported by the authority upon which it relies. The majority primarily relies on *Jefferson School District* (1980) PERB Decision No. 133 and *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg/San Mateo*), where the Board held that an employer has a duty to meet with an employee organization to clarify the terms of an ambiguous union proposal to determine whether the proposal concerns a subject within the scope of representation; the employer cannot perfunctorily declare the proposal outside scope and refuse to bargain over it. (*Jefferson School District*, *supra*, PERB Decision No. 133, p. 11; *Healdsburg /San Mateo*, *supra*, PERB Decision No. 375, pp. 9-10.) The majority also relies on County of Santa Clara (2013) PERB Decision No. 2321-M and *Bellflower Unified School District* (2014) PERB Decision No. 2385, in which the Board held that an employer has a duty to meet with an employee organization to clarify whether the union's demand to bargain the effects of a non-negotiable management decision encompasses any effects within the scope of representation. (County of Santa Clara, supra, PERB Decision No. 2321-M, pp. 31-32; *Bellflower Unified School District*, *supra*, PERB Decision No. 2385, p. 7.)

These decisions address the employer's obligation to seek clarification of a union proposal or demand that may or may not encompass subjects within the scope of representation. No decision says that when an employer takes an action it believes to be outside the scope of representation, it must meet and confer with employee organizations over whether the action is in fact a mandatory bargaining subject. But that is the rule the majority adopts today.

The majority's new rule creates two big problems. First, it allows employee organizations to demand bargaining over non-negotiable management decisions in the guise of "clarifying" whether the decision is within the scope of representation. This necessarily undermines the employer's right to make the non-negotiable decision.

Second, the majority's new rule absolves charging parties of their burden of proof in unilateral change cases like this one. In a unilateral change case, the charging party bears the burden of proving that the challenged employer action concerned a subject within the scope of representation. (County of Santa Clara, supra, PERB Decision No. 2321-M, p. 13; PERB Reg. 32178.) [29] If PERB is unable to determine from the record whether the employer's action was within the scope of representation, the charging party has not met its burden and the allegation must be dismissed. Here, as the majority admits, the record does not prove that subdivision (b)(3) is within the scope of representation. Yet the majority nonetheless finds a unilateral change violation. Unlike the majority, I would follow—not upend—PERB Regulation 32178 and dismiss the unilateral change allegation as to subdivision (b)(3) because Charging Parties failed to prove that provision is within the scope of representation.

5. Conclusion

The majority's imposition of a bargaining obligation over the challenged provisions of the COIN ordinance (with the exception of subdivision (b)(1)) rests on a shaky legal foundation. The majority's perpetuation of a categorical rule that ground rules are within the scope of representation—the initial adoption of which was based upon *previously* invalidated federal precedent—is out of step with every other jurisdiction in the country. Similarly, there is no legal basis for the majority's determination that the challenged provisions are not subject to the Claremont test, nor for its decision to make employer actions that "have a direct impact on the negotiating process" subject to mandatory negotiations. And the majority provides no reason for creating a new bargaining obligation over non-negotiable decisions instead of enforcing the burden of proof set out in PERB's Regulations.

Ultimately, however, the majority's legal sleight of hand does not produce a rabbit because, as explained above, the challenged provisions are neither ground rules nor do they impede labor negotiations. Rather, these provisions merely allow the taxpayers who will shoulder the cost of any County labor contract to obtain sufficient information to understand the potential financial ramifications of what their elected representatives may agree to in negotiations. Accordingly, I would dismiss the consolidated complaints because none of the challenged provisions of the COIN ordinance are within the scope of representation.

1 The MMBA is codified at Government Code section 3500 et seq. All statutory references herein are to the Government Code, unless otherwise specified.

2 PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

3 OCEA represents multiple County bargaining units including the General Unit, Health Care Professional Unit, Community Services Unit, Office Services Unit, Sheriff's Special Officer and Deputy Coroner Unit, Supervising Management Unit, Probation Services Unit, and Probation Supervisory Management Unit. OCAA represents the Attorney Unit, and Local 501 represents the Craft and Plant Engineer Unit.

4 All undifferentiated references to a subdivision hereafter refer to the COIN ordinance, section 1-3-21.

5 No party has excepted to the ALJ's conclusion that subdivision (d) is outside the scope of representation and the scope of consultation. Therefore, it is not before us. (PERB Regulation 32300, subd. (c).) Nor has any charging party contended that unilateral adoption of subdivision (a) of the ordinance was unlawful.

6 One case upon which the dissent relies involved a ground rules dispute on a different topic. In *University of Illinois, Chicago* (2018) 34 PERI ¶ 173, a non-precedential decision by the executive director of the Illinois Educational Labor Relations Board, it was concluded that the parties' history, in which they had typically commenced successor bargaining in the spring prior to a summer contract expiration, provided the default for when the parties' next round of bargaining should begin. The employer was therefore found to have had no duty to bargain in response to a union's demand for early negotiations. We need not delve into whether such history sets a "default" in any particular set of circumstances, but we disagree that one party's request to start successor negotiations earlier than in the past is not a mandatory topic of bargaining. Such a rule is antithetical to sound labor relations.

7 No party has the right to impose unilaterally its position regarding days of the week, times, intervals, durations, frequencies, topic sequences, or locations for bargaining. (See, e.g., *Anaheim*, *supra*, PERB Decision No. 177, p. 9.) While the dissent appears to agree, it is willing only to opine that a party's refusal to discuss ground rules "could still be evidence of bad faith bargaining."

8 See, e.g., *Gonzales Union High School District*, *supra*, PERB Decision No. 480, adopting proposed decision at p. 38 [union representing school district employees could not declare that it was unavailable to bargain during summer break].

9 As discussed ante, it would not be safe to assume this is true for the topics at issue in the County's ordinance, as both for certain mandatory topics and for certain permissive topics, employers are constrained from making unilateral changes. Because in this case the County passed its ordinance without notice and an opportunity to meet and confer, and the County refused to meet and confer with OCEA, OCAA and Local 501, we are not called upon to determine what defaults may or may not apply as to each of the ordinance's topics, nor must we decide whether the County could have imposed or insisted on any part of the ordinance after meeting and conferring in good faith and reaching a bona fide impasse, or as a condition to signing a new contract. Generally, however, unilateral action as to ground rules will often have a destructive impact on negotiations by torpedoing such efforts before they get underway. Such conduct could therefore constitute an indicia of bad faith under the totality of circumstances test, even if it did not constitute a per se violation as a unilateral change. (*Stockton*, *supra*, PERB Decision No. 143, p. 24.)

10 While Claremont remains good law, we must acknowledge the Supreme Court's more recent pronouncement in Richmond Firefighters that the First National Maintenance-type balancing test—the same test prescribed by *Claremont*—applies only to some managerial decisions, not those directly defining the employment relationship. (Richmond Firefighters, supra, 51 Cal.4th 259, 273.)

11 Subdivision (a)(3) of the ordinance itself defines ground rules as "preliminary procedural matters governing the conduct of negotiations including, but not limited to, the time and place for bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals."

12 This case was litigated as a violation of the duty to bargain, and did not allege that the COIN ordinance was an unreasonable local rule under PERB Regulation 32603, subdivision (f), which describes as an unfair practice, adopting or enforcing a "local rule that is not in conformance with MMBA." We therefore save for another day resolution of whether certain ground rules would be prohibited because they are unreasonable.

13 EERA is codified at section 3540 et seq. HEERA is codified at section 3560 et seq. The Dills Act is codified at section 3512 et seq.

14 In *Jefferson*, *supra*, PERB Decision No. 133, as in this case, the Board was unable to determine the precise limits of negotiability because the employer refused to discuss proposals it declared to be outside the scope of representation. Nevertheless, the Board determined the employer violated its duty to bargain in good faith by refusing to seek clarification.

15 The Brown Act is codified at section 54950 et seq.

16 The California Attorney General has also recognized the problems inherent in public negotiations, opining that the Legislature did not intend to require local agencies subject to the MMBA "to do their labor bargaining in a fish bowl." (61 Ops.Cal.Atty.Gen. 1, 5-6, (1978).)

17 Should a local agency subject to the MMBA elect to serve as its own negotiating team, the governing board would be unable to meet in closed session to discuss negotiations. As the Attorney General has noted, this would give the employee organization a significant advantage in being able to caucus in private. (Cf. 61 Ops.Cal.Atty.Gen., supra, at p. 5.)

18 As noted, the ALJ concluded that OCAA's argument met the unalleged violation test. The County has not excepted to that conclusion, and it is not before us. (PERB Regulation 32300, subd. (c).)

19 Subdivision (c)(3) requires the disclosure of more than just offers, counteroffers, and supposals, but also "a list of names of all persons in attendance during the negotiation sessions, the date of the sessions, the length of the sessions, the location where the sessions took place and any pertinent facts regarding the negotiations that occurred in a particular session." The ALJ did not determine, and the unions do not argue, that disclosure of these other facts is negotiable. However, the ALJ's remedy addressed the entirety of the subdivision (c)(3). The County, while excepting to the conclusion that it was negotiable, does not argue that only certain portions of this provision should be severed. The County has thus waived that issue (PERB Reg. 32300, subd. (c)), so we do not consider it.

20 The record in this case mentions the Orange County Managers Association, which represents the Administrative Management Unit. In addition, exceptions are pending concerning proposed decisions in two cases involving other County bargaining units, represented by the American Federation of State, County & Municipal Employees, Local 2076, and the Association of Orange County Deputy Sheriffs, respectively. (See *El Monte Union High School District* (1980) PERB Decision No. 142 [the Board may take administrative notice of its own files].)

21 For instance, the ALJ questioned whether it would be lawful for the County, even after bargaining to impasse, to enact an ordinance and "cement a ground rule in perpetuity rather than allow the parties to negotiate ground rules during the beginning of each successor MOU negotiations." The ALJ also observed that, despite his conclusion that the County was not required by section 3507 to consult in good faith before enacting the COIN ordinance,

the County would not be allowed pursuant to MMBA section 3507 to set parameters as to the bargaining process which conflicted with other sections of the MMBA, such as the obligation to bargain in good faith under MMBA section 3505 as the disputed local rule or its application would be inconsistent and contrary to the express provisions of the MMBA. (International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley (1983) 34 Cal.3d 191; [Huntington

Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492]; City of San Rafael (2004) PERB Decision No. 1698-M; County of Monterey (2004) PERB Decision No. 1663-M.)
Because the parties have not addressed these or any other theories in this case, we express no opinion on how they would apply to the provisions of the COIN ordinance.

22 The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references are to the Government Code.

23 All undifferentiated references to a subdivision hereafter refer to the COIN ordinance, section 1-3-21.

24 Additionally, *Anaheim* relied on a second NLRB decision, Borg-Warner Controls, A Division of Borg-Warner Corporation (1972) 198 NLRB 726 (Borg-Warner), to support the rule that ground rules are a mandatory subject. That case, however, involved a surface bargaining allegation, not an allegation that the employer refused to bargain over ground rules. Specifically, the employer refused to mutually arrange meeting times and locations, which would be an indicator of surface bargaining under PERB precedent. (E.g., *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 33-34.) Borg-Warner thus does not support imposing a statutory obligation to bargain over ground rules.

25 The majority dismisses my concern that deeming ground rules a mandatory subject of bargaining may allow a party to torpedo negotiations before they start. First, this concern is consistently expressed in the labor board and court of appeal decisions cited above as a reason for deeming ground rules to be outside the scope of representation. Second, there is no evidence before us showing that PERB's categorical rule has in fact prevented negotiations from breaking down over ground rule disagreements, as the majority claims. It is equally possible that parties do not find ground rules a significant enough issue to let disagreement over them stall negotiations, or that they choose not to use them at all.

26 Contrary to the majority's characterization, such a holding would not be "follow[ing] every turn of the private sector case law." (Maj. Opn. p. 8) The NLRB adopted this rule forty years ago and it has withstood the frequently oscillating currents of that board's decisional law to this day.

27 Unlike my colleagues, I see no need to disavow any part of City of Alhambra (2010) PERB Decision No. 2139-M (*Alhambra*). In *Alhambra*, the Board held that a particular change in minimum qualifications was not within the scope of representation. At that time, neither PERB nor the courts had held minimum qualifications to be a mandatory subject of bargaining, nor are they obviously so. The Board thus had to apply the Claremont test to determine whether the city had an obligation to meet and confer over the change at issue. To the extent my colleagues fault *Alhambra* for failing to mention the other two categories of managerial decisions enumerated in Richmond Firefighters, that omission was immaterial to the Board's decision. Accordingly, I do not find *Alhambra* incompatible with the majority's clarification of the test for mandatory bargaining subjects under the MMBA.

28 This authority also does not support the majority's conclusion that the COIN ordinance's disclosure provisions are a mandatory subject of bargaining. In *Ross School District Board of Trustees* (1978) PERB Decision No. 48, the Board held that the district unlawfully insisted to impasse on labor negotiations being conducted in public, a permissive subject of bargaining because under the EERA public negotiations may only be conducted by mutual agreement. (Id., adopting proposed decision, pp. 6-9.) In *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, the Board declined to decide whether the presence of employee observers at negotiations is within the scope of representation. (Id. at p. 34.) Neither decision found a proposal to conduct public negotiations—to which the majority likens the disclosure provisions—to be within the scope of representation.

29 PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Cases Cited
40 PERC 5

End of Document

TOWN OF MARION AND AFSCME, MUP-2116 (12/19/75).

(50 Duty To Bargain)
53.4 open meeting laws
54.4 meetings and communications
54.7 permissive subjects
(60) Prohibited Practices by Employer)
67. Refusal to bargain

Commissioners participating: Madeline H. Miceli; Henry C. Alarie

Appearances:

Kathryn Noonan - Counsel to the Commission
William H. Carey - Counsel to the Public Employer
Daniel B. Kulak - Counsel to the Union

DECISION

Statement of the Case

On December 9, 1974, a Complaint of Prohibited Practice was filed with the State Labor Relations Commission, herein called the Commission, by the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), alleging that prohibited practices described in General Laws, Chapter 150E, Section 10(a) had been committed by the Town of Marion, (Public Employer) by insisting that collective bargaining sessions be open to the public.

After investigation, the Commission, on March 26, 1975, issued its Complaint of Prohibited Practice alleging that the Public Employer had violated Chapter 150E, Sections 10(a)(5) and (1) by refusing to bargain in good faith with the Union as the exclusive representative of certain police officers employed by the Town of Marion.

On April 17, 1975, a formal hearing was conducted before Madeline H. Miceli, Commissioner, at which time the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce exhibits.

Findings of Fact

The Town of Marion (Town) is a Public Employer and the Selectmen are the chief executives of the town within the meaning of Section 1 of Chapter 150E of the General Laws. The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), is the exclusive representative of police officers employed by the Town, for the purpose of collective bargaining with respect to wages, hours, standards of productivity and performance and other terms and conditions of employment.

Until the time of the events involved in this case, there had been no prior history of collective bargaining between the Town and AFSCME. The first meeting between the parties on October 15, 1974 was held for the purpose of establishing ground rules for negotiations. At this meeting, which was open to the public and the press, certain ground rules were agreed to. However, as an

additional ground rule, the Public Employer stated that it wished all future meetings to be open to the public and the press. AFSCME did not agree to this item and refused to submit proposals at that time. Ground rules, including the question of open sessions,[1] were discussed again at a November 19, 1974 meeting. The Employer modified its position at this meeting and indicated that while it still wished to bargain in open sessions, it might agree to change to a closed session if any disruption occurred. AFSCME's position was that any open sessions were unacceptable. Therefore no agreement was reached at this meeting.

On December 9, 1974, AFSCME filed a Complaint with the Labor Relations Commission and an informal hearing was held on January 3, 1975. The parties agreed to meet again to attempt to resolve this issue. This final meeting took place on January 7, 1975. The Town reiterated its position that negotiations be in open session, with the parties resorting to a closed session in the event that they became unproductive or disruptive. At that time Public Employer indicated a willingness to exchange proposals in confidence. AFSCME would not agree to start the meetings in open sessions and would not agree to submit its proposals, even in closed session unless there was an understanding that all sessions be closed.

Opinion and Conclusions of Law

Based upon the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

1. That the Public Employer has violated General Laws, Chapter 150E, Section 10(a)(5) by refusing to bargain in good faith with the exclusive representative of employees in an appropriate unit, and

2. That the Public Employer has interefered, restrained and coerced employees in the exercise of their rights guaranteed under General Laws, Chapter 150E, in violation of Section 10(1).

Insistence by the Town upon collective bargaining sessions open to union members, the general public and the media over the continued objections of the Union violates the Employer's duty to bargain in good faith, under the rule promulgated in Mayor Samuel E. Zoll and City of Salem, Massachusetts and Local 1780, International Association of Firefighters, AFL-CIO, Case No. MUP-309 (December 14, 1972). Contrary to the argument advanced by the Public Employer here, this case is controlled by City of Salem. We said there and we reiterate now that the matter of public view or open bargaining is a non-mandatory subject of bargaining. The Public Employer's insistence on at least beginning bargaining in open session is unlawful as insistence to the point of impasse upon a non-mandatory subject and contrary to the rule of the Supreme Court, NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

[1] The term "open sessions" as used hereinafter refers to collective bargaining sessions between the Town and AFSCME which allowed the general public and newspaper reporters to observe.

Town of Marion and AFSCME, MUP-2116

As in Borg-Warner, we agree that bargaining need not be restricted to mandatory subjects. The suggestion by the Employer that the negotiating sessions be open to the public was not per se unlawful. Had the Union wished, it could have agreed to the suggestion. However, we have found that the Employer continued to press for open sessions even after the Union's refusal to conduct bargaining in any but executive session. It is this insistence which constitutes a per se violation of Section 10(a)(5).[2]

There are additional reasons in this instance, as there were in City of Salem, for finding that the Town's insistence on open meetings also violates General Laws Chapter 150E, Section 10(a)(1). Open negotiating sessions necessarily provide an opportunity for rank and file members of the bargaining unit as well as other members of the public and the press to be present. Assurances by the Employer that only bona fide representatives of the parties would be given the opportunity to speak at the sessions does not allay the fear that the mere presence of non-negotiators would have a dampening effect on the give-and-take so necessary for successful bargaining.[3] The National Labor Relations Board has held that "the mere presence of a stenographer at such negotiation is not conducive to the friendly atmosphere so necessary for the successful termination of the negotiations...." Reed & Prince Mfg. Co., 96 NLRB 850 at 854. If a disinterested stenographer may upset the delicate balance of the bargaining process, the attendance of outsiders, townspeople, reporters and rank and file members would virtually collapse it.

General Laws, Chapter 150E, Section 2 gives employees the right to bargain collectively through representatives of their own choosing, free from restraint or coercion. The Public Employer's insistence upon open sessions violates this right and undermines the representational integrity of the Union.[4]

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[2]The final position of the Town, that closed sessions would be resorted to if negotiations were disruptive or unproductive lacks credibility. Since AFSCME would not agree to open sessions, negotiations could not have reached a more unproductive state.

[3]Successful negotiations are based on compromise. They require that each side be free to test out a variety of proposals on the other; withdrawing some, giving up others in order to gain a better advantage in a different area. The presence of third parties necessarily inhibits such compromises and reduces the flexibility management and unions must have to reach agreement. Positions taken in public tend to harden and battle lines are drawn in spite of the mutual desire of the parties to meet in an acceptable middle ground.

[4]Insistence by an employer that negotiaitons be conducted in the presence of employees to whom the employer issues a general invitation to attend was found to be interference with the employees' right to bargain through the representatives of their own choosing by the NLRB in L.G. Everest, Inc., 103 NLRB 308. An open public meeting proffers an invitation to employees as well as others.

Town of Marion and AFSCME, MUP-2116

City of Salem, supra, also addressed the issue of the relationship of General Laws Chapter 39, §§23A and C (open meeting law) to municipal collective bargaining and found the requirements of the former statute inconsistent with the procedural framework for bargaining set forth in G.L. c.149, §1781 (repealed effective July 1, 1974). We reaffirm the rational of City of Salem and conclude that the new statute (G.L. c.150E, §1 et seq.) is similarly inconsistent with an application of the open meeting law to the bargaining process. Our conclusion is supported by a ruling of the Attorney General that the open meeting law is inapplicable to collective bargaining since such sessions are not "meetings" within the meaning of that term in the statute. Op. Atty. Gen., Sept. 12, 1967.

In resolving the relationship between the Commonwealth's open meeting law and public employee collective bargaining in favor of the allowance for closed sessions, we have examined how other states have dealt with the conflicting goals of similar statutes. in Bassett v. Braddock, 262 So.2d 425 (Fla. 1972), the Florida Supreme Court upheld a lower court decision that closed negotiations for public employee contracts did not violate their "Government in the Sunshine" law, (Fla. Stat. §286.011 F.S.A.). Extensive expert testimony in that case was unanimous that meaningful collective bargaining would be destroyed if full publicity were accorded at each step of the negotiations.

In 1972, the New York Public Employment Relations Board conducted a "Survey on Disclosure During Public Sector Negotiations", GERR No. 463, D-2 to D-6 (1972) (cited in Smith, Edwards and Clark, Labor Relations Law in the Public Sector, Bobbs-Merrill Co., Inc. (1974)), and recommended, after extensive fact-finding, that legislation regarding disclosure would be undesirable.

These experiences of other states, the opinion of the Attorney General, the nature of the collective bargaining process and the delicate balancing it requires compel the decision that G.L. c.23A and C are not applicable to public employee negotiations.[5]

O R D E R

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ordered:

1. That the Town of Marion and its Selectmen shall cease and desist from refusing to bargain collectively in good faith with AFSCME by ceasing to insist upon or imposing as a precondition to collective bargaining that the bargaining sessions be open to the public and the press.

[5]The subsequent enactment of G.L. c.150E §7, providing that in the event of conflict between matters within the scope of collective bargaining and certain statutes that the terms of the collective bargaining agreement shall prevail, does not now make closed negotiations repugnant to the Constitutions of the United States or the Commonwealth of Massachusetts. We cannot agree that this statute gives "unofficial" groups the power to override duly enacted laws. Negotiations between Public Employers and Unions, as in this case, are conducted with the duly designated chief executives of the city or town acting for the town (G.L. c.150E §1). In addition, we conclude that the open meeting law is not applicable to negotiating sessions and therefore would not be overridden or repealed by the parties' agreement to meet in closed session.

Town of Marion and AFSCME, MUP-2116

2. That the Town of Marion and its Selectmen cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their protected rights under the Law.

3. That the Town of Marion and its Selectmen shall post immediately, in plain sight, and leave posted for a period of thirty (30) consecutive days from the date of posting, in a conspicuous place and about the permises of the Town of Marion where its police officers usually congregate or where notices to them are usually posted, a copy of the Notice appended hereto.

4. That the Town of Marion and its Selectmen notify the Massachusetts Labor Relations Commission in writing, within ten (10) days of the service of this Decision of the steps taken to comply with this Order.

Madeline H. Miceli,
Commissioner

Henry C. Alarie,
Commissioner

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

We will not insist that all collective bargaining sessions with the police officers of the town, represented by AFSCME, be conducted in open sessions.

We will not insist that any collective bargaining with the police officers of the town, represented by AFSCME, begin in open sessions.

TOWN OF MARION

By_____
DAVID W. JOHNS, Chairman
Baord of Selectmen

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 100 Cambridge Street, Room 1604, Boston, Massachusetts, Telephone 727-3505.

2014 WL 3339216 (OR ERB)

Employees Relations Board

State of Oregon

WASHINGTON COUNTY DISPATCHERS ASSOCIATION, COMPLAINANT
v.
WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY, RESPONDENT
WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY, COMPLAINANT
v.
WASHINGTON COUNTY DISPATCHERS ASSOCIATION, RESPONDENT

Case Nos. UP-015/27-13 (UNFAIR LABOR PRACTICE)
June 16, 2014

RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

***1** On April 1, 2014, this Board heard oral argument on Washington County Dispatchers Association's (Association or WCDA) objections to a Recommended Order issued on February 13, 2014 by Administrative Law Judge (ALJ) Larry L. Witherell. [1] Thereafter, we invited interested parties to file *amicus curiae* briefs regarding legal and policy questions concerning electronic recording of collective bargaining sessions. We also allowed the named parties to file supplemental briefs concerning those same questions. [2] Having considered the *amicus curiae* and supplemental briefs, we proceed with our consideration.

Elizabeth Lemoine
Attorney at Law
Makler, Lemoine, & Goldberg, P.C.
Portland, Oregon
represented Washington County Dispatchers Association
Daniel Rowan
Attorney at Law
Bullard Law
Portland, Oregon
represented Washington County Consolidated Communications Agency

On March 26, 2013, the Association filed an unfair labor practice complaint against the Washington County Consolidated Communications Agency (Agency or WCCCA). The complaint, as amended on April 30, 2013, alleged that the Agency violated ORS 243.672(l)(e) by refusing to meet and bargain when the Association insisted on electronically recording the parties' bargaining sessions.

On June 5, 2013, the Agency filed an unfair labor practice complaint against the Association. The complaint, as amended on August 28, 2013, alleged that the Association violated ORS 243.672(2)(b) by conditioning bargaining on the Agency's concession that the Association electronically record the bargaining sessions; that the Association violated ORS 243.672(2)(b) by insisting that the Agency continue to bargain over the bargaining ground rules; and that the Association violated ORS 243.672(2)(d) by refusing to comply with a written agreement (the bargaining ground rules) with the Agency.

The Association and Agency each filed timely answers to the complaints. The complaints were consolidated for hearing and decision.

The issues are:

1. Did the Association violate ORS 243.672(2)(b) or (d) by insisting on electronically recording (and then actually recording) the parties' bargaining sessions, over the Agency's objection?

2. Did the Agency violate ORS 243.672(l)(e) by initially refusing to bargain with the Association in light of the Association insisting that all bargaining sessions be electronically recorded?

3. If the Agency prevails, should the Association be required to pay the Agency a civil penalty?

***2** For the reasons set forth below, we conclude that the Association violated ORS 243.672(2)(b), and that the Agency did not violate ORS 243.672(1)(e). [3] We further conclude that a civil penalty is not warranted.

RULINGS

The rulings of the ALJ have been reviewed and are correct

FINDINGS OF FACT

1. The Agency is a public employer within the meaning of ORS 243.650(20) and employs certain public safety employees represented by the Association. The Association is a labor organization within the meaning of ORS 243.650(13). The Agency and Association were parties to a collective bargaining agreement that was effective from July 1, 2010 to June 30, 2013.

2. During the relevant times and events, Mark Makler, an attorney, served as the Association's chief spokesman and negotiator. During the relevant times and events, Jim Mooney, an outside human resources and labor relations consultant, served as chief spokesman and negotiator for the Agency. [4]

3. In late 2012, the Association informed the Agency that it wished to negotiate a successor agreement. The parties began the process for bargaining a successor agreement in January 2013, when the Agency sent the Association a proposed set of ground rules for the negotiations. The Agency proposed the ground rules that originally had been used during negotiations for the 2010-2013 agreement. Proposal Number 5 stated that "[e]ach bargaining team will be responsible for maintaining its own notes of negotiation meetings." Proposal Number 6 provided that
"[t]he parties agree that there shall be no public comment or press releases made during the period of negotiations until impasse has been declared, and then only after giving good faith advanced notification to the other party before the issuance of the public comment or press release. The parties agree that bargaining sessions will be closed to the press and public." [5]

4. The first face-to-face meeting between Agency and Association representatives was held on February 19, 2013. The Association submitted its proposed ground rules, including proposals Number 9 and 10, which stated:

"9. News Releases and Confidentiality

"It is agreed that any information regarding the status of negotiations or mediation will be released to the news media only with the express written consent of both parties, with a copy presented to the other party at least twenty-four (24) hours prior to release. This does not restrict the parties from communicating with their respective constituents; however each party will make their best efforts to ensure the confidentiality of such information. The parties agree either party may unilaterally exclude any press from attending negotiations.

"10. Notes

"The WCDA will provide electronic recording equipment to electronically record bargaining sessions, exclusive of the February 19, 2013, session at which ground rules were discussed. A copy of the recordings will be provided to WCCCA bargaining team representative _____, within three (3) working days following the bargaining session." (Blank, underscoring, and bold in original.) [6]

***3** The Association wanted to digitally record the bargaining sessions because of an issue of trust between the parties and because of problems that arose over the interpretation of the 2010-2013 agreement. In particular, Brett Goodman was the prior Association president and was principally responsible for negotiating the 2010-2013 agreement for the Association. However, Goodman was subsequently promoted to a management position and became a member of the Agency's bargaining team. This situation contributed to the Association's concern about lacking an understanding of the bargaining history for the 2010-2013 agreement.

5. The Agency had concerns about the size of the Association's bargaining team (proposal Number 7) and the recording of bargaining sessions (proposal Number 10). Mooney objected to the Association's proposed ground rule concerning the digital recording of bargaining sessions. Mooney stated that he did not think that recording the sessions would improve the trust in labor relations. Makler responded that he thought that it would, and further said that the two would just have to agree to disagree about the benefits of recording the bargaining sessions. [7]

6. The parties then went into their respective caucuses. After the caucuses, the Association clarified the size of the Association's team, which satisfied the Agency. Faced with the Agency's objection, Makler deleted -- by physically striking out -- the recording proposal contained in Number 10. At that tune, Makler considered it to be a permissive subject and that he could not force it on the other party. Makler stated that the Association was not going to talk about recordings, and because the Agency did not want the provision in the ground rules, Makler stated that the provision was "gone." Makler then made another proposal under the heading of Number 10. The replacement proposal stated:

"10. Notes, Records and CBA Preparation

"Each bargaining team is responsible for monitoring its own notes of bargaining. WCDA will be the keeper of official TA's. WCDA will be responsible for preparing any drafts of the CBA and WCDA will be responsible for preparing the final version of the CBA. WCDA will provide Word and PDF e[-]copies of drafts and/or final versions of the CBA to the Agency and designated Agency bargaining team members." (Emphasis in original.)

The Agency accepted this new proposal, and Makler and Mooney then executed the ground-rules agreement with the changes only to Numbers 7 and 10. Makler made no statement at the February 19 meeting that the Association believed that it could or could not record the bargaining sessions, notwithstanding the ground rule discussion and agreement. After the execution of the ground rules, the parties began to exchange and discuss substantive bargaining proposals.

7. The second bargaining session was held on March 5, 2013. The Agency began the session by making four or five language proposals. This was followed by a discussion of the items, and then the parties retired to their respective caucuses. When the two sides reconvened at the bargaining table, Makler announced that the Association intended to openly use an electronic digital recorder to record the bargaining sessions between the parties. Makler provided Mooney with a selection from Chapter 5, "The PECBA Collective Bargaining Process," from *Labor and Employment Law: Public Sector, Volume One* (Oregon State Bar Legal Publication, 2011 ed). He also provided copies of criminal statutes ORS 165.535 (Definitions applicable to obtaining contents of communications) and ORS 165.540 (Obtaining contents of communications). Makler stated that the Association was going to record the sessions under ORS 165.540 because, he claimed, the law allowed the Association do so. Mooney stated that

the Agency would consider the Association's intent to electronically record the bargaining sessions and would get back to the Association. The session, which began at 8:05 a.m., then ended at 10:18 a.m.

***4** 8. On March 7, 2013, Mooney e-mailed Makler concerning the Association's stated intent to record the sessions.
"First, I don't believe that recording our meetings will enhance trust or lead to more open and constructive discussion at the bargaining table. Second, while someone may hold the opinion that because Oregon's ERB has yet to rule on the issue, a unilateral decision to record negotiations sessions (albeit with proper notification) is not inconsistent with Oregon law, I believe that if and when this issue goes before the ERB, they are quite likely to follow the NLRB. Finally, you raised the issue of recording our negotiating sessions at our first meeting when we were discussing ground rules. On behalf of the employer, I objected, and my understanding is that we agreed that there would be no digital recording.

"I hope that you and your team will reconsider your position on this subject. Either way, please let us know if we should still be planning to meet on the 18th."

9. On March 13, 2013, Mooney e-mailed Malder and asked if the parties were meeting. The next day, Makler responded that the Association still intended to electronically record the session on Monday, March 18. On March 15, Mooney notified Malder that he was canceling the upcoming bargaining session. Mooney explained:
"If the ERB rules that we have to consent to being digitally recorded, we will comply. Otherwise, especially given the ground rules we agreed to at our first meeting, we will continue to insist that our negotiation meetings not be electronically recorded.

"I suppose that WCDA can file a ULP accusing WCCCA of refusing to meet or that WCCCA can file a ULP accusing WCDA of bargaining in bad faith regarding the ground rules. To me that seems like a waste of both time and money for our clients. We should be getting down to the business of working out a successor agreement.

"If it is truly important to you to establish a precedent for forcing an unwilling negotiating partner to electronically record confidential negotiations, I submit that a situation like this one -- when the partner specifically refused to agree to electronic recording, you produced the alternate language, and you finished that session and two-thirds of the subsequent session before announcing your unilateral intention to record -- does not afford the kind of fact pattern that is likely to make your case. The ERB might not even address the recording issue.

"I realize that this is all speculative. If, upon further consideration, you and your team decide to continue negotiations according to our ground rules (without electronic recording devices), WCCCA's team will be available to meet as scheduled on the 28th."

10. On March 16, 2013, Makler responded to Mooney.
"In short -- there was no agreement NOT to record -- there was mutual agreement to agree to disagree and since ground rules are a permissive subject of bargaining (at least per the ERB) we (WCDA) chose to not allow you to file a ULP and to seek other avenues and ways to lawfully record the negotiations. The fact that 1 + bargaining meetings occurred before we asserted a lawful position and the ORS has no bearing on whether the law in Oregon allows us to unilaterally record the negotiations -- we intend to do so and we have lawfully and [*sic*] put you on notice that we intend to do so.

***5** "Now you have responded that you intend to refuse to meet and bargain because we have asserted a lawful right to record -- how do you square your current position to refuse to meet and bargain with our ground rules and with the [Public Employee Collective Bargaining Act] PECBA and with the ORS that I cited and provided that indicate that WCDA can record." (Emphasis in original.)

11. On March 24, 2013, Mooney informed Makler that "[a]t this point our position has not changed. We will not agree to participate in recorded negotiations meetings unless ordered to do so by the ERB. If your position remains unchanged then I propose that we cancel the meeting scheduled for the 28th."

12. On March 26, 2013, the Association filed its unfair labor practice complaint against the Agency.

13. On May 21, 2013, the Agency decided to return to the bargaining table and the parties met for face-to-face bargaining. Makler began the meeting by announcing that the Association would be electronically recording the session. In response, Mooney stated the Agency's objection to the recording. The Association nevertheless recorded the session. The Association recorded every bargaining session beginning with the May 21 session. At each subsequent bargaining session, Makler announced at the beginning of the meeting that the Association would be recording the session. Mooney promptly stated his objections to the Association's recording of the bargaining session. At no time did Makler withdraw the Association's demand to record the session when confronted with Agency's objection. On June 5, the Agency filed its unfair labor practice complaint.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The Association violated ORS 243.672(2)(b) by insisting, over the Agency's objection, that the parties' bargaining sessions be electronically recorded.

We first address the Agency's claim that the Association violated ORS 243.672(2)(b), which prohibits a labor organization from "[r]efus[ing] to bargain collectively in good faith with the public employer." The Agency alleges that the Association insisted on electronically recording bargaining sessions, and that in doing so, it violated ORS 243.672 2(b). The Association does not dispute that it insisted, in no uncertain terms, that it would electronically record all bargaining sessions as of March 5, 2013, and that it did electronically record the parties' bargaining sessions over the Agency's objections. The Association asserts, however, that its conduct was lawful because it purportedly had a "right" to do so. For the following reasons, we agree with the Agency.

We begin with the areas of agreement. The parties agree that the subject of audio recording collective bargaining sessions is a permissive subject of bargaining and that it is a *per se* violation of the duty to bargain in good faith to insist on a permissive subject of bargaining, such as a "ground rules" proposal, as a precursor to bargaining. *See, e.g., Lane County v. AFSCME Local 626, AFL-CIO*, Case No. C-59-80, 5 PECBR 4042, 4044 (1980). Additionally, the parties agree that, if we adopt longstanding National Labor Relations Board (NLRB) precedent, the Association's conduct is unlawful. The parties part ways, however, on whether we should adopt the NLRB's precedent for parties subject to the PECBA, and conclude that a party may not insist (over the other party's objection) that bargaining sessions be electronically recorded. We turn to those questions.

***6** In *Bartlett-Collins, Co.*, 237 NLRB 770, 772-73 (1978), *enf'd*, 639 F2d 652 (10th Cir.), *cert den*, 452 US 961, 101 S.Ct. 3109 (1981), the NLRB determined that "a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations" did not constitute a mandatory subject of bargaining under the NLRA, but rather a permissive subject. Therefore, if a party "insist[ed] to impasse" over the other party's objection on using a court reporter or a recording device in bargaining sessions, the insisting party violated the duty to collectively bargain in good faith. *Id.*

In enforcing the NLRB's order, the court observed that the purpose of the NLRA "is to foster collective bargaining and the resolution of industrial disputes," and that such policies would be undermined if negotiations were allowed to breakdown over a threshold procedural issue of a party insisting on electronically recording bargaining sessions. 639 F2d at 656. The court further noted that a contrary ruling "would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process" and that "[t]oo often negotiations would flounder before their true inception." *Id.*

The court rejected the employer's argument "that no honest bargainer can be disadvantaged by the recording of bargaining sessions." The court explained that the NLRB "and numerous experts in the field of labor relations believe that the presence of a court reporter has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Id.* (internal quotations omitted). The court further explained that insisting on a verbatim recording of collective bargaining sessions: (1) "may cause parties to talk for the record rather than to advance toward an agreement"; (2) may formalize the bargainings "sapping the spontaneity and flexibility often necessary to successful negotiations"; (3) may begin the bargaining "on a discordant note"; and (4) "may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement." *Id.*

The court acknowledged the employer's argument "that recording bargaining sessions provides important benefits" by purportedly: (1) speeding up bargaining by freeing parties of the burden of note taking; (2) helping parties in later construing and applying the final agreement; (3) helping the NLRB and courts in the event of litigation; and (4) promoting responsibility in bargaining by minimizing idle chatter, filibustering and intemperate behavior." *Id.* The court noted that, in support of these contentions, the employer pointed to the fact that all of the NLRB's formal proceedings are transcribed. *Id.*

The court agreed that "[r]ecording of bargaining sessions does have some positive aspects," but then explained that the value is not as great as the employer asserted when the recording is done over the objection of a party. *Id.* "Making a verbatim transcript," the court explained,

***7** "does not necessarily facilitate party interpretation of a labor contract and [the] resolution of refusal-to-bargain charges. The parties remain 'free to discuss points outside of the bargaining room and even while in bargaining sessions they are free to make 'off the record' statements.' *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 984 (8th Cir. 1966). Thus, the parties could continue to haggle over the meaning of the contract. In unfair labor practice proceedings, the Board would still be required to take testimony and make findings of fact as to what occurred when the parties were not speaking on the record. Moreover, the temperate and responsible bargaining the Company asserts would follow from the use of a court reporter may simply reflect a stultified process of negotiations and posturing for the record instead of the spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires.

"The Company's analogy to recording of formal Board proceedings is misplaced. The purposes of collective bargaining and those of the judicial process are not the same. Court reporters are an integral part of an adjudicatory hearing because they facilitate the main goal of adjudication, ascertaining the truth. Collective bargaining, on the other hand, "cannot be equated with an academic collective search for truth or even with what might be thought to be the ideal of one." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 488, 80 S.Ct. at 426. Agreement is the result of, among other things, the relative economic power of the opposing parties, reason, public opinion, accommodation, and persuasion. *Id.* at 489-90, 80 S.Ct. at 427. The pursuit of truth and justice is not always the guiding beacon in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes.

"The number of cases in which bargaining parties resort to adjudication and in which resolution depends upon an accurate record of the bargaining process is small in comparison to the number of labor contracts negotiated. This fact supports the reasonableness of the Board's conclusion that any advantages from stenographic recording of negotiations are outweighed by the negative effects on the bargaining process of allowing one side to insist upon the presence of a court reporter." *Id.* at 657.

See also Local No. 455, Bakery, Confectionary and Tobacco Workers International Union, AFL-CIO (Nabisco Brands, Inc.), 272 NLRB 1362, 1364, LRRM (BNA) 1007 (1984) ("[e]xperience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaming," and that "[b]oth sides talk for the record and not for the purpose of advancing negotiations towards eventual settlement."

For over 35 years following the NLRB's decision in *Barllett-Collins*, that precedent has continued to guide labor/management collective bargaining for those parties under the NLRB's jurisdiction. We are unaware of (and have not been provided with) any labor-management disharmony or unrest in this area of the law (in either the private or public sector). Nor have we been provided

with persuasive information establishing that changes in technology have undermined the rationale behind this longstanding federal precedent. To the contrary, the submitted *amicus curiae* briefs overwhelmingly endorse this precedent and convincingly explain that the negative consequences of allowing a party to insist on electronic recording of bargaining sessions remain detrimental and deleterious to successful collective bargaining.

***8** In arguing to the contrary, the Association advances two arguments: (1) that this precedent is, in the words of the Association, "ancient"; and (2) that this private-sector precedent should not be adopted by this Board for purposes of the PECBA because Oregon law expressly allows collective bargaining sessions to be electronically recorded. We reject both arguments.

To begin, we disagree with the Association's assertion that we should devalue precedent because it is longstanding. Rather, that such precedent has withstood the changes of time, the workplace, and labor-management practices speaks to its soundness and vitality. To be sure, there are undoubtedly instances in which changes in society or labor relations might wan-ant revisiting and overruling precedent that no longer comports with those changes. As noted above, we afforded interested parties in both labor and management to provide us with arguments as to how electronic recording of bargaining sessions should be treated under the PECBA. With one exception, *amici* strongly urged that the aforementioned precedent be embraced by this Board, and asserted that allowing a party to insist on electronic recording of bargaining sessions would be damaging to collective bargaining under the PECBA. [8]

We also disagree with the Association's contention that we are barred from adopting this precedent for purposes of the PECBA. According to the Association, it had the unfettered right to electronically record the parties' bargaining sessions under Oregon's Public Meetings Law (PML) (ORS 192.610 to 192.690). [9] The Association's argument is premised, however, on a conclusion that the sessions here were "public meetings" within the meaning of the PML. That premise, however, is faulty. In *Southwestern Oregon Publishing Co., Inc. v. Southwestern Oregon Community College Dist.*, 28 Or App 383, 559 P2d 1289 (1977), the court concluded that the PML "has no applicability to the negotiations conducted by a retained negotiator." *Id.* at 386. Here, there is no dispute that Mooney, who negotiated on behalf of the Agency, was a retained negotiator, and not a member of either the Agency's governing or public body. Accordingly, under binding court precedent, the PML has no applicability here.

Echoing an earlier theme, the Association asks this Board to disregard *Southwestern Oregon Publishing* because it is "very old." The Association also asserts that the case "has no substantive analysis, logic or argument." As explained above, we disagree with the Association's position that we may or should ignore an Oregon appellate case merely because it was decided long ago. Moreover, regardless of the age of the case or the Association's perception of the quality of the court's legal analysis, this Board is not free to disregard binding court precedent.

Therefore, having considered the parties' respective positions and the *amicus curiae* briefs, we have decided to adopt the approach taken by the NLRB on the subject of recording bargaining sessions. As set forth above, the Association does not dispute that, under that precedent, its conduct was unlawful under ORS 243.672(2)(b) because it insisted on recording the bargaining sessions (a permissive subject) as a prerequisite to the parties bargaining over mandatory subjects. Accordingly, we will find that the Association violated ORS 243.672(2)(b).

***9** Our dissenting colleague would take a different approach and analyze whether the recording of collective bargaining sessions violates the duty to bargain in good faith under the particular circumstance of each case. That approach is not without precedent, as it is the approach taken by the NLRB before its decision in *Bartlett-Collins. See* 237 NLRB at 772. For the reasons expressed by the NLRB in *Bartlett-Collins* (and its progeny), enforcing federal courts, and our decision here, recording bargaining sessions should be considered a permissive subject of bargaining, meaning that a party may not insist, over the other party's objection, that bargaining sessions be recorded.

3. The Agency did not violate ORS 243.672(l)(e) when it initially declined to cede to the Association's demand that the parties' bargaining sessions be electronically recorded.

Relatedly, we dismiss the Association's claim that the Agency violated ORS 243.672(1)(e) when it initially refused to bargain in light of the Association insisting that the bargaining sessions be recorded. In *Jackson County v. Jackson County Sheriff's Employees' Association*, Case No. UP-24-11, 25 PECBR (2012), we dismissed the employer's claim that the union had violated ORS 243.672(2)(b) when the union walked out of a bargaining session and refused to bargain for a brief period based on the union's misunderstanding that the employer was conditioning bargaining on a permissive subject. In doing so, we observed that, although the union's understanding was based on a mistaken belief that the employer was conditioning bargaining on a permissive subject, that misunderstanding was immediately conveyed to the employer and entirely within the purview of the employer to correct.

Here, as set forth above, there was no *misunderstanding* that the Association was insisting on a pel-missive subject as a prerequisite to bargaining over mandatory subjects. Rather, the Association was doing so expressly. Thus, there is even greater reason to apply the rationale in *Jackson County* to dismiss the Association's complaint, as it was entirely within the purview of the Association to stop insisting on the permissive subject of recording the bargaining sessions as a requirement of bargaining. Moreover, the Agency's suspension of bargaining was temporary and the Agency did return to the bargaining table even though the Association continued to insist on a permissive subject.

Our decision here is also consistent with NLRB precedent that one party's insistence on a permissive subject of bargaining as a condition to bargaining may temporarily suspend the bargaining duty of the other party. *See Nassau Ins. Co.*, 280 NLRB 878, 878 n 3, 124 LRRM (BNA) 1075 (1986). That NLRB precedent recognizes that in certain circumstances one party's unlawful conduct may temporarily suspend the other party's duty to bargain so long as the breach orunlawiul action continues. *See, e.g., Arundel Corp.*, 210 NLRB 525, 527 (1974). Thus, although one unfair labor practice does not condone another, there are limited circumstances as outlined above and applicable here in which a party may temporarily suspend bargaining in the face of significant unlawful conduct of the other party. Therefore, we will dismiss the Association's complaint in Case No. UP-015-13. ORS 243.676(3)(a).

Remedy

***10** Because we have determined that the Association violated ORS 243.672(2)(b) by insisting on the Agency's acceptance of a permissive subject, namely electronically recording the bargaining sessions, we are required to enter a cease and desist order. ORS 243.676(2)(c). Therefore, we will order the Association to meet and bargain collectively in good faith with the Agency with respect to employment relations. As explained above, that means that the Association is to cease and desist from electronically recording the parties' bargaining sessions, unless the Agency voluntarily agrees that such bargaining sessions may be recorded.

Upon finding a respondent has violated the PECBA, this Board “shall * * * [t]ake such affirmative action * * * as necessary to effectuate the purposes of * * * ORS 243.650 to 243.782.” ORS 243.676(2)(c). Because the Association's conduct has led to a substantial delay in good faith bargaining, the Agency requests that we require the Association to pay members of the bargaining unit interest on any retroactive wage increases that the parties agree to in a successor agreement. However, we conclude that the conduct, which presents a case of first impression, does not warrant such a remedy, and we decline to order one,

We will not order the Association to post a notice of its wrongdoing as requested by the Agency. We generally order such a posting if we determine that a party's violation of the PECBA was: (1) calculated or flagrant; (2) part of a continuing course of illegal conduct; (3) committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). Under the circumstances of this case, especially given that this is a case of first impression under the PECBA, we conclude that a posting is not warranted.

Finally, the Agency requests that we award a civil penalty. This Board may assess a civil penalty of up to $1,000 "as a result of an unfair labor practice complaint hearing." ORS 243.676(4). As relevant here, we may do so if "[t]he complaint has been "affirmed" after finding: (1) "that the person who has committed, or who is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge"; or (2) "that the action constituting the unfair labor practice was egregious." ORS 243.676(4)(a); *see also* OAR 115-035-0075. Here, given our disposition of this issue of first impression, we do not find that the Association knew that its conduct constituted an unfair labor practice or that the Association's actions were egregious. Consequently, we do not award a civil penalty.

ORDER

***11** 1. The Association violated ORS 243.672(2)(b) when it insisted on electronically recording bargaining sessions over the objections of the Agency. The Association will cease and desist from violating ORS 243.672(2)(b).

2. The Association will meet and bargain in good faith with the Agency over employment relations. The Association will not insist on electronically recording the parties' bargaining sessions and may not record the parties' bargaining sessions unless the Agency voluntarily agrees that it may do so.

3. The complaint in Case No. UP-015-13 is dismissed.

DATED this 16 day of June 2014.

Kathryn A. Logan
Chair
Jason M. Weyand
Member
Adam L. Rhynard
Member

***12** This order may be appealed pursuant to ORS 183.482.

Member Weyand dissenting.

I disagree with my colleagues' conclusions that the Association committed a *per se* violation of ORS 243.672(2)(b) when it insisted on recording bargaining sessions over the WCCCA's objections, and that the WCCCA did not violate ORS 243.672(l)(e) when it conditioned bargaining on the Association's agreement not to record bargaining. For the reasons set forth below, I would reach the opposite conclusion.

This case involves competing unfair labor practice complaints alleging that both parties violated the obligation to bargain in good faith. We recognize two distinct types of bad faith bargaining violations: "*per se*" violations and ""totality of conduct" violations. *Salem Police Employees Union v. City of Salem*, Case No. UP-121-87, 11 PECBR 282, 289 (1989). A *per se* violation occurs when a party's conduct is "so inimical to the negotiations process" that it is sufficient to establish a violation even absent a showing of subjective bad faith. *See Federation of Oregon Parole and Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12, 25 PECBR 629, 635 (2013). We find a "totality of conduct" violation if a party's behavior during negotiations, when viewed comprehensively, indicates an unwillingness to reach an agreement through good faith bargaining. *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 453, *AWOP*, 146 Or App 777, 932 P2d 1216 (1997).

Here, the majority has adopted private sector precedent and established a rule that a party who insists on recording bargaining over the other party's objections commits a *per se* violation of the duty to bargain in good faith. Implicit in this ruling is a conclusion by the majority that one party's insistence on recording bargaining over the other party's objections is ""inimical" to the negotiating process. I disagree. Undoubtedly, electronic recording of negotiations will impact negotiations in a variety of ways, some negative and some positive. But the magnitude and the nature of the impact in the public sector is speculative at best, and it is far from clear that recording negotiations is so inherently damaging to the collective bargaining process that it is "inimical" to successful negotiations. Thus, I see no need to establish a "one-size-fits-all" approach to this issue. Doing so effectively creates a default rule prohibiting the recording of negotiations in the public sector unless both parties agree. Such a rule is easily administered, but I am not convinced that it is necessary or that the rule serves the public interest well.

If we were to establish a default rule concerning the right to record collective bargaining sessions under the PECBA, we should not follow the private sector's lead. The services performed by the employers and employees covered by the PECBA are provided for the benefit of the public, and are paid for by the public. This is not the case in the private sector. Consequently, public policy considerations not relevant to the private sector must be taken into account before we create a blanket rule that significantly impacts public sector negotiations. Perhaps the most important public policy impacted is, as the Oregon Supreme Court described in *Jordan v. MVD*, Oregon's "strong and enduring policy that public records and governmental activities be open to the public." 308 Or 433, 438, 781 P2d 1203 (1989), citing *to MacEwan v. Holm et al*, 226 Or 27, 359 P2d 413 (1961). Thus public policy favoring open government is derived from many sources, but most notably from our Public Records Law, ORS 192.410 through 192.505, and our Public Meetings Law, ORS 192.610 through 192.690. [10]

***13** Given this well-established preference for open government, and the impact that public sector collective bargaining has on the public, it is axiomatic that the public has a significant interest in having a reasonable level of access to information about how negotiations are conducted and why particular decisions are made. Recordings of bargaining sessions can serve as a source of valuable information about negotiations not only for the parties involved in the negotiations, but also for the public. Establishing a default rule that substantially limits rather than expands when such recordings may be made does nothing to promote open government or public access to information concerning ongoing negotiations.

I do not intend to suggest that the recording of bargaining sessions should be allowed under all situations. Certainly, it would be lawful for the parties to both agree not to record bargaining. Additionally, there are situations where recording bargaining over the objections of the other party could violate the PECBA. For example, if the negotiations were recorded in a manner that would unreasonably chill the parties' willingness to bargain openly, this could be the basis for a bad faith bargaining charge under ORS 243.672(1)(e) or (2)(b). However, the recording of bargaining over the other party's objections should be considered only as one possible factor under a "totality of conduct" analysis rather than an automatic "*per se*" violation. As a result, there would have to be some additional facts or circumstances surrounding the recording of negotiations that would support a finding of bad faith. To the extent, to the extent that recording bargaining sessions might chill protected employee activity, a labor organization or public employee could bring a claim under ORS 243.672(1)(a) or (1)(c).

If we were to apply a "totality of conduct" analysis to this case, I would conclude that the WCCCA did not prove by a preponderance of the evidence that the Association violated ORS 243.672(2)(b). As a result, I would dismiss this claim. I now turn to the Association's claim that the WCCCA violated ORS 243.672(l)(e) when it refused to continue negotiations until the Association agreed not to record bargaining sessions. We have long held that a party commits *aper se* violation of the duty to bargain in good faith if it "conditions" further negotiations on a concession made by the other party. *Lane County v. AFSCME Local 626, AFL-CIO*, Case No. C-59-80, 5 PECBR 4042, 4044 (1980) (union committed a *per se* violation of ORS 243.672(2)(b) by conditioning further bargaining on the employer's agreement to ground rules proposals). Here, it is undisputed that the WCCCA unambiguously refused to even meet for negotiations for two months unless the Association agreed to reverse its decision to electronically record bargaining sessions. Thus, while the WCCCA was put in a difficult position by the Association's aggressive tactics, it did condition further bargaining on a concession by the Association. Therefore, the WCCCA, not the Association, violated its obligation to bargain in good faith and thus, ORS 243.672(1)(e).

***14** The WCCCA's refusal to bargain was not justified by its concerns about the possible chilling impact of recording bargaining sessions. In general, a party to negotiations who believes that the other party is engaging in unlawful behavior should not respond with its own unlawful refusal to bargain, as is the case here. Rather, a party with this type of concern should utilize this Board's lawful dispute resolution procedures while continuing with the negotiations process in good faith.

For these reasons, I do not join in the majority's decision.

Jason M. Weyand
Member

Footnotes

1 In a periodic reassignment of cases, the matter had been transferred to ALJ Witherell for the issuance of the recommended order after a hearing was held by ALJ B. Carlton Grew on November 18, 2013, in Salem, Oregon. The record closed on December 23, 2013, following receipt of the parties' post-hearing briefs. In its objections, the Association contends that this Board was not permitted to transfer the matter to ALJ Witherell. This Board has previously addressed and rejected such a contention, and we adhere to that case precedent. *See Arlington Education Association v. Arlington School District No, 3*, Case No., Case No. UP-65-99, 18 PECBR 901, 903 (2000), *rev'd and remanded on other grounds*, 177 Or App 658, 34 P3d 1197 (2001), 19 PECBR 762 (2002) (on remand), *aff'd*, 196 Or App 586, 103 P3d 1138 (2004).

2 Those supplemental briefs were submitted on May 9, 2014.

3 Because the Agency's ORS 243.672(2)(d) claim is based on the same conduct (*i.e.*, electronically recording the bargaining sessions) as the ORS 243.672(2)(b) claim, and because finding a separate violation for that same conduct would add nothing to our remedy, we do not address the (2)(d) claim. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354 (2008).

4 Unless stated otherwise, all the communications noted herein, whether written or oral, were made either by Mooney (representing the Agency) or Makler (representing the Association).

5 In addition to Numbers 5 and 6, the Agency proposed ground rules on the composition/membership of the bargaining teams; observers; making tentative agreements; priority of language issues before economic issues; scheduling of meetings; and the commencement of the 150-day bargaining period.

6 In addition to Numbers 9 and 10, the Association proposed rules covering meeting schedules; designated spokespersons; authority for tentative agreements; requesting caucuses; making proposals and counter-proposals; a moratorium date; and composition/membership of the bargaining teams.

7 The Association asserts that Makler's “agree to disagree” declaration referred to whether the Association had agreed that it would or would not record bargaining. Mooney testified that the statement referred to the discussion with Makler over the disputed usefulness of recording negotiations. The explanation given by Mooney and the specificity of his testimony over Makler's testimony, lead us to accept Mooney's version of events; the logic of the interpretation in the context of the surrounding events also lead us to conclude that the statement referred to the usefulness issue.

8 We received *amicus curiae* briefs on behalf of the following organizations, all in support of the conclusion that we reach today: Oregon Public Employer Labor Relations Association; National Public Employer Labor Relations Association; Oregon School Board Association; League of Oregon Cities; Association of Oregon Counties; Oregon Association of Chiefs of Police; Oregon Fire Chiefs Association; and Tri-County Metropolitan Transportation District. We received one *amicus curiae* brief in opposition to this approach, which was submitted by John Witty, an attorney who has represented public sector employers for approximately 26 years.

9 The Association also forwards the criminal provisions ORS 165.535 and ORS 165.540 as having some significance. *See* Findings of Fact 7. ORS 165.540(l)(c) states that a person may not

> "[o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained."

Although an announcement at the beginning of the bargaining sessions may insulate an individual from criminal liability under ORS 165.540, ORS 243.672(2) still applies to the Association's conduct.

10 Specifically, ORS 192.620 states in part that "[t]he Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made," while ORS 192.420(1) provides that "[e]very person has a right to inspect any public record of a public body in this state," except for certain specific records enumerated under statutory exceptions under ORS 192.501 through 192.505.

2014 WL 3339216 (OR ERB)

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1976 WL 385442 (NV LGEMRB)

Local Government Employee-Management Relations Board

State of Nevada

IN THE MATTER OF THE WASHOE COUNTY TEACHERS ASSOCIATION AND THE WASHOE COUNTY SCHOOL DISTRICT: PROHIBITED PRACTICE IN THE REFUSAL OF THE WASHOE COUNTY SCHOOL DISTRICT TO BARGAIN IN GOOD FAITH, AND VIOLATION OF NRS 288.270(1)(A) AND (1)(E)

Case No. A1-045295
ITEM #54
May 21, 1976

DECISION

***1** By complaint filed February 17, 1976, the Washoe County Teachers Association asserts that the Washoe County School District has refused to negotiate in good faith because of the District's unilateral determination that this year's negotiations sessions must be open to the public.

The parties negotiated publicly last year, but, the contract resulting from those negotiations contained no provision mandating that this year's negotiating sessions be open.

On January 14, 1976, the Association directed a memorandum to the District indicating a desire to have closed sessions this year. The District responded on January 30th, stating that they were ready to enter into negotiations "but only if such sessions are open."

The controversy centers around the parties' differing interpretations of the provisions of NRS 288.220(1):
The following proceedings, required by or pursuant to this chapter, are not subject to any provision of chapter 241 of NRS:

1. Any negotiation or informal discussion between a local government employer and an employee organization or employees as individuals, whether conducted by the governing body or through a representative or representatives.

Chapter 241 of the Nevada Revised Statutes is Nevada's "Open Meeting Law" which requires meetings of public agencies, commissions, bureaus, departments, public corporations, municipal corporations, quasi-municipal corporations and political subdivisions be open and public.

Although the parties have not directed us to any decision which construes a statute similar to NRS 288.200(1), several of our sister agencies have considered claims of bad faith bargaining where the employer unilaterally directed that negotiations be open. Mayor Samuel E. Zoll and City of Salem and IAFF Local 1780, Massachusetts Labor Relations Commission, 485 GERR B-7, January 8, 1973; Quamohegan Teachers Association, Eliot and South Berwick, and Eliot and South Berwick School Board of Directors, Maine Public Employee Labor Relations Board, 505 GERR A-11, May 28, 1973; Pennsylvania Labor Relations Board vs. Board of School Directors of the Bethleham Area School District, Case No. PERA-C-2861-C, 505 GERR E-1, May 28, 1973.

In the Zoll and Quamphegan cases specific mention was made of existing state laws comparable to our "Open Meeting Law." Yet, despite the absence of any specific statutory provision exempting negotiations from these open meeting provisions, each

Board found a unilateral directive that negotiations be open constituted a failure to bargain in good faith. All three Boards ordered that the parties enter into closed negotiations sessions.

***2** In Bassett v. Braddock, 262 S.2d 425 (Fla. 1972) and Talbot v. Concord Union School District, 323 A.2d 912 (N.H. 1974) the Supreme Courts of Florida and New Hampshire thoroughly considered the impact of open negotiations. The laws of both states included statutes similar to our "Open Meeting Law" and neither had a provision exempting collective bargaining from their purview, yet, both Courts found that meaningful negotiations must be closed.

The District argues that NRS 288.220(1) is not applicable in the case of school districts as the actions of the board of trustees of the school district are not covered by the provisions of NRS Chapter 241, but, by the provisions of NRS 386.335. This latter statute is not mentioned in NRS 288.220(1).

Without setting out the entire statute in full, NRS 386. 335 requires that meetings of the board of trustees of a school district be open and public, with the exception of certain executive sessions. The key term in the statute is "meetings." The Florida Supreme Court in the Bassett decision, supra, addressed itself to a very similar situation; the citizens who brought suit relied upon Florida's "Government in the Sunshine" law which required that "meetings" of any board or commission be open. They insisted that matters preliminary to the actual discussion and ratification of the teachers' contract be open and public. In affirming the denial of relief to plaintiffs, the Court stated:

> Full consideration of the recommendations of the Board's negotiator was accordingly had in a public meeting and aired and voted upon in public. Those recommendations were in a sense simply the acorn from which the final contract grew-in the sunshine. There is no violation. Id at page 427.

Obviously, the meeting wherein the Board of School Trustees ultimately reviews, considers and votes upon ratification of a contract with the Washoe County Teachers Association must be open and public. However, negotiation sessions, whether informal or formal, between the Board's negotiating team and the Association's negotiating team does not appear to us to constitute "meetings" within the purview of NRS 386.335.

Having found that these negotiations are exempt from the open meeting setting, it would seem that the provisions of NRS 288.220(1) indicate an option that negotiations may either be open or closed. Unfortunately, the statute does not address itself to specifically who shall make the determination whether the sessions are to be open or closed.

The purpose of NRS Chapter 288 is to provide the framework within which local government employers and employee organizations may bargain collectively, and, to open lines of communication, both formal and informal. The obligation to bargain collectively is a mutual one and is defined as such by NRS 288.030. At any time one party to the collective bargaining process establishes, unilaterally, a condition precedent to collective bargaining which is not provided for in Chapter 288, they are thwarting the purpose of the Act and are in violation of their obligation to bargain in good faith.

***3** The reasons for closed negotiation sessions are too numerous and too obvious to be restated here and are well expressed in the authority previously cited. We find that, in light of the purposes, both express and implied, in Chapter 288 of the Nevada Revised Statutes, negotiation sessions are to be closed unless the parties mutually agree otherwise.

During the course of the hearing on this matter, the Teachers Association wished to place into evidence a memorandum prepared by a District employee after consultation with the District's counsel. The document was ultimately presented to the Board of School Trustess in an executive (closed) session. Counsel for the District objected to our consideration of the document

asserting that it is a privileged communication between attorney and client. We sealed the document pending written arguments by counsel on its privileged status.

We have concluded that it is unnecessary to make a determination on the privileged status of the document because we do not feel that its contents, whatever they might be, could impact upon our decision. Both parties have indicated that the question raised by this complaint is basically one of law. The essential factual situation is not in dispute and has been recited in the the opening portion of this decision. Our determination of this complaint was, necessarily, based upon our review and construction of the Local Government Employee Management Relations Act. The sealed document cannot affect the written provisions of the Act. Since there is an adequate basis for reaching a determination on the complaint without reviewing the contents of the document, the proposed exhibit has remained sealed and has not been considered in reaching our determination.

FINDINGS OF FACT

1. That the Washoe County Teachers Association is a local government employee organization.

2. That the Washoe County School District is a local government employer.

3. That on January 14, 1976, the Washoe County Teachers Association directed a memorandum to the Washoe County School District indicating a desire to have closed negotiation sessions this year.

4. That the Washoe County School District responded on January 30, 1976, with a letter stating that they were ready to enter into negotiations "but only if such sessions are open."

5. That the Washoe County School District asserts that they must hold open negotiation sessions in light of the provisions of NRS 386.335.

CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board possesses original jurisdiction over the parties and subject matter of this complaint pursuant to the provisions of NRS Chapter 288.

2. That the Washoe County Teachers Association is a local government employee organization within the term as defined in NRS 288.040.

3. That the Washoe County School District is a local government employer within the term as defined in NRS 288.060.

***4** 4. That the provisions of NRS 386.335 require that "meetings" of the Board of School Trustees be open and public.

5. That the term "meetings" in NRS 386.335 does not include informal and formal negotiation sessions between the negotiating team selected by the Washoe County School District Board of Trustees and the negotiating team selected by the Washoe County Teachers Association.

6. That the term "meeting" in NRS 386.335 does require that the final consideration, review and ratification of the collective bargaining agreement between the parties by the Board of School Trustees be open and public.

7. That the unilateral determination by the Washoe County School District that negotiations between the District and the Washoe County Teachers Association be open and public constitutes a refusal to bargain collectively in good faith in violation of the provisions of NRS 288.270(1)(e).

8. That in light of the intent of the provisions of NRS Chapter 288, negotiation sessions between the Washoe County Teachers Association and the Washoe County School District are to be closed unless the parties mutually agree that they be otherwise.

In conformity with this decision, the parties are directed to immediately commence closed negotiation sessions.

Dated this 21st day of May, 1976.

Christ N. Karamanos
Chairman
Dorothy Eisenberg
Board Member

John T. Gojack, Board Vice Chairman, has disqualified himself from participating in this case because of his participation in a recent mediation effort between the parties to this complaint.

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BARNARD IGLITZIN & LAVITT

February 17, 2022 - 4:32 PM

Transmittal Information

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