BEFORE THE SECRETARY OF HUMAN RESOURCES
STATE OF KANSAS

HAYS-NEA, Petitioner, vs. UNIFIED SCHOOL DISTRICT 489, HAYS, KANSAS, Respondent,	)	Case No. 72-CAE-1-1993

INITIAL ORDER

ON the 21st day of October, 1992, the above-captioned matter came on for hearing pursuant to K.S.A. 72-5430a(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Gene F. Anderson, Attorney
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RESPONDENT: Appeared by William W. Jeter, Attorney
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ISSUE PRESENTED FOR REVIEW

1. WHETHER THE U.S.D. 278 BOARD OF EDUCATION COMMITTED A PROHIBITED PRACTICE BY REFUSING TO NEGOTIATE IN GOOD FAITH WITH REPRESENTATIVES OF THE RECOGNIZED PROFESSIONAL EMPLOYEES' ORGANIZATION AS REQUIRED IN K.S.A. 72-5423 BY:

   A. REFUSING TO PROVIDE SPECIFIC COUNTER PROPOSALS TO EACH OF THE PROFESSIONAL EMPLOYEES' ORGANIZATION'S PROPOSALS;

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B. FAILING TO PROVIDE THE PROFESSIONAL EMPLOYEES' ORGANIZATION WITH SPECIFIC REASONS WHY A PROPOSAL WAS OBJECTIONABLE WHEN NO COUNTER PROPOSAL WAS OFFERED; and

C. PRESENTING ITS FIRST AND ONLY PROPOSAL AS A PACKAGE ON A "TAKE IT OR PROCEED TO IMPASSE" BASIS.

SYLLABUS

1. . **DUTY TO NEGOTIATE** - *Definition.* The duty to negotiate or bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement and implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground.

2. **PROHIBITED PRACTICES** - *Failure to Negotiate in Good Faith - Totality of conduct test.* The *"totality of conduct"* standard is employed when a party has been charged with failing to bargain in good faith requiring the overall conduct of the parties throughout the course of the professional negotiations process must be considered.

3. **DUTY TO NEGOTIATE** - *Good Faith Requirement - Authority of negotiators.* A party must vest its negotiators with sufficient authority to carry on meaningful bargaining to satisfy the *"good faith"* requirements of K.S.A. 72-5413(g). A negotiations representative should have authority to fully explore all bargaining issues and to reach tentative agreements on proposals, subject to the opportunity for the representative to consult with his principle before making a final commitment.

4. **DUTY TO NEGOTIATE** - *Good Faith Requirement - Duty to reach agreement or make concessions.* The *"good faith"* concept established in K.S.A. 72-5413(g) imposes absolutely no requirement that the parties reach agreement. The PNA does not compel either party to agree to a proposal or make a concession, but it does impose a duty to negotiate with a fair and open mind, and with a sincere purpose to find a basis for agreement.

5. **DUTY TO NEGOTIATE** - *Good Faith Requirement - Duty to furnish information on request.* The duty to negotiate in good faith found in K.S.A. 72-5413(g) encompasses the duty to furnish information.

6. **DUTY TO NEGOTIATE** - *Good Faith Requirement - Duty to furnish information - Exception for rejection of proposal.* Generally, a board of education's duty to supply the bargaining representative with information does not arise until the employee organization makes a request or a demand that the information be furnished. An exception to this general rule is found in the situation involving a party's response to a negotiation proposal. As a matter of course, if one party rejects the proposal offered by the other party without presenting a new counterproposal, the rejecting party has a duty to specifically explain all its objections to the proposal.

7. **PROHIBITED PRACTICES** - *Defenses to Complaint - Doctrine of Equitable Estoppel.* The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction in which he is involved wholly inconsistent with his previous acts connected to such transaction.

FINDINGS OF FACT[1]

1. The Hays-National Education Association ("*Hays-NEA*") is the exclusive bargaining representative for the professional employees of Unified School District 489, Hays, Kansas ("*Board*"). (Petition and Answer).

2. The Board of Education of School District No. 489 on January 21, 1992 submitted its notice of it wished to negotiate for a 1992-93 memorandum of agreement to the Hays-NEA. The notice contained the following six subjects: Linking salaries to classroom performance (merit pay); a two year contract; health insurance; length of school year; length of school day; and editorial changes. (Ex. 1).

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[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."

3. By letter of January 31, 1992 the Hays-NEA submitted to the Board its list of subjects for negotiation. The notice contained the following 13 subjects: Master Agreement; salaries; drug-free workplace policy; hours and amounts of work; extra-duty/extra-pay; Editorial changes; increased funding; incentive leave; voluntary early retirement; disciplinary policy; provision for factfinding; added columns; and upper evaluation. (Ex. 2).

4. The actual bargaining sessions for the 1992-93 memorandum of agreement did not begin until May 19, 1993. The delay was caused by the lengthy negotiations required to achieve an agreement for the 1991-92 school year. Eight negotiation sessions over three months failed to reach result in an agreement, and the parties proceded to mediation and then fact-finding. The fact-finder's report was issued March 16, 1992. The parties apparently accepted the fact-finder's recommendations and entered into a memorandum of agreement ratified by the Board on April 6, 1992. (Ex. A, 7; Tr. p. 20).

5. The Board and the Hays-NEA met for four negotiating sessions on the 1992-93 memorandum of agreement: May 19, June 1, June 22, and June 29, 1992. Mr. Bob White, UniServ Director for the Post Rock UniServ District of Kansas NEA, was spokesman for the teachers' negotiating team. Mr. William W. Jeter, Hays attorney, was spokesman for the Board. A total of approximately seven hours of negotiations occurred. All sessions were recorded both on audio and video tape. (Ex. 3, 4, 5, 6, 7, 8, 9, 10, 11; Tr.p. 12-13).

6. The parties met at the bargaining table for the first time on May 19, 1992. The purpose of the meeting was to lay out the subjects for negotiations for the 1992-93 memorandum of agreement. The teachers presented a partial list of proposals, including billable hours, C.O.L.A., automatic salary schedule advancement, catch-up experience step, return of the high base, re-number experience steps, extended contract pay vs. substitute pay, early retirement, employee discipline procedures, BS + 36 salary schedule column, and extra duty/extra pay. The board presented three proposals: 5 extra contract days, merit pay, and refund of excess health insurance premiums. Since the main purpose of the meeting was to put issues on the table, full discussion of the proposals was reserved for future meetings, and none of the proposals presented by either side on May 19th was acted upon at that time. (Ex. 3, 7, Tr.p. 23-26).

7. The major portion of the second negotiation session on June 1, 1992 was devoted to the presentation of additional Hays-NEA proposals, including the bulk of its salary recommendations. Additionally, Hays-NEA responded to the proposals made by the Board at the May 19th meeting. The Board reserved response to the Hays-NEA proposals until it received all proposals. According to the Board's chief negotiator they were "*Kind of waiting to get all the rest of your proposals and regroup.*" (Ex. 4, 7; Tr.p. 32-38).

8. At the June 1, 1992 session the Hays-NEA express its concern about a document titled *"Negotiation Report"* prepared and circulated to teachers and citizens of the school district by the Board after the May 19th negotiation session. The purpose of the document was, as stated by the Board:

> *"On of the important lessons of the difficult 14 months of reaching agreement on a 1991-92 teacher's contract was that communication about negotiations needs to be strengthed. Each of our teachers (as well as other staff and patrons) deserves as much information as possible during negotiations so he/she has a good measure of the process and the contract terms under discussion. . . . [T]he Board on a periodic basis will give you its perspective of the 1992-93 negotiations, which have just begun in earnest. These reports about the negotiating sessions will be presented as objectively as possible. They will, nonetheless, be only the Board's report. And it should be understood that the Board team represents the interests of all USD 489 patrons, not any one narrowly focused group of its constitutents."*

The Hays-NEA objected to the document because they felt it presented a slanted view of the negotiations, and contained misrepresentations of their proposals and positions. The Board continued to publish and distribute a *"Negotiation Report"* after each of the negotiating sessions. (Ex. 4, 7; Tr.p. 28-32, 239-40).

9. As part of the 1991-92 negotiations the parties agreed to the formation of an extra-duty/extra-pay study committee which was to study the issue and make a recommendation to be considered as part of the 1992-93 negotiations. The Hays-NEA had

appointed its members to the committee in April and had made several requests the board name its members. At the June 1, 1992 meeting the Hays-NEA requested the joint committee on extra duty/extra pay meet prior to the next bargaining session, to which the board agreed. However, the board failed to timely name its members of that committee, and the joint committee did not meet until after negotiations ceased June 29th. (Tr.p. 24-25, 37-38).

10. At the June 22, 1992 session the Board presented a package proposal which included three alternative salary packages. When the Board presented this package proposal its chief negotiator stated that if the Hays-NEA could not accept the dollar amounts the sides were effectively at impasse. Additionally, the chief negotiator informed the Hays-NEA that any of their proposals not included in the Board's proposal could be assumed rejected, and advised *"If you need any of these proposals to reach agreement, then we are at impasse."* No explanations were given for rejecting those proposals. (Ex. 5, 7; Tr.p. 39-40).

11. As part of package proposal presentation the Board's chief negotiator told the Hays-NEA team, *"In order to reach agreement, or move to impasse, I'm putting all the authority that this team has on the table tonight."* This lack of authority to deviate from the package proposal was reiterated throughout discussions on June 22, 1992 as evidenced by the responses to inquiries concerning the status of Hays-NEA proposals:

Item:	Extra duty/extra pay
Response:	No Authority
Item:	Discipline
Response:	Rejected
Item:	BS + 36 Column
Response:	Rejected
Item:	Early Retirement
Response:	No Authority
Item:	Severance Pay
Response:	No Authority

Item: Equitable Work Load
Response: "What you've got is all we've got. . . ."

Item: A different merit pay
Response: ". . .This team has no authority to look at anything else. . . ."

Asked by Mr. White if he would be willing to go back to the board for additional authority, the Board's chief negotiator responded: *"Sure, I mean, any proposal that you want to make tonight, we'll take them back to the board. But you know, what you've already got is all that we've got. And I don't think that we're going to get anymore on it. And I think a lot of that is probably a carry over from a year ago. Let's make a good offer and let's get it on the table - and if they [the teachers] don't want it, let's get on with impasse - go to mediation - go to fact finding. If we're going to do it, let's do it now. Let's not wait until next year to get it done. So that's where we're coming from."* (Ex. 7).

12. The June 29, 1992 negotiation session centered on the Board's "package proposal" which contained three alternative salary proposals. In the course of discussions the Board chief negotiator restated the Board's position expressed at the June 22, 1992 session: *"Well, Bob, the bottom line is - we gave you three options - and that's it. If you don't like them, tell us you don't like them and let's go on to the next step O.K."* That "next step" would be mediation as part of the statutory impasse procedure. At that session Mr. White asked several hypotheticals in an attempt to determine whether any negotiating room remained. The following exchange between the parties' chief negotiators further illustrates the Board maintained its negotiations position established at the June 22, 1992 meeting:

Bob: . . . Let me ask you this. Suppose that, that ah, we did get 3.5% for cost of living and 1% improvement and 2 1/2 to 3% for extra duties or extra days, extra days, and we re-numbered the salary schedule and we had a high base with no multiplier . . .

Bill: Well, you've gone beyond . . .

Bob: Do you think we could get an agreement on that?

Bill: No.

Bob: No.....Uh, if the teachers were to accept your offer B, without the 5 days and the demerit do you thing we'd have an agreement on that?

Bill: No.

Bob: Did I understand when you proposed this proposal this last session that that was made as a response to all of the issues that were not responded to otherwise? For example, um, I think it was the second, not it was the third session after I gave you the discipline proposal, you said, I asked you if you had any objections or any response, you said "not yet", that you wanted to wait and respond later.

Bill: Well, that would have been, I had indicated at the last session that was rejected by my package proposal.

Bob: Ok.

Bill: So any of your proposals that were not included in that package proposal would have been rejected.

(Ex. 6, 7; Tr.p. 50-53).

13. At the conclusion of the fourth negotiation session on June 29th, negotiations broke off when both parties expressed the belief they had reached impasse. (Ex. 6, 7; Tr.p. 53). At the time of impasse, agreement had not been reached on any of the 13 items the Hays-NEA noticed for negotiations. The Board made one counter-offer: salary. Of the remaining 12 items, seven items were expressly or by implication rejected and the remaining five were not discussed.The Board and the Hays-NEA executed a joint Petition for declaration of Impasse for submission to the Secretary of Human Resources which was filed July 1, 1992. The petition stated 23 subjects remained in dispute which included nine under the heading Salary Schedules; severance pay; incentive Leave reduction plan; demerit pay; length of school year; lenght of school day; more

equitable work-load assignments; voluntary early retirement benefits; return of excess health insurance premiums; upward evaluation procedures; drug-free work-place policy; editorial changes; duration of agreement; reopener clause. The impasse was referred to the Federal Mediation and Conciliation Services for mediation on July 6, 1992. (Case #72-I-160-1992).

14. The Hays-NEA filed the prohibited practice complaint on July 22, 1992.

15. Fred Kaufman is the Superintendent of U.S.D. 489, and testified at the hearing that the board made only one counterproposal, that being the salary proposal, and it was the Board's last offer. He indicated it was the Board's intention if its offer was rejected, the Board would declare impasse. *"It was our intent definitely,"* Mr. Kaufman testified. (Tr.p. 241). *". . .the message that we wanted to communicate was we don't have anything else to offer."* (Tr.p. 241). He furhter stated that the Board *"could have put together a counterproposal, to other offers but frankly, we did not want to."* (Tr.p. 228). According to Mr. Kaufman, the Board is the final arbiter of whether a proposal is meritorious or not, and if the Board deems a proposal to be nonmeritorious, the board is under no duty to negotiate further on that issue, and the board is under no duty to explain its rejection (Tr.p. 230-231).

16. Larry Gilchrist was a teacher and a member of the teachers' negotiating team who has been involved in roughly 200 negotiating session during the 20 years he has served on negotiating teams. He said the teachers saw no reason to respond to the board's salary proposal. He testified, *"We could not see a reason for countering your proposal when you had not addressed our other proposal. We need to negotiate in entirety not just on one item."* (Tr.p. 158).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER THE U.S.D. 278 BOARD OF EDUCATION COMMITTED A PROHIBITED PRACTICE BY REFUSING TO NEGOTIATE IN GOOD FAITH WITH REPRESENTATIVES OF THE RECOGNIZED PROFESSIONAL EMPLOYEES' ORGANIZATION AS REQUIRED IN K.S.A. 72-5423 BY:

A. REFUSING TO PROVIDE SPECIFIC COUNTER PROPOSALS TO EACH OF THE PROFESSIONAL EMPLOYEES' ORGANIZATION'S PROPOSALS;

B. FAILING TO PROVIDE THE PROFESSIONAL EMPLOYEES' ORGANIZATION WITH SPECIFIC REASONS WHY A PROPOSAL WAS OBJECTIONABLE WHEN NO COUNTER PROPOSAL WAS OFFERED; and

C. PRESENTING ITS FIRST AND ONLY PROPOSAL AS A PACKAGE ON A "TAKE IT OR PROCEED TO IMPASSE" BASIS.

The Hays-NEA alleges the Board of Education of U.S.D. 489, Hays, Kansas, ("Board") committed a prohibited practice by engaging in *"surface bargaining"* rather than negotiating in good faith as required by the Kansas Professional Negotiations Act ("PNA"). Evidence of this negotiation tactic the Hays-NEA assets includes the Board making a *"first and best, take-it-or-leave-it offer that was predictably unacceptable, the lack of counterproposals by the board, the failure of the board to offer explanation for rejection of offers, and the board's [negotiating team's] self-professed lack of authority to consider teacher's proposals."* (Pet. Brief p.).

The Board maintains that it provided a package proposal which it believed was a good offer, and addressed, either by counterproposal, rejection or discussion, each of the proposals of the Hays-NEA that were mandatorily negotiable. Additionally, the package proposal represented all the authority given the Board's negotiating team to reach an agreement. Finally, the Board argues the Hays-NEA should be precluded from bringing the prohibited

practice complaint because by filing the joint declaration of impasse, the Hays-NEA was admitting the Board had bargained in good faith.

The Duty to Negotiate in Good Faith

The legislative parameters of the duty to bargain under the PNA are found in K.S.A. 72-5423(a):

> *"[W]hen such an [employees'] organization is recognized, the board of education and the professional employees' organization shall enter into professional negotiations on request of either party at any time during the school year prior to issuance or renewal of the annual teacher's contracts."*

K.S.A. 72-5413(g) defines "*Professional negotiation*" as:

> *"[M]eeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."*

The Kansas Supreme Court in Tri-County Educator's Ass'n v. Tri-County Special Ed., 225 Kan. 781, 783 (1979) has interpreted this to mean:

> *"Mandatorily negotiable items, when proposed by either party, must be negotiated in good faith by both parties."*

K.S.A. 72-5430(b)(5) makes it a prohibited practice for a board of education or its designated representative willfully to:

> *"[R]efuse to negotiate in good faith with the representatives of recognized professional employees' organizations as required by K.S.A. 72-5423 and amendments thereto."*

[1] *"Professional negotiations"* as contemplated by the Kansas Professional Negotiations Act is something more than the mere meeting of the board of education with the recognized employee representative. The duty to negotiate or bargain in good faith is an *"obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . .."* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (CA 9, 1943).[2] This implies both *"an open mind and a sincere desire to reach an agreement"* as well as *"a sincere effort . . . to reach a common ground."* Id.; *see also* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Herman Sausage Co., 43 LRRM 1090 (1958). *"Professional negotiations"* is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of *"take it or leave it;"* it presupposes a desire to reach ultimate agreement and thereby enter into a memorandum of agreement. A board of education must do more than sit down and chat. That the finder-of-fact must look beyond the fact that the employer met and entered discussions with the employees'

[2] Where there is no Kansas case law interpreting or applying a specific section of PNA, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et seq. (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA. Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992). See also Footnote #3, ante.

representative was succinctly stated in NLRB v. Big Three Industries, Inc., 497 F.2d 43, 46 (5th Cir. 1974):

> *"(M)erely meeting together or simply manifesting a willingness to talk does not discharge the federally imposed duty to bargain. (Citations omitted). Indeed, to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful starategy to make bargaining futile or fail. (citatitons omitted).*
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> *"Mechanically prodding through the forms of collective bargaining, therefore, does not suffice, for Congress has required the parties not simply to convene, but to meet and negotiate in a certain frame of mind -- to bargain in good faith. Negotiating parties are thus statutorily adjured to enter discussions with an 'open mind,' and a sincere purpose to find the basis of agreement . . . (citations omitted)."*

The essential element is the intent to adjust differences and to reach an acceptable common ground, and the basic requirement of negotiating in good faith being that the parties must negotiate with the view of trying to reach an agreement. Morris, The Developing Labor Law, Ch. 13, p. 559 (1989). Specifically, good faith requires more than the proposal of a particular provision and absolute refusal to even consider modifications, General Elec. Co. & Int'l Union of Elec., Radio & Mach. Workers, N.L.R.B. 192 (1964). As Justice Frankfurter explained the concept of *"good faith"* in his concurring opinion to NLRB v. Truitt Manf. Co., 351 U.S. 149, 154-55 (1956):

> *"These sections [Section 8(a), (b) & (d), 29 USC §151 (1985) of the National Labor Relations Act ("NLRA")][3] obligate the parties to make an honest effort to come to terms; they are required to try to reach agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness."*

"Professional negotiations" refers to a bilateral procedure whereby the employer and the bargaining representative jointly attempt to establish the terms and conditions of professional service. The objective the Kansas legislature hoped to achieve by this process can be equated to that sought by the Congress in adopting the National Labor Relations Act ("NLRA") as described by the U.S. Supreme Court in H.K. Porter Co., 397 U.S. 99, 103 (1970):

> *"The object of this Act [the NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act 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."*

It is this type of *"give and take negotiations"* over terms and conditions of employment that the Kansas PERB has found to be required of the public employer under PEERA. Local 1357, Service

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[3] As noted in Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 19 (December 16, 1992): "It should therefore be noted that Section 8(d) of the NLRA and K.S.A. 72-5423(a) of the PNA place upon an employer a similar duty to bargain with the certified representative about employee wages, hours and other mandatory terms and conditions of employment. The language of K.S.A. 72-5430(a)(1) & (5) is almost identical to the language of Section 8(a)(1) and (5) of the NLRA." Additionally, Section 8(b) prohibits similar activities by an employee organization that are prohibited by K.S.A. 72-5430(b).

and Maintenance Unit vs. Emporia State University, 75-CAE-6-1979, p. 3 (Feb. 18, 1980), and is equally required of a board of education under PNA.

[2] When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the professional negotiations process must be considered. Duval County School Bd. v. Florida Public Employee Relations Comm., 353 So.2d 1244 (Fla. 1978). This *"totality of conduct"* is the standard through which the quality of negotiations is tested. NLRB v. Virginia Elec. & Power Co., 314 U.S. 169 (1941).[4] *"Although . . . state of mind may occasionally be revealed by declarations, ordinarily the proof must come by inference from external conduct."* Cox, the Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1337, 1418 (1956). As Justice Frankfurter stated in his concurring opinion to NLRB v. Truitt Manf. Co., 351 U.S. 149, 154-55 (1956):

> *"A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relationship of the parties, antecedent events explaining behavior at the table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes the finding of*

[4] The "good faith" requirement of K.S.A. 72-5413(g) of the Professional Negotiations Act is also found in K.S.A. 75-4322(m) of the Public Employer-Employee Relations Act. The "totality of conduct" standard has been employed by the Kansas Public Employee Relations Board in considering charges of bad faith bargaining under PEERA. Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office, 75-CAE-9-1990 (March 11, 1991).

> *absence of good faith one for judgement of the Labor Board . . . "*

Except in cases where conduct fails to meet the minimum obligation imposed by law or constitutes an outright or per se refusal to bargain, all the relevant facts of a case are studied in determining whether the board of education or the recognized employee organization is bargaining in good faith.

In applying the *"totality of conduct"* standard, a party's conduct is examined as a whole for a clear indication as to whether that party has refused to meet and confer in good faith. No single factor is usually relied upon as conclusive evidence that the party did not genuinely try to reach agreement. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 157 (J. Frankfurter, concurring 1956). One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in negotiations, their frequency, progress toward agreement, and the persistence with which the employer offers opportunity for agreement. N.L.R.B. v. Sands Mfg. Co., 91 F.2d 721, 725 (1938). Archibald Cox in an article for the Harvard Law Review, Good Faith Bargaining, 71 Harv.L.Rev. 1401, 1418-19 (1958), provides a summary of the *"totality of conduct"* test:

> *"In every case, the basic question is whether the employer acted like a man closed against agreement with the union. The Board can judge his subjective state of mind only by asking whether a normal employer, willing to*

agree with a labor union, would have followed the same course of action."

Authority to Negotiate

[3] At the outset, a party must vest its negotiators with sufficient authority to carry on meaningful bargaining to satisfy the *"good faith"* requirements of K.S.A. 72-5413(g). *See* NLRB v. Fitzgerald Mills Corp, 313 F.2d 260 (CA 2, 1963). A negotiations representative should have authority to fully explore all bargaining issues and to reach tentative agreements on proposals, subject to the opportunity for the representative to consult with his principle before making a final commitment. *See* Midwest Instruments, Inc., 48 LRRM 1793, 1796 (1961). While the absence of competent authority of a bargaining representative to enter into a binding agreement is not necessarily indicative of bad faith, the character of the agent's powers is a factor to be given consideration. Fitzgerald Mills Corp, 48 LRRM 1748 (1961). The limiting of authority of one's negotiator to accept only its proposed contract is an indicia of a refusal to bargain in good faith. NLRB v. Herman Sausage Co., 43 LRRM 1090, 1091 (1958).

The record reveals the Board's team presented a package proposal on June 22, 1992 and such represented all the authority of the negotiating team. It is clear from the record that the Board's negotiating team did not have authority to fully explore all

bargaining issues and to reach tentative agreements on proposals, and that its only authority was to accept the Board's proposal package. This limitation is clearly illustrated in the statement of the Board's chief negotiator just prior to presenting the package proposal: *"In order to reach an agreement, or move to impasse, I'm putting all the authority that this team has on the table tonight. . ... The Board of Education's proposal, and let me reiterate, is all the authority that this team has."* (Ex. 5, p. 15). Any counterproposals or inquiries concerning modifications to that package proposal were deflected with a response concerning the Board's negotiating team's lack of authority and that the matter would have to be referred to the Board for consideration. Such a negotiating posture has been found an indicia of bad faith. *See* Fitzgerald Mills Corp, 48 LRRM 1745, 1748 (1961).

Proposals, Counterproposals, & Concessions

[4] The *"good faith"* concept established in K.S.A. 72-5413(g) imposes absolutely no requirement that the parties reach agreement. The PNA does not compel either party to agree to a proposal or make a concession, but it does impose a duty to negotiate with a fair and open mind, and with a sincere purpose to find a basis for agreement. Throughout the negotiations process, however, a party may desist from making concessions on positions reasonably taken.

A board of education need not yield from a reasonable bargaining position if its position is based upon legitimate business interests, provided it maintains an open mind to the proposals advanced by the employee organization. *See* Vause, The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 562 (1990). If honest and sincere bargaining efforts fail to produce an understanding on terms, nothing in the PNA makes illegal a board of education's refusal to accept the particular terms submitted to it. A board of education's refusal to grant a particular demand or make a counter-proposal on an issue does not necessarily constitute bad-faith bargaining.

Likewise, the failure to make a counterproposal in response to a proposal does not constitute a *per se* failure to bargain in good faith. Vause, The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 557 (1990). But depending on the circumstances, failure to offer a reasonable counterproposal could be an indicium of bad faith, Pasco County School Bd. v. Florida PERC, 353 So.2d 108, 124 (1977), and the granting or withholding of concessions may be of vital importance in defending against charges of refusal to bargain in good faith. The historic language in NLRB v. Reed and Prince Mfg. Co., 205 F.2d 131, 134-35 (1951) bears this out:

> *"[W]hile the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union if §8(a)(5) is to read as imposing any substantial obligation at all."*

Thus, even though Section 8(d) of the NLRA does not require the making of a concession, the courts' and the Board's definitions of good faith suggest that willingness to compromise is an important if not an essential ingredient. For this reason, Professor Cox concluded *"that the conventional definition of good faith bargaining as a sincere effort to reach an agreement goes beyond the statute."* Cox, the Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1337, 1414 (1956). Such a liberal definition of *"good faith"* appears equally applicable to the PNA. Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives. *See* Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979). The Professional Negotiations Act was designed to accomplish the salutary purpose of promoting harmony between boards of education and their professional employees by allowing meaningful employee participation in establishing their terms and conditions of employment.

The advancement of proposals by a party will be considered as a factor in determining overall good faith. The fact that a

proposal is *"predictably unacceptable"* will not justify an inference of bad faith if the proposal does not foreclose future negotiations, NLRB v. Crockett-Bradley, Inc., 598 F.2d 971, 975-77 (CA 5, 1979), unless it is so harsh or patently unreasonable as to frustrate agreement. Moreover, the fact that a proposal merely embodies existing practices or advances less desirable working conditions, is not, in itself, supportive of a finding of bad faith. Such facts may nonetheless be a consideration in evaluating the totality of bargaining conduct.

The Board argues that certain of the negotiation subjects were identical to subjects bargained the prior year and were the stumbling blocks to reaching the 1991-92 memorandum of agreement. According to the Board, *"It was very clear from the onset that the parties would not reach agreement"* as the arguments and positions of the parties had not changed. Therefore, the Board concludes, protracted negotiations were unnecessary.

Extensive discussions during the prior year negotiations may reduce the length of bargaining required before reaching impasse, but the fact that a subject noticed for negotiations as part of the 1992-93 memorandum of agreement was also a subject of discussion during the 1991-92 professional negotiations, does not relieve a party of the duty to come to the table with an open mind, to submit

the issue to negotiations, or to engage in a full exchange of communication.

Duty to Provide Explanation for Rejection

[5] The Board takes the position that it has no obligation to provide an explanation for rejection of a Hays-NEA proposal unless and until a request for a response is made by Hays-NEA. The duty to provide an explanation as to the specifics of a proposal found objectionable and the basis for that objection, where no counterproposal is offered, is analogous to a party's duty to provide information. The duty to negotiate in good faith found in K.S.A. 72-5413(g) encompasses the duty to furnish information. Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992, p. 52 (Dec. 11, 1992); see also NLRB v. Western Wirebound Wirebox Co., 356 F.2d 88 (CA 9, 1966); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (CA 6, 1963). It demands instead a certain amount of exchange of relevant information to insure intelligent negotiation. N.L.R.B. v. Frontier Homes Corp., 371 F.2d 978 (8th Cir. 1967).

The professional negotiations process requires that the bargaining parties have adequate information about the immediate subjects at issue in negotiations, otherwise the process cannot function properly. This requirement is based upon the principle that the parties need sufficient information to enable them to

understand and intelligently discuss the issue raised during negotiations. It is reasoned that such information may be essential in structuring economic proposals. Disclosure of relevant information encourages mutual respect between the negotiators, and promotes cooperation and open exchange. *See* Steelworkers v. Warrior & Gulf Navigation Co., 353 U.S. 574 (1960). As the U.S. Supreme Court observed in NLRB v. Insurance Agents' Int'l Union, 366 U.S. 477, 489 (1960):

> *"Discussions conducted under the standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."*

A refusal to honor a legitimate request for information can foreclose further meaningful bargaining. Relying on Truitt and other decisions requiring disclosure of bargaining information, the court in General Electric Co., 418 F.2d 736, 750 (CA 2, 1969) concluded:

> *"If the purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema."*

Additionally, the employer's duty to furnish information is based upon the premise that without such information the employee representative would be unable to perform its duties properly as negotiating agent. See Aluminum Ore Co. v. NLRB, 131 F.2d 485 (CA

7, 1942). As the Fourth Circuit court noted, certified employee representatives cannot be expected to represent unit employees in an effective manner where they do not possess information which "*is necessary to the proper discharge of the duties of the bargaining agent.*" NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, 1954). Thus an employer is required to furnish the representative of the employees relevant information needed to enable the latter effectively to negotiate for the employees, and a refusal to do so may constitute a refusal to negotiate in good faith. See NLRB v. Acme Industrial Co., 385 U.S. 432 (1966); International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (CA 3, 1967); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (CA 6, 1963); NLRB v. United Brass Works, Inc., 287 F.2d 689 (CA 4, 1961); NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (CA 2, 1968).

The failure to provide requested information has been found to constitute evidence of a refusal to bargain in good faith both on the part of the employer, N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956), and the employee organization, Detroit Newspaper Printing and Graphic Communications Local 13, 598 F.2d 267 (1979); See also Oakley, at 59; Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (CA 1, 1966); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965). The employer's refusal to supply information has been found to be as much a violation of the duty to bargain as if it had failed to meet

and confer with the union in good faith. *See* Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965); Livingston Shipbuilding Co. v. NLRB, 102 LRRM 1127 (1979). In NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, 1954), the Fourth Circuit court concluded it was:

> *"[W]ell settled that it is an unfair labor practice within the meaning of Section 8(a)(5) of the NLRA for an employer to refuse to furnish a bargaining union [such information as] is necessary to the proper discharge of the duties of the bargaining agent."*

This duty to furnish the employee representative relevant information was given explicit approval by the Supreme Court in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

Once a good-faith demand is made for relevant information, the board of education must make a diligent effort to obtain or provide the information in a reasonably prompt manner. See Quaker Oats Co., 114 LRRM 1277 (1983). In general, a board of education must furnish information notwithstanding its availability from the professional employees themselves. *See* NLRB v. Twin City Lines, Inc., 425 F.2d 164 (CA 8, 1970). Even though a board of education has not expressly refused to furnish the information, its failure to make a diligent effort to obtain or to provide the information *"reasonably promptly"* may be equated with a flat refusal. Oakley, supra at p. 17; *see* NLRB v. John S. Swift Co., 44 LRRM 1388 (1959),

(the court stated that the *"company's inaction spoke louder than its words."*).

[6] Generally, a board of education's duty to supply the bargaining representative with information does not arise until the employee organization makes a request or a demand that the information be furnished. *See* NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (CA 1, 1954); Westinghouse Elec. Supply Co. v. NLRB, 196 F.2d 1012 (CA 3, 1969). A board of education is not guilty of an unfair labor practice by failing to furnish information to the certified employee representative unless the representative has demanded the information. See Curtis-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965).

An exception to this general rule is found in the situation involving a party's response to a negotiation proposal. As a matter of course, if one party rejects the proposal offered by the other party without presenting a new counterproposal, the rejecting party has a duty to specifically explain all its objections to the proposal. Surely there can be no more valuable piece of information to a party during negotiations than an explanation of why the other party finds a proposal objectionable. By being fully advised of the extent and basis for each area of objection to the proposal, a party can intelligently review its proposal and formulate any modifications which could conceivably address the

proffered objections and hopefully make the proposal acceptable.[5] No formal request for such explanation following announcement of the rejection is required to impose this duty. The request for such information, should the proposal be rejected, is implicit in the proffering of the proposal. To hold otherwise would leave the party in the position of having to speculate as to what aspect of its proposal is objectionable and why. Such hinders the negotiation process. A party could conceivably be required to make a formal request for an explanation following a rejection, as the Board appears to advocate, but such adds nothing but an extra, time-consuming step in the negotiating process. The better policy is to require the detailed explanation to accompany the rejection. To require an explanation at the time of rejection should expedite and facilitate professional negotiations.

Take-it-or-leave-it negotiations

Generally, offering a union a contract on a *"take-it-or-leave-it"* basis has been held to be a repudiation of collective bargaining, *See e.g.* NLRB v. Insurance Agents' Int'l Union, 361

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[5] As stated in Neon Sign, 95 LRRM 1161, 1162 (19):

"Nor are we convinced that the Administrative Law Judge correctly interprets the statute when he concludes that Respondent's inaction was justified since the Union had the initial burden of coming up with a counteroffer satisfactory to Respondent in order to entice them to move, and failed to do so. As we view Section 8(a)(5), it imposes the obligation to bargain in good faith on both parties equally. This obligation extends beyond a mere pro forma appearance at the bargaining table. At the minimum, the Act requires that the parties possess a good-faith intention to reach an agreement."

U.S. 477 (1960), and may be evidence of bad faith. Palm Beach Junior College Bd. of Trustees v. United Faculty, 425 So.2d 133, 137 (Fla. 1982). A party may not so assume a *"take-it-or-leave-it"* bargaining posture to the point that it is unable to alter a position once taken. General Electric, at 762-63. There is a difference between lawful *"hard bargaining"* and unlawful bad faith bargaining. Hard bargaining, manifested by the insistence upon one's own position without making a concession to the other party's proposal, is a legitimate bargaining technique. However, this approach should not be confused with unyielding positions and a closed mind, which is inapposite to good faith bargaining. Vause, The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 561 (1990).

Although one party to a collective bargaining negotiation may adhere to a position throughout the negotiations, that party must nevertheless submit the issue to negotiation and engage in full exchange of communication pertaining to its position. City of Phoenix v. Phoenix Employment Relations Bd., 699 P.2d 1323 (Ariz. 1985). For example, where a party comes to the table with a fixed and preconceived determination as to which issues it would discuss and which it would not, there is a failure to bargain in good faith. Vause, The Good Faith Obligation in Public Sector

Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Rev. 511, p. 561 (1990). On the other hand, it has also held by the National Labor Relations Board that an employer's *"take-it-or-leave-it"* position during negotiations does not constitute bad faith where the union refused to compromise on any of its demands or to pursue negotiations diligently to help resolve bargaining differences. Romo Paper Prod. Corp., 85 LRRM 1165 (1874). Additionally, an employer's adherence to a *"package"* proposal during contract negotiations has been allowed where the employer's has exhibited a willingness to concede other points. Midwest Instruments, Inc., 48 LRRM 1793 (1961).

The Hays-NEA and the Board met at the negotiations table only four times over a period of approximately 40 days. The first two meetings involved primarily laying out the discussion items for the 1992-93 contract and the presentation of Hays-NEA proposals (Ex. 7). The Board's response came as a package proposal submitted at the third meeting. It is important to note that the Board's proposal on June 22, 1993 was its first and only response to Hays-NEA's wage proposal. Negotiations, especially on monetary subjects, are expected to be a somewhat drawn-out process in which neither party offers at the outset that which it is willing to finally settle. Generally a board of education's best offer will not be included in its initial response to a recognized employee

representative's proposals. Gilroy and Sinicropt, Collective Negotiations and Public Administration, at p. 38-39.

Prefacing the submission of the Board's package proposal the Board's chief negotiator stated, however, *"In order to reach an agreement, or move to impasse, I'm putting all the authority that this team has on the table tonight. If any of your proposals are not included in my proposal, you may assume that they are rejected. . . . If you need any of those proposals to reach agreement, then we are at impasse."* (Ex. Ex. 5, p.2). This position was reaffirmed later during discussions on whether the Board would entertain changes to the package when the Board's chief negotiator stated:

> *"But you know, what you've already got is all that we've got. And I don't know that we're going to get anymore on it. and I think a lot of that is probably a carry over from a year ago. Let's make a good offer and let's get on with impasse, go to mediation, go to factfinding. If we're going to do it, let's do it now. Let's not wait until next year to get it done. So that's where we're coming from." (Ex. 5, p. 15).*

It is apparent from the record, considered in the context of the entire course of bargaining, that the Board in fact did virtually nothing more than reject the Hays-NEA proposals. Except for the counter-offer on salaries, the Board did not make a genuine effort to reconcile the differences between it and Hays-NEA on other substantive subjects of negotiation; in some instances simply rejecting the proposal by failing to included it in the package. *See* Ex. 5, p.5. According to the joint Petition for Declaration of

Impasse twenty-three issues remained in dispute at the conclusion of the June 29, 1992 session. No agreements had been reached on any of the substantive issues noticed for negotiation. The position taken by the Board of *"accept our proposal or go to impasse"* offered little opportunity for conciliation or a negotiated agreement. While there is no question the parties appeared a long way from agreement on the salary issue, and in all likelihood could reach an impasse on that subject, impasse on one issue does not excuse a party from continuing to negotiate on the remaining unresolved subjects of negotiation. Patrick & Co., 103 LRRM 1457 (19). Additionally, once the Board submitted its package proposal, it exhibited no willingness to concede other points to reach an agreement. This position was maintained even after Hays-NEA expressed the possibility of acceptance of the Board's package proposal if agreement could be reached on other monetary proposals. As Mr. White, Hays-NEA's chief negotiator, indicated on June 29, 1992:

> *"We, you know, we feel like that there are other, there are other issues that if addressed and resolved would make a package more attractive. But when the package is simply salary and that's all and the package doesn't serve to include things that might make the salary more appealing but rather rejects the things outright, can't sell that."*

As to whether the unreasonable position taken by a bargaining party amounts to bad faith, this must be determined from the

particular facts of each situation, taking into consideration the parties and their relationship. NEA v. Board of Education of Shawnee Mission, 212 Kan. 741, 756 (1973). In Shawnee Mission, the Court concluded:

> *"As illustrated by the authority cited, there are a variety of universal actions which may conclusively demonstrate an employer's lack of good faith, in the sense that his conduct is utterly inconsistent with the sincere desire to reach an agreement. When such conduct occurs, no amount of protestations of good faith will avail the employer -- his acts belie his words.*

The record, considered as a whole, clearly demonstrates the Board did not approach the bargaining table with an open mind and sincere desire to reach an agreement through the negotiations process. Indeed, its conduct revealed an attitude of disparagement of the bargaining process. Rather than achieving an agreement through negotiation, the goal of the Board apparently was no repeat of the protracted 1991-92 negotiations. To that end the Board assumed a "*let's get on with impasse, go to mediation, go to factfinding. If we're going to do it, let's do it now. Let's not wait until next year to get it done*" attitude which sacrificed the negotiations process for expediency. This perception of a lack of willingness to compromise or explore alternatives was reinforced by the Board's continual declarations that if the Hays-NEA could not accept its package proposal or required any of its proposals to reach agreement, then the parties were at impasse. The actions of

the Board certainly fall short of meeting its obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement or to make a sincere effort to reach a common ground required by K.S.A. 72-5413(g), and are inconsistent with a course of actions a normal employer would have pursued to achieve a negotiated agreement.

There is sufficient evidence in the record to prove that the Board refused to negotiate in good faith by (1) limiting the authority of the Board's negotiators to accept only its package proposal such that the team could not fully explore all bargaining issues or reach tentative agreements on conflicting proposals; (2) adamantly refusing to enter into a memorandum of agreement with the Hays-NEA except on its own terms and rejecting the Hays-NEA proposals without explanation; and (3) taking a first-and-best, take-it-or-go-to-impasse offer which stifled the give-and-take negotiations and the full exchange of communication that accompanies the bargaining process. But for the intervening actions of the Hays-NEA, the Board would be found to have committed a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

Equitable Estoppel

As noted above, the parties met on four occasions to negotiate a memorandum of agreement for the 1992-93 school year. Then, as

Hays-NEA states in its proposed findings of fact, at the conclusion of the fourth session on June 29, 1992 *"negotiations broke off when the parties believed they had reached impasse."* (#8, p.2). A joint Petition for Impasse Declaration was signed by the chief spokesperson for both negotiating teams on that date, and filed with the Secretary on July 1, 1992. (Case No. 72-I-160-1992).

K.S.A. 72-5426(a) provides in pertinent part:

> *"If in the course of professional negotiation either the board of education or the recognized professional employees' organization or both, believe that an impasse exists therein, either party individually or both parties together may file a petition [for impasse declaration] with the secretary, . . ."*

K.S.A. 72-5426(c) states:

> *"If the secretary finds that an impasse exists in professional negotiation between the parties, the secretary shall begin impasse resolution procedures in accordance with K.S.A. 72-5427 and 72-5428, and amendments thereto."*

On July 6, 1992, the secretary, pursuant to K.S.A. 72-5427, referred the case to the Federal Mediation and Conciliation Services for the mediation phase of the impasse procedures. (Case No. 72-I-160-1992). Subsequently, on July 22, 1992, the Hays-NEA filed the prohibited practice complaint at issue here.

The PNA provides no definition for *"impasse"* nor guidelines for determining when an impasse exists. It is a generally understood principle of labor law that an impasse is reached when the negotiating parties become deadlocked after bargaining in good

faith exhaustively about mandatory subjects. Morris, The Developing Labor Law, 2d Ed., Ch. 10, at 173 (1989). It is that point in negotiations where the positions of the parties are set and beyond which they will not go. Phillip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (CA 6, 1964). If either party fails to bargain in good faith, no valid impasse can be reached. NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1349 (19__); Seattle-First National Bank v. NLRB, 106 LRRM 2621, 2625 (1981).

By filing the Petition for Declaration of Impasse the Hays-NEA, by statutory definition, was stating its belief *"that an impasse exists."* Through deductive reasoning, since no valid impasse can exist where either party fails to bargain in good faith, and since Hays-NEA through the declaration of impasse indicated that, as of June 29, 1992, the parties were at impasse, then it must be concluded that as of June 29, 1992 the Board was bargaining in good faith. The Petition for Declaration of Impasse is deemed an admission against interest of Hays-NEA.

An *"admission"* is a voluntary acknowledgment made by a party of the existence or truth of certain facts which are inconsistent with his claim in an action. As explained in 29 Am.Jur.2d, Evidence, §597 at p.651:

> *"[A]n admission is a position taken by an adversary, . . . which is contrary to and inconsistent with the contention being make by him in the litigation."*

In the instant case, Hays-NEA is alleging that the board has committed a prohibited practice by failing to negotiate in good faith during bargaining leading up to the joint declaration of impasse. This position is clearly inconsistent with a position that the parties were at impasse because a necessary element of impasse is good faith.

[7] The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction in which he is involved wholly inconsistent with his previous acts connected to such transaction. Browning v. Lefevre, 191 Kan. 397, 400 (1963). This doctrine is based upon the principle that a person is held to a representation made or a position assumed when otherwise inequitable consequences would result to another. Bowen v. Westerhaus, 224 Kan. 42 (1978). The effect of invoking equitable estoppel is that a person's voluntary conduct may preclude him, both in law and in equity, from asserting rights against another person relying on such conduct. Lines v. City of Topeka, 223 Kan. 772 (1978).

Generally, a statement by one person to another, unless relied and acted on by the other to his prejudice, does not constitute an estoppel. King v. Mead, 60 Kan. 539 (1899). However, the party seeking to invoke the doctrine of equitable estoppel need not

always show he has changed a position to his detriment based upon the other party's action. The Kansas Supreme Court in Wagner v. Sunray Mid-Continent Oil Co., 182 Kan. 81 (1957), held that the signing of a division order might estop the petitioner from maintaining his action against the defendant saying:

> *". . . rather than reliance by the defendants to their detriment, plaintiff's signing of the division orders in fact gave them a benefit to which they were not entitled."* Id. at p. 93.

The facts upon which Hays-NEA bases its allegations of failure to negotiate in good faith were all known to its representatives at the time it and the Board declared impasse on June 29, 1992. There is nothing in the record to indicate that the Board withheld information or concealed facts in an attempt to mislead Hays-NEA into believing it was negotiating in good faith, or to induce Hays-NEA to declare impasse and thereby be estopped from filing any prohibited practice claims. While the Board may not have relied to their detriment on the Hays-NEA declaration of impasse, it was the beneficiary of the Hays-NEA action which relieved it of liability for failure to negotiate in good faith. Therefore, Hays-NEA must be held to its position that the parties were at impasse on June 29, 1993, which by implication includes an admission of good faith in negotiations. Consequently, Hays-NEA is estopped from asserting the inconsistent position that the Board failed to negotiate in good faith during negotiations leading up to the June 29th

declaration of impasse. Accordingly, the Hays-NEA prohibited practice complaint must be dismissed.

This case should serve as a warning to both parties to professional negotiations. If there exists a belief that a party has failed to negotiate in good faith, a complaint should be filed at that time rather than postpone filing, proceed to impasse and, if a no agreement is forthcoming, file the complaint at a later date. Evidence of conduct occurring before the date of impasse will not be considered to support any subsequent complaint[6], and, as in this case, a party may be totally estopped from bringing the complaint. But to the extent that any related incidents occurred prior to the filing the declaration of impasse, they may be relied upon solely as background information to "shed light" on events within the period covered by the prohibited practice complaint, *See* NLRB v. Fitzgerald Mills Corp, 48 LRRM 1745, 1748 (1961).

ORDER

IT IS HEREBY ORDERED that the Petitioner's complaint are dismissed with prejudice.

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[6] However, assume the situation where Hays-NEA joined in a declaration of impasse and later discovers evidence which had been purposefully withheld information or concealed facts in an attempt to mislead Hays-NEA into believing it was negotiating in good faith, or to induce Hays-NEA to declare impasse, the Board in this situation could not take advantage of the estoppel doctrine.

IT IS FURTHER ORDERED that the Respondent shall post a copy of this order in a conspicuous location at all locations where members of the negotiating unit are employed.

Dated this 7th day of May, 1993

Monty R. Bertelli, Presiding Officer
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Human Resources, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on May 25, 1993 addressed to: Secretary of Human Resources, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 7th day of May, 1993, a true and correct copy of the above and foregoing Initial Order was served upon each of he parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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