

BEFORE THE SECRETARY OF HUMAN RESOURCES  
STATE OF KANSAS

NEA-TOPEKA,

Petitioner,

vs.

UNIFIED SCHOOL DISTRICT 501,  
TOPEKA, KANSAS,

Respondent,

Case No. 72-CAE-10-1994

**RECEIVED**

MAR 20 1995

Kansas Dept. of Human Resources  
(ES & LR)

**INITIAL ORDER**

ON the 27th day of June and the 19th day of July, 1994, 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 David M. Schauner, Attorney  
Kansas National Education Association  
715 W. 10th Street  
Topeka, Kansas 66612

RESPONDENT: Appeared by Wesley A. Weathers, Attorney  
WEATHERS & RILEY  
P.O. Box 67209  
Topeka, Kansas 66667

**ISSUE PRESENTED FOR REVIEW**

1. WHETHER THE U.S.D. 501 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 THROUGH IMPLEMENTATION OF THE FOLLOWING UNILATERAL CHANGES IN HOURS AND AMOUNTS OF WORK:

72-CAE-10-1994

- A. CHANGING THE DURATION OF THE SCHOOL TERM FOR THE 1994-95 SCHOOL YEAR;
  - B. INCREASING THE DUTY DAY BY TEN MINUTES; and
  - C. CHANGING THE NUMBER OF CLASS PERIODS AT THE SECONDARY SCHOOLS FROM SIX TO SEVEN AS PART OF THE "TECH PREP INITIATIVE."
2. WHETHER THE U.S.D. 501 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 FAILING TO PROVIDE ITS NEGOTIATING TEAM WITH SUFFICIENT AUTHORITY TO REACH AGREEMENT.

#### SYLLABUS

- [1] **PROFESSIONAL NEGOTIATIONS - Waiver of Right to Professional Negotiations - Language in agreement.** A waiver of professional employee rights to professional negotiations may be accomplished only by "clear and unequivocal" language.
- [2] **PROFESSIONAL NEGOTIATIONS - Waiver of Right to Professional Negotiations - Language in agreement.** In a case involving a claimed waiver of bargaining rights by professional employees through a "management's rights clause," such clauses are generally interpreted only to maintain the status quo of a professional agreement, and are not to be used to allow a board of education to make unilateral changes in working conditions without regard to bargaining.
- [3] **PROFESSIONAL NEGOTIATIONS - Mandatory Subjects - Duration of the school term.** A board of education may unilaterally set the total length or "duration" of the "school term" which includes the number of days or hours which teachers must actually teach children plus the number of parent-teacher conference and inservice training days if those days are required to reach the statutory minimum school term provided in K.S.A. 72-1106. If, however, a board of education proposes a school term in excess of the statutory minimum, it still has the authority to unilaterally set the number of days or hours which teachers must actually teach children but the number of parent-teacher conference and inservice training days in excess of the statutory minimum school term become mandatorily negotiable.

- [4] **PROFESSIONAL NEGOTIATIONS - Mandatory Subjects - Duration of the school term.** *"Duration of the school term" should be viewed as a "permissive" rather than "illegal" subject of negotiations.*
  
- [5] **PROHIBITED PRACTICES - Statute of Limitations - Determining when six month period begins.** *In deciding whether the period for filing a prohibited practice complaint has expired under the PNA, the secretary has adopted the rule that the six month period begins to run from the date the injured party "receives unequivocal notice of an adverse employment action rather than the time that action becomes effective."*
  
- [6] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Tests.** *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.*
  
- [7] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Balancing test adopted.** *The binding quality of a past practice may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.*
  
- [8] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Balancing test when applied.** *Included in the public employer's obligation to negotiate in good faith is the duty to continue past practices that involve mandatory subjects of negotiation.*
  
- [9] **PROHIBITED PRACTICES - Duty to Negotiate in Good Faith - Unilateral changes.** *A party to professional negotiations 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.*

### FINDINGS OF FACT<sup>1</sup>

1. The Petitioner, NEA-Topeka, is a "professional employees' organization" as defined by K.S.A. 72-5413(e) and the "recognized exclusive professional employees' organization", pursuant to K.S.A. 72-5416 through 73-5419, for professional employees of Unified School District 501, Topeka, KS ("District").
2. The Respondent, Unified School District 501, Topeka, Kansas, is operated by a "board of education" as defined by K.S.A. 72-5413(b).
3. The Secretary of the Department of Human Resources has jurisdiction over the parties and the subject matter of the case, i.e. a prohibited practice complaint, K.S.A. 72-5430a.
4. In 1992, NEA-T and USD 501 entered into a Professional Agreement (the PA) through professional negotiations under the PNA for the time period of August 1, 1992 through July 1, 1995. (Exhibit 3.) That PA provides for a limited reopener pursuant to which a successor PA was negotiated for the period of August 1, 1993, to July 31, 1995 (the current PA), and that current PA provides a limited reopener, applicable to the negotiations of concern here, as follows:

". . . Notwithstanding any of the above provisions, either party may give the other written notice as required by law on or before February 1, 1994, of their intent to reopen negotiations for the 1994-95 school year limited to the following issues: Salary Articles 32, 33, 35, 36, 37, 38, 39, and 40 (including discussion of appropriate state statutes in relation to instructional and in-service days and state-mandated reform and restructuring issues); Article 26. "Duty Year." and Article 27. "Professional Teaching Day." for clarification; Article 41, "Fringe

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<sup>1</sup> 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, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburgh 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."

Benefits" and one undesignated article or subject for the Board; and one undesignated article or subject for the Association."

Exhibit 3A, Article 1 "DURATION", p. 2.

5. The 1993-95 PA contains a reservation of rights clause, Article 4, "SCHOOL BOARD'S POWER AND RIGHTS", which states, inter alia, as follows:

"It is understood and agreed that the Board retains those powers expressly granted to it by statute, including those necessarily implied, and that the statutes are to be strictly construed, including the right to make unilateral changes except as specifically limited by any provision contained within this Agreement, including by way of example but not by way of limitation, exclusive right to establish salaries and wages, including pay for duties under supplemental contract; hours and amounts of work; vacation allowances, holidays, sick, extended, sabbatical and other leave, and number of holidays; . . .

"The foregoing enumeration of School Board's rights and responsibilities is not intended to exclude other rights not enumerated herein. The only limitation on any right of the Board shall be by law or by the express limitation by specific provisions contained within this Agreement. . . ."

Id., Exhibit 3A, pp. 4-5.

6. Article 26, "DUTY YEAR", of the PA states as follows:

"The number of duty days (as defined by Article 27, "Professional Teaching Day") for the calendar years covered by this Professional Agreement shall not exceed one hundred eighty-nine (189) days. The District will administratively schedule the 182-day instructional calendar in compliance with the State Department regulations relating to a 1098-hour school year.

"In the event of inclement weather which causes school to be closed the school year may be reduced to not less than one hundred eighty-one (181) instructional days and one hundred eighty-eight (188) duty days."

This provision relates only to the total number of duty days which necessarily includes school days, parent/teacher conferences and inservice days.

7. Neither NEA-Topeka nor the District has made any proposals during the current negotiations on the subjects of vacations, holidays, the number of parent/teacher conferences or inservice days or the length of the school day. (Ex. A, B).

8. Article 27 of the PA states as follows:

"A. A professional teaching day by its very nature cannot be completely defined by the limits of time. The professional day includes not only actual duty hours, but also instruction related and professional activities which are necessary for the physical, mental, and emotional growth of the student. Preparation of daily lesson plans, the setting of teaching goals in terms of the learner, and the using of the evaluation techniques are only a part of the full professional task. Thus, the professional day is divided into the following five (5) areas:

1. Professional instructional responsibilities.
2. Professional non-instructional responsibilities.
3. Parent-teacher conferences.
4. Extracurricular activity responsibilities.
5. Extra pay activities.

"B. The professional day for professional employees shall ordinarily consist of seven (7) hours (420 minutes) of duty time. The normal weekly time for a high school or middle school professional employee (grades 6 through 12) to be on duty in the classroom, including field trips, shall be twenty-five (25) hours. (1500 minutes); five (5) hours (300 minutes) for

preparation; and five (5) hours (300 minutes) available for other professional noninstructional responsibilities. The maximum weekly time for an elementary professional employee (grades K-5) to be on duty in the classroom, including field trips, shall be thirty (30) hours (1800 minutes); five (5) hours (300 minutes) available for preparation and professional non-instructional responsibilities. It is understood, however, that the nature of the teaching profession requires that additional hours be expended for preparation and evaluation.

"C. Professional Non-Instructional Responsibilities. Instructional-related and professional activities are requisites to the operation of the school; and even though they are sometimes outside the school day, professional employees included within the bargaining unit, because of their professional involvement, are expected to be an integral part of these programs and spend additional hours beyond the regular teaching day performing these activities. Illustrative of these activities, but not limited to, are the following:

1. Parent, student, and administrative conferences.
2. Research, development, and evaluation of programs, including accreditation.
3. Staff meetings (building, departmental, and district wide).
4. Extracurricular activity responsibilities."

Id., (Ex. 3A at 31-32).

9. Under the reopener clause of Article I of the current PA (see proposed Fact No. I), Article 26, "Duty Year" and Article 27, "The Professional Teaching Day", can only be opened "for clarification." (Ex. 3A, Article I.)
10. On or about January 31, 1994, the parties exchanged notices under the reopener clause to negotiate amendments for the 1994-95 PA. (Ex. A, B). In its reopener notice the District made specific reference to the fact that

this year's negotiations were pursuant to Article I, including the discussion of appropriate state statutes and also included Articles 26 and 27. (Ex. A). Neither party has proposed any changes to the existing language of Article 27. (Tr., pp. 159-160, Ex. B). The only change made or proposed to Article 26 by either party is the additional four (4) duty days as a result of USD 501's four (4)-day expansion of the school term. As acknowledged in NEA-T's reopener notice, "those items which are a part of the current Professional Agreement and which are not noticed by either party for negotiations will carry forward unchanged in a successor agreement." (Ex. B).

11. Pursuant to the reopener notices, NEA-Topeka and the District met on nine separate occasions for the purpose of professional negotiations under the PNA, the first of which session occurred on February 22, 1994, and the last on May 25, 1994. During these sessions, the parties explained their proposals, discussed the length of the school term, worked on NEA-T's non-salary schedule proposals such as interim leave and credit for past experience, reviewed, discussed and disputed the District's financial situation and exchanged and considered their respective salary proposals both of which included specific reference to the length of the duty year. (Tr., p. 181-186.)
12. At the time of hearing, the District was facing financial uncertainty attributed to the following problems:
  - (a) Total enrollment is falling in the 501 District. Under the School Finance Act, school funding is specifically tied to a formula calling for \$3,600 per student per year in state aid and, from the 1988-89 school year through the 1993-94 school year, the District experienced a net loss in gross head count of 369 students and current projections indicate that there will be an additional loss of 82 students during the upcoming 1994-95 school year. (Ex. N, p. 3; Jones Depo., pp. 15-17; Exhibit X.) This information was provided to the Board by the Administration on April 16, 1994. (Id.)
  - (b) The weighted "full time equivalency" (FTE) number upon which state funding is actually based is



derived from a formula with several variables, but for the 1995 budget year, FTE is predicted by the District to be within plus or minus 5 of the projected loss of 82 students from the gross head count. (Jones Depo., pp. 58-59.)

- (c) During that period, i.e., 1988-89 through 1993-94, the District has increased its certified staff by approximately 102 members. (Ex. N, p. 3.) This information was provided to the Board by the Administration on April 16, 1994. (Id.)
- (d) Based on estimates as of April 16, 1994, the USD 501 budget office was projecting that the District would have \$295,200 less to spend from its general fund budget during 1995 than it had for the 1994 budget year. (Ex. N, p. 2.) This information was provided to the Board on April 16, 1994. (Id.)
- (e) The total decline in revenue from the 1994 budget is approximately \$500,000 since USD 501 also lost an additional \$186,000 from its 1994 budgeted revenue due to a State Board audit of enrollment which found that there were actually fewer students than had been reported by the District on September 20, 1993. (Tr., pp. 262, 266; Tr., Jones Depo., pp. 9-11; Exhibit N).
- (f) As of April 16, 1994, the budget office was predicting a decrease in expenditures for the 1995 budget as compared with the 1994 budget in the amount of \$216,778, but despite this drop in expenditures, if, as predicted, there was a further decline in enrollment of 82 students, the estimated budget for 1995 would still result in a \$265,262 deficit. (Ex. N, p. 2). This projected deficit for 1995 was calculated with the assumption that salaries would remain the same as in fiscal year 1994. (Ex. N, p. 2, fn. 3.) This information was provided to the Board by the Administration on April 16, 1994. (Id.).
- (g) For the District to offer its work force a 3% salary increase, an additional \$1,568,790 would be needed, \$1,098,192 of which would go to the bargaining unit. Based upon estimated budget revenue vs. estimated expenditures, including a 3%

raise for all employees, USD 501 would have a total budget deficit of \$1,834,421. (Ex. N, p. 5.) This information was provided to the Board by the Administration on April 16, 1994. (Id.).

- (h) The District actually loses more than \$3,600 per pupil when enrollment declines because it has previously passed one LOB which was voted on and approved by the taxpayers, but LABs also provide funding authority strictly on a per pupil basis and under this existing LAB, the District realizes an additional \$900 per student; thus any decline in enrollment actually reduces District revenue by a total of \$4,500 per pupil. (Tr., pp. 264-268.)
  - (i) While there is an additional \$220,000 in state aid for special education for 1995, mandated increases in the special education services more than offset that revenue increase; it is predicted that almost \$1,000,000 more will need to be transferred to the special education budget this year as compared with last year. (Tr., pp. 308-310; Jones Depo., pp. 31-32.)
  - (j) That due to these financial problems, USD 501 decided to cut its certified staff by 55 to 70 employees for the 1994-95 school year and opted to do so by attrition rather than through nonrenewals. (Tr., pp. 269-270.)
14. The District also faces additional financial uncertainties as a result of the Brown v. Board of Education desegregation lawsuit, wherein USD 501 was ordered to institute a sweeping desegregation plan calling for the closing of some schools, the building of new schools, the transfer of students, requiring added transportation costs, and the expansion of certain existing programs. It is estimated that for the 1995 budget year, the cost of these changes, together with the costs associated with that litigation such as attorney fees and expert witnesses will be approximately \$1 million. (Tr., pp. 349-352).
15. In addition to direct financial costs associated with the Brown case, the resulting desegregation plan will also create the possibility of the loss of more students than would normally be expected, so it is possible that enrollment will decline more than the 82 now projected.

In fact, one expert has projected that USD 501 could possibly suffer a 10% loss of enrollment due to this so-called "*white flight*." (Jones Depo., pp. 15-17). Even without the uncertainty of "*white flight*", the Administration's current projection is that USD 501 will continue to lose approximately 100 students per year in every year from 1994 to 1998. (Jones Depo., pp. 15-19; Ex. X).

16. There was a bill before the 1994 Kansas legislature which the District was supporting and which would have increased the per pupil funding rate under the School Finance Act, but that legislation failed in the late stages of the session and the legislature adjourned in late April or early May without increasing the \$3,600 per pupil amount. At that time NEA-Topeka and the District knew no additional funds would be forthcoming from the State for the 1994-95 school year, and they were able to proceed with negotiation of monetary topics. (Tr., pp. 47-48; 260-261; Jones Depo., p. 84). At the time of the hearing, the only other option still available to the District to obtain increased revenue for the 1994-95 school year was through the local option budget (LAB) provisions of K.S.A. 72-6433. Since an LAB could require a district referendum upon petition by the taxpayers, the availability of those funds was uncertain as the voters could reject the LAB, thus leaving the District with no additional revenue. The District had yet to formally adopt the LAB or set the amount of same at the time of the hearing. (Tr., p. 260).
17. During the April 26, 1994, negotiating session, Dr. Ivan Klimko, the District's representative, candidly discussed the District's financial problems, including the projection of declining enrollment, and advised NEA-Topeka that the board of education had not given him authority to place any additional money on the table. (Tr., pp. 395-399.) At the conclusion of that bargaining session, the parties were in agreement that the negotiations were not at impasse, and the negotiating teams mutually agreed to establish future dates for bargaining. NEA-Topeka's team continued to meet to refine its "language proposals" on the variety of issues still unresolved. (Ex. D.). The USD 501 Board of Education has discussed the budget and the budget implications at most of its meetings during the 1993-94 school year, but did not give Dr. Klimko explicit

authority to make a financial offer until May 25th.  
(Tr., pp. 28-31; 257-258).

18. NEA-Topeka made its first salary proposal on May 18, 1994, and this offer called for a salary and fringe benefits increase for the teachers of 9.70% or 9.75% and was contingent upon no "new days" being added to the duty year. (Tr., pp., 164, 176-178). On May 25, 1994, the District's negotiator, Dr. Klimko, presented NEA-Topeka with a proposal calling for a 3% salary increase, with all of the new money being added to the salary schedule. The offer, however, was contingent upon the District being able to fund this increase through either budget cuts or a successful LAB increase. (Tr., pp. 73-76, 275-277; Ex. M, Ex. 5). The timing of this year's exchange of salary offers is not unusual for professional negotiations between NEA-Topeka and the District. In past bargaining, NEA-Topeka has not pressed for a salary offer before the end of the legislative session. (Tr., pp.188-189). Likewise, NEA-Topeka typically has not received an offer from the District until it has made its first offer. (Id.)
19. A dispute arose at the May 25, 1994, session over the District's projections for enrollment for the 1994-95 school year. Relying upon a form filed by the District Administration with the State Board of Education on December 5, 1993, NEA-Topeka contended the District might actually have an increase in enrollment and consequently state monies with which to fund salaries. (Jones Depo., pp. 5-9; See also, Cooper Depo., pp. 24-25). The District continuously accumulates information and refine its calculations concerning enrollment projection during the first part of the calendar year, and its most up-to-date enrollment projections, showing the projected student enrollment decrease, were those presented to the Board on April 16, 1994, and set forth in Exhibit N. (Jones Depo., pp. 49-50).
20. At the May 25th session, after explaining the District's 3% offer with all new money going to the salary schedule, Dr. Klimko invited a counteroffer from NEA-Topeka and, while the District's offer did not address NEA-Topeka's other financial proposals, the NEA-Topeka team understood that it could have taken the new money represented by the 3% increase and formulated a counteroffer wherein some of it would have been used to fund those other proposals. Such a counter-offer would have been considered by the District. (Tr., pp. 171-172). Dr. NEA-Topeka declined to

do so at that time, at which point Dr. Klimko indicated his belief that the parties were at impasse. (Tr., pp. 73-76, 275-277; Ex. M, Ex. 5). While indicating to NEA-Topeka that, for the first time in the parties' bargaining history the District's negotiating team was willing to continue bargaining during mediation (Tr., pp. 325-328, 170), Dr. Klimko stated the District was not willing to waive the mandatory June 1st deadline for impasse as it had during the past 2 years, because that had stretched-out negotiations beyond the start of the school year which was not in anyone's best interests; mediation had been successful last year and it was hoped that it would help this year. (Tr., pp. 325-328). It was only after this May bargaining sessions did NEA-Topeka become aware that the District intended to implement revisions in the number of work days without negotiating them. (Trans., 179, 206).

21. Another bargaining session had been scheduled for May 27th, but NEA-Topeka refused to attend and filed this Complaint instead. (Tr., p. 334).
22. During the fall of 1993, the 1994-95 academic calendar was extensively discussed with various groups within the school district, including NEA-T through its President, Linda Baker, because of concerns raised over heat in the non-airconditioned schools during the early part of the school term. (Tr., pp. 44-46). On November 18, 1993, the 501 Board of Education adopted a 1994-95 academic calendar at a regularly scheduled board meeting and that calendar included 186 duty days, 10 of which at the beginning of the school year are to be half days, with 10 minutes being added to the remaining 176 school days. The calendar also specifies the number of inservice days, the number of parent/teacher conferences, the beginning and ending dates of school and the holidays and vacation days when school is not in session. (Tr. pp. 32, 97-98, 421; Ex. E, F and G). A number of questions concerning that calendar were raised during discussion in response to which Superintendent Weaver acknowledged that there were issues "*that still must be resolved.*" Even though there were questions that remained unresolved concerning the 1994-95 school calendar, Superintendent Weaver urged the board to take action that day, "*and if there are changes that effect the decision, it could be placed under decision again.*" (Ex. F).

23. The District traditionally adopts the academic calendar for each school year during November of the preceding year and has done so without first submitting the calendar to professional negotiations with NEA-Topeka. (Tr., p. 203; Ex. H, I, J, and K).
24. The 1993-94 calendar, contains 182 teaching days of which six are parent-teacher conference days, and 7 staff development inservice days. (Tr. pp. 149, 421, 433, 447, 454; Ex. K). Pursuant to K.S.A. 72-1106(a), the minimum duration of the school term was increased to 186 days. All school districts in the State are subject to the same increase in the minimum number of days/hours for the 1994-95 school term. The District traditionally seeks to adopt a school calendar containing a school term which meets both the days and hours requirements of K.S.A. 72-1106, and which also exceeds the minimum hours required in order to have flexibility for snow days in the event of inclement weather so that additional, previously unscheduled days will not have to be added late in the school year. (Tr., pp. 496-504).
25. During the current professional negotiations, the District agreed to "discuss" the appropriate state statutes in relation to the duration of the school term. During two of the bargaining sessions, USD 501 brought as guest speakers Dale Dennis and Veryl Peters of the State Board, Joseph Zima, USD 501 general counsel, Rome Mitchell, USD 501 Director of Secondary Education, and Dr. Brenda Cain, USD 501 Director of Elementary Education, to discuss and attempt to explain the way the calendar is developed in accordance with the state statutes. (Tr., pp. 78-79, 96-98, 300-306). Despite those discussions on duration of the school term, the District never agreed that it was willing or obligated to submit that portion of its school calendar to the professional negotiations process. Instead, the District took the position that matters which relate to the duration of the school term, including whether it opts for a school term consisting of hours or days, are neither mandatory nor permissive subjects of bargaining. (Tr., p. 97).
26. The District's development of the Technical Preparation (Tech Prep) Initiative is a curriculum change which is part of a general, growing awareness that the public school system is not properly preparing noncollege bound

students for entry into the employment market. (Tr., pp. 307-308). The Tech Prep Initiative is not a new program for the 1994-95 school year, but is the extension of an existing program and involves a financial commitment for the 1994-95 school year of from \$600,000 to \$700,000. (Tr., p. 292).

27. Article 5 of the 1993-95 PA states:

*"It is understood and agreed that the Board has the full responsibility and obligation by the law to determine school curriculum."*

This Article is not open for negotiations this year. (Exhibits A and B).

28. Because of Tech Prep Initiative, the 9th graders at Topeka West High will have 7 class periods instead of 6 and this change also affects the schedules of teachers who teach the 9th grades. (Tr., pp. 117-121). However, no teacher will teach more than 5 periods and the other 2 periods will be used for planning, supervision and/or tutorials. (Tr., pp. 122-124).
29. When the District phased out junior high schools in the late 1970's and opened middle schools in their place, a change was made in the number of class periods per day; the old junior highs had only 6 periods, but as each new middle school was opened, a 7-period day was instituted. (Tr., pp. 214-215). This conversion was complete as of 1980 and continuously from that time to the present, all middle school teachers have had a 7-period day. (Tr., pp. 136-137, 214-218).
30. The parties have stipulated and agreed as follows:
- a. The evidentiary record may be reopened for the receipt of the factual stipulations and documents.
  - b. Subsequent to closure of the evidentiary record in this proceeding, certain events have occurred concerning USD 1994-95 academic calendar which will help clarify and supplement the testimony of USD 501 witnesses, including that of Dr. Brenda Cain, concerning the number of teaching days and in-service days in said calendar.

- c. During Dr. Cain's testimony, she indicated that there would be two half days of parent/teacher conferences for the elementary teachers during the first two weeks of school, but that she was not sure exactly when those events would be scheduled or how they would be handled in connection with the heat schedule of half day classes and the fact that there were four half days of District-wide teacher in-service scheduled during the period of August 22nd through the 25th.
- d. District-wide in-service programs for the afternoons of August 22nd through the 25th were scheduled just prior to August 1st. The parties agree that the following documents may be received in evidence on this issue: 1) a May 18, 1994, Memorandum from Dr. Jeffrey in. Weaver, Ph.D., USD 501 Superintendent of Schools, concerning these in-service days, (Ex. AA; 2) a document containing the detailed information about the in-service activities promised by Dr. Weaver's Memorandum which is entitled "AUGUST IN-SERVICE -Activities and Workshops" (Ex. BB).
- e. The in-service programs on the afternoons of August 24th and 25th include "elementary parent conferences" and those are the conferences referenced by Dr. Cain in her testimony. (Ex. BB).
- f. The elementary teachers of USD 501 will not be required to attend any other in-service activities on the afternoons of August 24th and 25th.
- g. USD 501 counts parent/teacher conferences as "school days" for the purpose of compliance with K.S.A. 72-1106 and includes them as "teaching days" in Exhibit G, the 1994-95 calendar.
- h. The elementary teachers will not be required to make up the two half days of in-service that they miss due to the elementary parent conferences on the afternoons of August 24th and 25th.
- i. Due to this scheduling, the 1994-95 academic calendar, Exhibit G, is now inaccurate in one regard: While all high school and middle school teachers will have a duty year, as per Exhibit G,



of 186 teaching days and seven in-service days, the elementary teachers will actually have a duty year of 187 teaching days, including the two half days of parent conferences on August 24th and 25th, and six in-service days. Thus, Exhibit G remains correct in that all teachers in the District will have a duty year consisting of 193 contract days.

### **CONCLUSIONS OF LAW AND DISCUSSION**

#### **ISSUE 1**

WHETHER THE U.S.D. 501 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 THROUGH IMPLEMENTATION OF THE FOLLOWING UNILATERAL CHANGES IN HOURS AND AMOUNTS OF WORK:

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National Education Association-Topeka ("NEA-Topeka") is the certified employee organization representing the professional employees of U.S.D. 501, Topeka, Kansas ("District"). NEA-Topeka has filed a prohibited practice complaint alleging the District has failed to bargain in good faith in violation of K.S.A. 72-5430(b)(5). Specifically, NEA-Topeka accuses the District of unilaterally changing terms and conditions of professional service without first submitting the proposed changes to professional

negotiations. The District's actions complained of by NEA-Topeka include: 1) adopting a school calendar that added four days to the school term; 2) as part of the school term adding ten minutes of class time to the duty day; and 3) changing from a six period duty day to a seven period day in the secondary schools as part of the "Tech Prep Initiative." NEA-Topeka alleges this changes impact "hours and amounts of work" which is a mandatory subject of professional negotiations therefore obligating the District to engage in professional negotiations prior to implementation of the changes.

#### **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."*

### Burden of Proof

The mere filing of charges by an aggrieved party creates no presumption of unfair labor practices under the Professional Negotiations Act ("PNA"), but it is incumbent upon the one alleging violation of the PNA to prove the charges by a fair preponderance of all the evidence. See F.O.P Lodge No. 4 v. City of Kansas City, KS, PERB Case No. 75-CAE-4-1991; Boeing Airplane Co. v. National Labor Relations Board, 140 F.2d 4323 (10th Cir. 1944). Findings of a prohibited practice must be supported by substantial evidence. Id.; Coppus Engineering Corp. v. National Labor Relations Board, 240 F.2d 564, 570 (1st Cir. 1957).

#### **A. CHANGING THE DURATION OF THE SCHOOL TERM FOR THE 1994-95 SCHOOL YEAR**

The District asserts in defense of its unilateral change in the duration of the school term for 1994-95 that: 1) by Article 4 of the Professional Agreement, NEA-Topeka waived its right to future professional negotiations during the term of that agreement; 2) the 1980 amendment to K.S.A. 72-5413(1) makes duration of the school term non-negotiable; 3) by past practice, NEA-Topeka waived its right to negotiate the calendar; and 4) the prohibited practice complaint was barred by the six month statute of limitations.

##### **1. WAIVER BY AGREEMENT**

It is the District's position that Article 4 of the Professional Agreement constitutes a waiver by NEA-Topeka of its

right to future professional negotiations during the term of that agreement because the parties "expressly agreed that during the term of the PA, USD 501 can act unilaterally on any negotiable subjects unless it is expressly prohibited by or inconsistent" with a term of that Agreement. It is well settled that when a "management rights" clause, such as Article 4, is the source of an alleged waiver, the clause must be closely scrutinized by the finder-of-fact to ascertain whether it truly affords specific justification for unilateral action. Oakley Education Association v. U.S.D. 274, Oakley, KS, Case No. 72-CAE-6-1992, p. 33, December 11, 1992; See Ador Corp, 58 LRRM 1280 (1965).

[1] The issue of waiver was fully discussed in Oakley Education Association v. U.S.D. 274, Oakley, KS, Case No. 72-CAE-6-1992, p. 31-33, December 11, 1992:

"A waiver by contract may be found where the language of the agreement is specific, or where the history of prior contract negotiations suggests that the subject was discussed and "consciously yielded." Waiver will not be inferred from a contract's silence on the subject, from a generally worded management prerogatives clause, or from a "zipper clause. " See Miami v.F.O.P., Miami Lodge 20, 131 LRRM 3171, 3177 (1989); TTP Corp, 77 LRRM 1097 (1971)."

It is a recognized labor law principle that catchall zipper clauses do not constitute a waiver of employees' interest in specific existing terms and conditions of employment so as to privilege the employer's termination or change of such terms and conditions without bargaining. Rather, such a waiver may be accomplished only by "clear and unequivocal" language. As explained in Radioear

Corp., 87 LRRM 1330, 1133-34 (1974) (Fanning and Jenkins dissenting):

"To find that a catchall clause, couched in the most general language and intended merely to forestall bargaining about what might be termed 'new' subjects, effectively operates as a 'conscious knowing waiver' of bargaining over modification or termination of an established condition of employment is, in our view, illogical."

[2] The Florida Supreme Court, in a case involving a claimed waiver of bargaining rights by public employees through a "zipper clause," said that such clauses "are generally interpreted only to maintain the status quo of a contract, and are not to be used to allow an employer to make unilateral changes in working conditions without regard to bargaining." Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 1221, 1226 (Fla 1985). As the Florida court later reasoned in Miami v. F.O.P., Miami Lodge 20, 131 LRRM 3171, 3177 (1989), to find waiver where an agreement does not directly speak to a particular management right would encourage public employers to refrain from raising at the bargaining table subjects which it hopes to change.

The District maintains the language of Article 4 is "clear and unambiguous" and therefore must be upheld as written. Arguably, Article 4 is as clear and unequivocal as any article can be that is composed primarily of one sentence containing 273 words, thirteen

semi-colons, eighteen commas, and uses the word "including" five times, but it does not reach the level of clarity required to find a waiver. In attempting to interpret the intent of the parties, this presiding officer read Article 4 numerous times, tried to break the sentence down by homogeneous subjects, and even attempted to diagram the sentence to determine which phrases modified which other words and phrases in an attempt to discern the intent of the parties. The "clarity" of Article 4 to which the District alludes still escapes this reader. One would assume that educators, of all professions, should be able to compose and communicate their intentions in a more clear, concise, and understandable manner than a sentence whose length comprises more than one-half of a page.

Nor does Article 4 demonstrate the requisite "conscious knowing waiver". Article 4 lists approximately twenty-five subjects upon which the District is given the "exclusive right to establish." A review of those subjects reveals that most, if not all, are mandatory subjects of bargaining, and are covered by provisions of the Professional Agreement. It is hard to conceive that NEA-Topeka would have spent all the time, effort and expense in negotiating the details and specifics of each Article if it then intended to waive its right to future professional negotiations by allowing the District to make unilateral changes, at will, to those Articles. This conclusion finds greater support given the history

of animosity and mistrust between the District and NEA-Topeka over the past few years.

The second paragraph of Article 4 appears to hold the key to resolving the extent of the power given by the Professional Agreement to the District to make unilateral changes. That paragraph states, in pertinent part:

*"The only limitation on any right of the Board shall be by law or by the express limitation by specific provision contained within this Agreement."*

Certainly the greatest limitation provided "by law" is that set by the PNA prohibition against unilateral changes to mandatory negotiable terms and conditions of employment. As concluded by the Secretary in Lindskoog v. U.S.D. 274, Oakley, KS, Case No. 72-CAE-6-1992, Syl. 3, December 11, 1992:

*"The PNA presupposes that a board of education will not alter existing conditions of employment without first consulting the exclusive bargaining representative selected by the professional employees and granting it an opportunity to negotiate on any proposed changes. A unilateral change, by a board of education, in terms and conditions of employment is a prima facie violation of the collective negotiation rights of its professional employees."*

Similarly, to argue that unless a provision in the Agreement contains language specifically limiting the right of the District, the District may unilaterally change those terms would result in an absurd result. A review of the fifty-two Articles and seventy-

eight pages of text in the Professional Agreement reveals no such specific language in any provision limiting the power of the District to make unilateral changes. One would anticipate that if NEA-Topeka intended this to be its sole means to avert limiting its right to negotiate changes in terms and conditions of professional service, such a provision would be found in at least one Article or provision of the Professional Agreement. What purpose is served by explaining and providing for this limitation on the District's power, if no such express limitation appears in any specific provision? The *"by the express limitation by specific provision"* language becomes surplusage.

The more reasonable interpretation of this language is that where a term or condition of professional service is established by the Professional Agreement, such provides an express limitation on the power of the District to make unilateral changes of that subject. No additional language stating that intent in each provision is necessary to protect the subject from unilateral action by the District.

In summary, where a board of education relies upon contract language as a purported waiver to establish its right to unilaterally change terms and conditions of employment not specifically covered by the professional agreement, the board must produce evidence to prove the matter in issue was fully discussed and consciously explored during negotiations and the teacher's



association must have consciously yielded or clearly and unmistakably waived its interest in the matter. Lindskog v. U.S.D. 274, Oakley, KS, Case No. 72-CAE-6-1992, Syl. 6, (December 11, 1992). The record contains no such evidence, and the language of Article 4 is not so clear and unequivocal as to show NEA-Topeka consciously yielded or clearly and unmistakably waived its right to professional negotiations prior to implementation of changes to terms and conditions of employment which are either mandatorily negotiable by law or which are specifically established by the Professional Agreement.

When Article 4 is condensed to its simplest form, it does not constitute a waiver by NEA-Topeka of its right to future professional negotiations during the term of the Professional Agreement, but simply appears to grant the District with the following powers:

1. Those expressly granted by, or necessarily implied from, statutes; and
2. To unilaterally change those terms and conditions of employment not mandatorily negotiable, or specifically covered by provisions of the Professional Agreement.

**2. K.S.A. 72-5413(1) make school term non-negotiable**

**a. Statutory amendment**

The District next argues that the 1980 amendment to K.S.A. 72-5413(1) makes duration of the school term non-negotiable. K.S.A. 72-5413(1) provides, in pertinent part:

*"Matters which relate to the duration of the school term, and specifically to consideration and determination by a board of education of the question of the development and adoption of a policy to provide for a school term consisting of school hours, are not included within the meaning of terms and conditions of professional service and are not subject to professional negotiations."*

There is no definition in the PNA for the term "school term" or the components which makeup a "school term." It is necessary, therefore, to look to other related statutes for guidance. The most appropriate statute is K.S.A. 72-1106. That statute uses both "school term" and "duration of school term."

K.S.A. 72-1106(a) tells one a "school term", during which public school for the 1994-95 school year shall be maintained, must "consist of not less than 186 school days for pupils attending kindergarten or any of the grades one through 11 and not less than 181 school days for pupils attending grade 12." K.S.A. 72-1106(e) provides that the state board of education may waive this "duration of the school term" upon application. From K.S.A. 72-1106 it may be concluded that a "school term" may be composed of a combination of:

1. Student contact days, K.S.A. 72-1106(a);
2. Time reserved for parent-teacher conferences, K.S.A. 72-1106(f); and
3. Time reserved for staff development or inservice training programs in an aggregate amount of time equal to the amount of time in excess of the school term which is scheduled by a board of education for similar activities, K.S.A. 72-1106(g).

It is the position of the District that the operative language of K.S.A. 72-5413(1) quoted above when read in conjunction with K.S.A. 72-1106 removes all matters relating to the number of days or hours which teachers must actually teach children, as well as parent-teacher conference and inservice training days, from professional negotiations. The District bases this argument on the premise that K.S.A. 72-5413(1) was amended in 1980 in response to the Supreme Court decision in NEA-Parsons v. U.S.D. 503, 225 Kan. 581 (1979). That opinion held only the statutory minimum school days, including those inservice and parent-teacher conference days included to reach that minimum requirement, were not mandatorily negotiable. If a school board wanted to extend its school term beyond the statutory minimum, it must submit those student contact, inservice days or parent-teacher conference days in excess of the minimum to professional negotiations.

The District argues the legislature adopted Senate Bill No. 539 to amend K.S.A. 72-5413(1) by adding the "*Matters which relate to the duration of a school term*" language to overturn the NEA-Parsons decision and make it clear "*that nothing concerning the duration of a school term was negotiable.*" The facts, however, do not necessary support this conclusion. First, Senate Bill No. 539 was a major rewrite of the PNA expanding the number of subjects specifically listed in the definition of "*terms and conditions of professional service* " (codifying rather than reacting to various

court determinations on negotiability), adding sections on determination of bargaining units and selection of exclusive employee representative, and establishing a negotiations impasse procedure. Such an extensive amendment cannot be characterized as simply a reaction to NEA-Parsons.

Second, to give the amendment the interpretation advanced by the District would conceivably nullify the negotiability of subjects made statutorily negotiable by other provisions of K.S.A. 72-5413(1). Among the subjects considered mandatorily negotiable as *"terms and conditions of professional service"* under K.S.A. 72-5413(1) which are components of a school calendar and that could also be considered *"matters which relate to the duration of the school term"* are *"number of holidays," "holiday leave," "number of inservice training days,"* and *"number of parent-teacher conference days."* Under the District's interpretation, a conflict develops wherein the first part of K.S.A. 72-5413(1) would make certain subjects mandatorily negotiable and then, under the *"matters which relate to the duration of the school term"* language, those same subjects would be removed from negotiation. If the intent of the legislature was to remove matters which relate to the duration of the school term from professional negotiations, why then specifically include them as subjects which are mandatorily negotiable?

In In re Adoption of Baby Boy L., 231 Kan. 199, 209 (1982), the Kansas Supreme Court cited with approval 73 Am.Jur.2d,

Statutes, §§ 249, 251 and 265, and concluded 1) the legislature is not to be presumed to have done a vain thing in the enactment of a statute; 2) a construction of a statute should be avoided which would render the application of the statute impracticable, or inconvenient, or which would require the performance of an impossible act; and 3) if possible, doubtful provisions should be given "a reasonable, rational, sensible, and intelligent construction." A construction which renders part of a legislative act surplusage is to be avoided, American Fidelity Ins. Co. v. Employers Mut. Cas. Co., 3 Kan.App.2d 245 (1979), since the legislature is presumed to not intend any statutory provision to be totally disregarded, Brown v. Wichita State University, 217 Kan. 279 (1975).

Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives. Oakley Ed. Ass'n v. U.S.D. 274, Case No. 72-CAE-6-1992 (December 11, 1992); See also Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979). The underlying purpose of the Professional Negotiations Act is "to encourage good relationships between a board of education and its professional employee." Liberal-NEA v. Board of Education, 211 Kan. 219, 232 (1973). The Professional Negotiations Act was designed to accomplish the salutary purpose of promoting harmony between boards of education and their profession-

al employees. A basic theme of this type of legislation is "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.J. Porter Co., Inc. v. NLRB, 397 U.S. 99, 103 (1969); City of New Haven v. Conn. St. Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979); West Hartford Education Ass'n., Inc. v. Decourcy, 295 A.2d 526 (Conn. 1972). The removal of subjects from negotiability and to allow a board of education to unilaterally determine terms and conditions of employment cannot be said to "encourage good relationships" and therefore the District's interpretation would be contra to the underlying purpose of the Professional Negotiations Act.

[3] A "reasonable, rational, sensible, and intelligent construction." can be given the actions of the legislature in adopting the 1980 "matters which relate to the duration of the school term" language which would, rather than being characterized as a negative reaction to the NEA-Parsons, would constitute a partial codification of that decision. This is consistent with the addition of a number of the specific subjects determined by the courts to be mandatorily negotiable although not listed in K.S.A. 72-5413(1) to the definition of "terms and conditions of professional service" that were included in Senate Bill No. 539. Under this interpretation, the "matters which relate to the duration of

the school term" language would allow a board of education to unilaterally set the total length or "duration" of the "school term" which includes the number of days or hours which teachers must actually teach children plus the number of parent-teacher conference and inservice training days if those days are required to reach the statutory minimum school term provided in K.S.A. 72-1106. This adopts a major premise of the interpretation advanced by the District.

If, however, a board of education proposes a school term in excess of the statutory minimum, it still has the authority to unilaterally set the number of days or hours which teachers must actually teach children but the number of parent-teacher conference and inservice training days in excess of the statutory minimum school term become mandatorily negotiable. These were found to be negotiable under NEA-Parsons, and this interpretation would codify that portion of the decision as well as preserve the negotiability of those subjects as provided by K.S.A. 72-5413(1).

By way of example, if a board of education establishes a 186 day school term, the minimum required by K.S.A. 72-1106, it would have the authority to unilaterally set the number of days which teachers must actually teach children (183) plus the number of parent-teach days (2) and inservice days (1). If, however, a board of education were to establish a 190 day school term, it could only unilaterally set the number of days which teachers must actually

teach children (185) and provide for one (1) parent-teacher or inservice day, but the number of parent teacher and inservice days that make up the remaining four (4) days of the school term would be subject to professional negotiations. Should the parties agree on a number of parent teacher and inservice days fewer than four (4), the balance of the 190 days could be unilaterally set by the district as student contact days. Finally, if the board of education establishes a 190 day school term, it could unilaterally set the number of days which teachers must actually teach children (189), and whether the one (1) remaining day would be a parent-teacher or inservice day would be subject to professional negotiations.

Under this interpretation, no portion of K.S.A. 72-5413(1) becomes surplusage and no statutory provision must to be totally disregarded. Effect is given to the *"matters which relate to the duration of the school term"* language amended into K.S.A. 72-5413(1), as a reaction to NEA-Parsons, by allowing boards of education to unilaterally set the length or duration of the school term, the number of student contact days, and the other *"matters which relate to the duration of the school term"* required to meet the statutory minimums set by K.S.A. 72-1106. At the same time, those subjects made terms and conditions of profession service by K.S.A. 72-5413(1) remain mandatorily negotiable once those statutory minimums have been reached. This is consistent with the



holding in Mankato Association of Professional Educators v. U.S.D. 278, Case No. 72-CAE-10-1992, p. 47-49 (March 11, 1993) and NEA-Parsons. While the number of days or hours in a school term and the number of days which teachers must actually teach children may be unilaterally set by a board of education<sup>2</sup>, these remain factors for consideration during salary negotiations.

**b. Illegal v. Permissive Subject of Bargaining**

The District maintains that "*duration of the school term*" is an "*illegal subject of bargaining upon which USD 502 cannot contractually obligate itself.*" It may be helpful at this time to review the differences between "*mandatory*," "*permissive*" and "*illegal*" subjects of bargaining. Once a specific subject has been classified as a "*mandatory*" subject of bargaining, the parties are required to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent completion of the impasse procedure set forth in K.S.A. 72-5426. See Detroit Police Officers Ass'n v. City of Detroit, 214 N.W.2d 803, 808 (Mich. 1974). A "*permissive*" subject of bargaining falls outside of the K.S.A. 72-5413(1) definition of "*terms and conditions of professional service.*" The parties may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to the point of impasse. See

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<sup>2</sup> Plus the number of parent-teacher conference and inservice training days if those days are required to reach the statutory minimum school term provided in K.S.A. 72-1106.

National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958). An "illegal" subject of bargaining is a provision that is unlawful under the PNA or other applicable statute. The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a memorandum of agreement provision embodying an illegal subject is unenforceable. Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich.L.Rev. 885, 895 (1973).

As noted, the District argues that the "*duration of the school term*" is an illegal subject of professional negotiations. There is no question but the **minimum** length of a school term is an illegal subject of professional negotiations. Certainly, the District and NEA-Topeka could discuss and agree upon a school term of less than 186 days, but such would be unenforceable as contrary to K.S.A. 72-1106. likewise, neither party could force the other to negotiate such a school term.

Similarly, the "*duration of the school term*" language used in K.S.A. 72-5413(1) certainly would, as it indicates, remove the subject from the meaning of "*terms and conditions of professional service*," and, as such would remove the subject from professional negotiations since neither no party could be forced to negotiate the subject. However, that does not mean that the subject is an "illegal" subject. As noted above, a "permissive" subject of professional negotiations also falls outside of the K.S.A. 72-

5413(1) definition of "*terms and conditions of professional service*," and neither side may insist on bargaining, but the parties may bargain by mutual agreement on a permissive subject.

[4] There is no reason why a board of education willing to negotiate the "*duration of the school term*" should be prohibited from doing so. The only caveat being that the statutory minimums of K.S.A. 72-1106 must be met. Certainly, this is consistent with the underlying purpose of the Professional Negotiations Act to encourage good relationships between a board of education and its professional employees, and this interpretation most effectively accomplishes the goals of the Act. Accordingly, "*duration of the school term*" should be viewed as a "*permissive*" rather than "*illegal*" subject of negotiations.<sup>3</sup>

The Preamble to the Professional Agreement contains an acknowledgment that the District and NEA-Topeka have entered into the agreement that follows. Article 26 of that Professional Agreement provided for a 1993-94 school term of 189 day duration; 182 days assigned to instruction (six days of which were assigned to parent-teacher conferences), and seven days for inservice training (Ex.K). The 1994-95 school term was increased to 193 day duration; 186 days assigned to instruction, six days of which were

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<sup>3</sup> As noted above, number of inservice and parent-teacher days could become mandatorily negotiable under certain circumstances.

assigned to parent-teacher conferences, and seven days for inservice training (Ex.G)<sup>4</sup>.

Applying the interpretation set forth above, the District could unilaterally establish a 193 day school term, it could unilaterally set the number of days which teachers must actually teach children at 186 and the number of parent-teacher conference days at six since they continue to be counted to reach the 186 day statutory minimum school term, but the number of inservice days that make up the remaining seven days of the school term in excess of the 186 day minimum would be subject to professional negotiations. Should the parties agree on a number of inservice days fewer than seven, and the District still desired a school term of 193 days, the balance of the 193 days could be unilaterally set by the district as student contact days, however the number of parent-teacher conference days required to meet the statutory minimum school term would resultingly be reduced so the number of parent-teacher conference days in excess of that minimum would then become negotiable.

In the instant case, the evidence shows that the school term established by the 1993-1995 Professional Agreement met not only the statutory minimum 182 day school term that existed for the

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<sup>4</sup> For the elementary teachers, the 1994-95 school term was also increased to 193 day duration. However because of the heat schedule they have 187 days assigned to instruction and parent-teacher conferences, and six days for inservice training.

1993-94 school year, but also the statutory minimum 186 day school term for the 1994-95 school year. No changes to the Professional Agreement was required to add days or hours for the 1994-95 school term to meet mandated minimums. So, when the District decided to add four days to the 1994-95 school term by consequence it opened the subjects of number of inservice, and potentially parent-teacher conference days, to professional negotiations. By unilaterally setting the school term that included seven inservice days, the District violated its duty to meet and confer in good faith, and thereby committed a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

**c. Waiver By Past Practice**

A thorough discussion of past practices and their application is set forth below. Suffice it to say here, the evidence produced by the District is insufficient to establish, pursuant to the criteria set forth below, the past practice it advocates as a waiver of NEA-Topeka's right to professional negotiations.

**d. Statute of Limitations Bar**

The District argues that the board of education took formal action establishing the 1994-95 school calendar on November 18, 1993. The prohibited practice complaint was filed on May 27, 1994; 189 days later. Since K.S.A. 72-5430a provides that any controversy concerning prohibited practices shall be commenced within six months of the date of the alleged practice, NEA-Topeka's

complaint was six days late and, therefore, barred by the statute of limitations.

[5] In deciding whether the period for filing a prohibited practice complaint has expired under the PNA, the secretary has adopted the rule that the six month period begins to run from the date the injured party "receives unequivocal notice of an adverse employment action rather than the time that action becomes effective." Liberal-NEA v. U.S.D. 480, Liberal, KS., Case No. 72-CAE-8-1992 (March, 1993); See also Armco Inc. v. NLRB, 126 LRRM 2961, 2964 (CA 6, 1987) citing with approval U.S. Postal Service, 116 LRRM 1417 (1984).

The question then becomes "Did NEA-Topeka have 'unequivocal notice of an adverse employment action' on November 18, 1993?" Black's Law Dictionary, 5th ed., defines "unequivocal" to mean "Clear; plain; capable of being understood in only one way, or as clearly demonstrated. Free from uncertainty, or without doubt". Was, therefore, the school calendar adopted on November, 18, 1993, sufficiently final so as to place NEA-Topeka on notice that this was the calendar that would be controlling for the 1994-95 school year. The answer must be in the negative.

A review of the minutes of the November 18, 1993 board of education meeting reveal that even though the school calendar had been adopted, the number of inservice days and whether they would be part of the one-half day heat schedule, remained, according to

Superintendent Weaver, an "issue . . . that still must be resolved." Even though there were questions that remained unresolved concerning the 1994-95 school calendar, Superintendent Weaver urged the board to take action that day, "and if there are changes that effect the decision, it could be placed under decision again." Clearly, the 1994-95 school calendar was not set in stone on November 18, 1993 but was expected to change to meet the changing demands of the school district.

As noted above, the inservice days component of the school term remained on November 18, 1993, and still remains, to be negotiated by the parties. Until the components of the calendar are set, either by a ratification of a professional agreement for 1994-95 or when a contract is unilaterally imposed, or when the District refuses to bargain further or expresses, with finality, an unwillingness to make change in the school schedules, can the calendar be considered final. It is not until that calendar is final can NEA-Topeka be said to have received '*unequivocal notice*' and the statute of limitations begins to run. NEA-Topeka was not aware until the May negotiation session that the District was taking the position that it was not willing or obligated to submit the components of the school term to the professional negotiations process. At that time it can be said that NEA-Topeka had '*unequivocal notice.*' This is well within the six month statute of limitations.

**B. INCREASING THE DUTY DAY BY TEN MINUTES**

The District readily admits that because certain school buildings are not air conditioned the board of education decided that the first ten days of 1994-95 school term would be only half days, with an additional 10 minutes of class time added to the remaining 176 full school days. Since Article 27 of the Professional Agreement provides that the professional teaching day consists of 7 hours of duty time, the District argues, and the additional ten minutes of class time did not extend the teaching day beyond that 7 hours, no teacher's hours and amounts of work were affected.

While the District is correct that the total time a teacher is required to be "on duty" has not increased beyond the seven hours required by the Professional Agreement, its argument fails to take into account the difference between the hours and amounts of work required of a teacher for class time as opposed to that required for preparation or other professional, non-instructional responsibilities. The Professional Agreement, however, recognizes that dichotomy. Article 27, paragraph B specifically states:

*"The professional day for professional employees shall ordinarily consist of seven (7) hours (420 minutes) of duty time. The normal weekly time for a high school or middle school professional employee (grades 6 through 12) to be on duty in the classroom, including field trips, shall be twenty-five (25) hours (1500) minutes; five (5) hours (300 minutes) for preparation; and five (5) hours (300*



*minutes) for other professional non-instructional responsibilities. . ."*

Similar limits are set forth for elementary professional employees. By agreement, professional employee duty day is broken down to what averages out to be 5 hours per day classroom duty, one hour for preparation, and one hour for other professional non-instructional responsibilities.

The District intends to add ten additional minutes of class time each week without extending the teachers' duty day. Without further explanation as to how this addition will be implemented, it is reasonable to assume that each teacher is going to be required to teach an additional ten minutes per day, which would also mean that ten minutes would have to be removed from either the teacher's preparation or other professional non-instructional responsibilities. The resulting normal weekly time for a professional employee to be on duty in the classroom will be twenty-five hours and fifty minutes, with nine hours and ten minutes divided, somehow, between preparation and other professional non-instructional responsibilities. Consequently, the decision of the District will directly affect terms and conditions of employment specifically established by the Professional Agreement, and such changes are mandatorily negotiable. The fact that the length of the duty day remains unchanged is not determinative.

The District again raises the waiver by Article 4 argument set forth above for the change in the duration of the school term. For the reasons set forth above, the argument must fail. In fact, the *"express limitation by specific provision"* language of Article 4, paragraph 2, offers additional support for NEA-Topeka's complaint. The hours set aside during a teacher's duty day for classroom duty, preparation, and other professional non-instructional responsibilities are specifically set out in the Professional Agreement and serve as an express limitation on the District's power to unilaterally set those terms and conditions of professional service. The addition of ten minutes of instruction each day by consequence must change at least two of those expressed limits. As quoted above, *"The PNA presupposes that a board of education will not alter existing conditions of employment without first consulting the exclusive bargaining representative selected by the professional employees and granting it an opportunity to negotiate on any proposed changes."* Lindskog v. U.S.D. 274, Oakley, KS, Case No. 72-CAE-6-1992, Syl. 3, December 11, 1992. By unilaterally changing the amount of daily class instruction by adding ten minutes, and correspondingly reducing the preparation or other professional non-instructional responsibilities of a teacher by the same ten minutes, the District would violate its duty to meet and confer in good faith, and thereby commit a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

However, the exact mechanics of how the additional ten minutes per day is to be added was not set at the time the prohibited practice complaint was filed or at the time of the hearing. The District contends that it can devise a plan which will not change the time limits set by Article 27, paragraph 2, but had yet to do so. Whether such is possible is unknown, and NEA-Topeka produced no evidence that such a plan could not be devised. If a plan can be devised which would not change those limits, or would not affect another mandatory subject of negotiation, then no prohibited practice will have been committed. Conversely, if no such plan is devised and a change is implemented without negotiation, the duty to meet and confer in good faith has been breached.

The problem here is that without the specifics of the plan to add the ten minutes and either the unilateral implementation of a plan that changes Article 27, paragraph 2, or an indication of an intent to implement such a plan without professional negotiations, it is impossible to make the determination that a prohibited practice has been committed. Since the school term has begun, and the ten minute addition has presumably been added, it must be assumed that a plan has been devised to address the Article 27 limits, and that plan implemented. If that plan calls for changes to the hourly limits in Article 25, paragraph 2, and those changes have been implemented without negotiation, then the District has committed a prohibited practice.

**C. CHANGING THE NUMBER OF CLASS PERIODS AT THE SECONDARY SCHOOLS FROM SIX TO SEVEN AS PART OF THE "TECH PREP INITIATIVE."**

The District contends the change from a six to seven period day as part of the "*Tech Prep Initiative*" is not mandatorily negotiable. In support of its position the District argues, in the alternative, that Article 4 constitutes a waiver of NEA-Topeka's right to negotiate the change, or, that as a result of past practice, NEA-Topeka has given the District the authority to unilaterally determine the number of teaching periods in a duty day.

**1. Waiver by Past Practice**

[6] 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. See Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Also, 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. Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992); see also R. Gorman, Basic Text on Labor Law, p. 450-54 (1976).

The number of teaching periods in a duty day is a mandatorily negotiable term and condition of professional service. Chee-Chaw Teachers Ass'n v. USD 247, 225 Kan. 561 (1979). This the District

does not contest, but in defense of its action the District argues a "past practice" developed between the parties whereby the District has been allowed to unilaterally determine whether classroom instruction is to be divided into six or seven periods. The District points to the fact that the middle school teachers have been required to teach seven periods for 14 years, and since the secondary teachers are subject to the same rights and limitations under Article 27(B) as the middle school teachers they entered into the Professional Agreement knowing they could be required to teach seven periods. As a result of that past practice, the argument continues, the NEA-Topeka has waived its statutory right to bargain.

A past practice is a consistent prior course of conduct between the parties to a collective-bargaining agreement that may assist in determining the parties present relationship. R.I. Court Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991).<sup>5</sup> Past practice may serve to clarify, implement, and even amend contract language, but these are not its only functions. Sometimes an established past practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties.

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<sup>5</sup> For a complete discussion of past practices see Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992). The reasoning, conclusions and citations included in that case are adopted here as though set forth in their entirety.

[7] The binding quality of a past practice may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions. Smith, Merrifield & Rothschild, Collective Bargaining and Labor Arbitration, p. 250 (1970). It is reasoned that because the professional agreement is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the professional agreement was entered into upon the assumption that this practice would continue in force. Essentially, by their silence, the parties have given assent to existing modes of procedure. Whether a past practice has been established, and the exact nature or such practice, is a question of fact for the presiding officer. See Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995 (1987); Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981).

While it is true that secondary teachers are subject to the same rights and limitations under Article 27(B) as the middle school teachers, and may have been so subject for up to fourteen years, there is no evidence in the record that the number of

periods of classroom instruction at the secondary level has ever been other than the six periods, or that the District has ever been allowed by NEA-Topeka to unilaterally change the number of periods. The evidence produced by the District is insufficient to establish, pursuant to the criteria set forth above, the past practice it advocates as a waiver of NEA-Topeka's right to professional negotiations.

It is just as evident that over those fourteen years the secondary teachers have come to expect that they will be required to teach six periods. Without evidence to the contrary, at the time of negotiation or ratification of the Professional Agreement, it is reasonable for the teachers to assume this long-standing practice on the number of periods at the secondary level has been accepted by NEA-Topeka and the District and will continue as an integral part of the agreement with just as much force as any of its written provisions.

[8] In summary, it is a prohibited practice for a board of education to refuse to negotiate in good faith with the certified representative of its professional employees. Included in the public employer's obligation to negotiate in good faith *"is the duty to continue past practices that involve mandatory subjects of negotiation."* Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995, 997 (1987). See also Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981); Carolina Steel Corp., 132 LRRM

1309 (1989) [Employer violated LRMA when, without bargaining to impasse, it discontinued 20 year practice of granting Christmas bonus]. By unilaterally changing the number of daily class periods at the secondary schools from six to seven, the District violated its duty to meet and confer in good faith, and thereby committed a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

## **2. Decision of Arbitrator Not Controlling**

The District seeks to use a decision from a grievance arbitration on the same change-in-number-of-class-periods issue as determinative of the issue here. According to the arbitrator, *"There is nothing in the contract that prevents the District from changing the total number of daily class periods at its three high schools from six to seven."* This determination, the District asserts, establishes U.S.D. 501's contractual rights and is binding upon both parties for all purposes, including this proceeding. This is not the case.

While the Kansas appellate courts have not addressed the issue, in In the Matter of Diane Marie Taylor, Complainant v. Unified School District #501, Topeka, Kansas, Shawnee County District Court Judge James M. MacNish, Jr. addressed the jurisdiction issue in response to a Motion for Reconsideration in Case No. 81-CV-1137. In his Memorandum Decision and order dated October 17, 1985 Judge MacNish stated:



"An arbitrator has the power to rule on matters concerning the interpretation and application of a professional agreement. Diane Taylor claimed her contract was violated by the Board's anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under 72-5430. That power is given to the Secretary of Human Resources under K.S.A. 72-5430(a)."

The Kansas Public Employee Relations Board adopted this reasoning in I.A.F.F. v. Junction City, KS, PERB Case No. 75-CAE-4 1994 (July 29, 1994).

The courts of other states have reached a similar result. The Pennsylvania Supreme Court in Hollinger v. Pa. Dept. of Public Welfare, 94 LRRM 2170, 2173 (1976), concluded:

"Thus, if a party seeks redress of conduct which arguably constitutes one of the unfair labor practices listed in [the Act], jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice is in the PLRB, and nowhere else."

Later, in Pennsylvania Labor Relations Bd. v. General Braddock Area School Dist., 380 A.2d 946 (Pa. 1977), the court reaffirm its position:

"[W]here a party seeks redress of an unfair labor practice, 'jurisdiction to determine whether an unfair labor practice has occurred and, if so, to prevent a party from continuing the practice, is in the [Pennsylvania Labor Relations Board] and nowhere else.' We

cannot, therefore, conclude that the PLRB is powerless to investigate charges of unfair labor practices merely because a collective bargaining agreement exists under which grievance arbitration is available for the determination of issues similar to those upon which the charges are based. See also Philadelphia Hous. Auth. v. Commonwealth, Pa. Labor Rel. Bd., 461 A.2d 649 (Pa. 1983).

In Detroit Fire Fighters v. City of Detroit, 293 N.W.2d 278

(Mich. 1980), the court stated:

"[O]ur legislature has determined that our state's policy is best served when public employment disputes, implicating statutory rights, are resolved under a system which provides a significant procedural, and appellate review, protection."

Similarly, the Supreme Court of Hawaii held that:

". . . [The statute] empowers the Board, upon complaints by employers, employees and employee organizations, to 'take such action with respect thereto as it deems necessary and proper.' Since the meaning and effect of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between [the employer] and [the union] was a question which related to an action which the Board might take in the exercise of its powers. The applicability of [the unfair practice statute] to the collective bargaining agreement is therefore a question which was properly placed before the Board by the petition." Fasi v. State Public Employment Rel.Bd., 591 P.2d 113 (Hawaii 1979).

The same conclusion has been reached at the federal level under the Labor Management Relations Act ("LMRA"), 29 U.S.C., §141

et seq. In Spielberg Mfg. Co., 36 LRRM 1152 (1955), The NLRB held it was not legally bound by the private tribunal's resolution. The Supreme Court, in Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964), reached the same conclusion, quoting with approval the following statement from International Harvester Co., 51 LRRM 1155, 1157 (1962):

*"There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award."*

### 3. Waiver By Contract Language

As to the waiver by Article 4 argument, for the reasons set forth above, that argument is without merit. The District also raises the argument that because NEA-Topeka expressly agreed to Article 5 of the PA, the District has "absolute power to act unilaterally on curriculum." The pertinent part of Article 5 states:

*"It is understood and agreed that the Board has the full responsibility and obligation by the law to determine school curriculum."*

It is apparently the position of the District that all matters that relate to a curriculum change are also within its "absolute power to act unilaterally."

There is no question that curriculum is within the sole discretion of the board of education, and not a mandatory subject of professional negotiations. Article 5 gives the District no new

rights or powers it does not already possess pursuant to the PNA or other statute. However, it does not give the board of education absolute power over all matters which are incident to adopting or changing the curriculum of a school district. Those statutes granting a board of education certain rights must be read in conjunction with the obligation to meet and confer in good faith on conditions of employment placed on the parties by K.S.A. 72-5423(a). On occasion a managerial right and the obligation to meet and confer create an overlap problem. By this is meant a given subject is arguably both a term and condition of employment and a prerogative which should be reserved to a board of education. As the Illinois court noted in Decatur Bd. of Ed. v. Ed. Labor Bd., 536 N.E.2d 743 (Ill.App. 4 Dist. 1989), "*Too many factors in school operations overlap . . . between managerial exclusivity and employee participation through bargaining.*" This overlap, the New Jersey Supreme Court observed, "*lead(s) to inevitable conflict.*" Woodstown-Pilegrove Bd. of Ed. v. Woodstown-Pilegrove Ed. Ass'n, 410 A.2d 1131 (N.J. 19).

It is well settled that while an employer is not obligated to bargain over purely managerial prerogatives, it is under an independent duty to bargain over the effects of that decision. FOP Lodge #4 v. City of Kansas City, KS, PERB Case No. 75-CAE-4-1991; See e.g. N.L.R.B. v. Transmarine Navigation Corp., 380 F.2d, 933, 939 (9th Cir. 1967); N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170,

176 (2nd Cir. 1961). Once the public employer makes a non-negotiable decision it is still under an obligation to notify the recognized employee representative of its decision so the representative may be given the opportunity to bargain over the rights of the public employees whose terms and conditons of employment will be altered by the managerial decision. Rapid Bindery, supra; N.L.R.B. v. Royal Plating and Polishing Co., 350 F.2d 191 (3rd Cir. 1965).

In addressing this issue the Florida Public Employee Relations Commission in Duval Teachers United v. School Board, (quoted in Stetson L.Rev., The Good Faith Obligation in Public sector Bargaining - Uses and Limits of the Private Sector Model, p. 511 (1990)) correctly concluded:

"In order to determine an employer's duty to bargain regarding a particular policy decision it desires to make, the subject matter of the decision must be categorized in one of two ways. The subject matter may itself be a wage, hour, term or condition of employment; alternatively, the subject matter may be a matter within the managerial prerogative to set standards of service, although its implementation will cause a change in wages, hours, terms or conditions of employment. If the subject matter of the decision is a term or condition of employment, it is a required subject of bargaining and the public employer must notify the certified bargaining representative of its proposed decision and afford the certified representative an opportunity to negotiate before the employer takes any action to adopt or implement the change. If the subject matter is within the managerial prerogative to set standards of service, the emploxer may adopt the change in policy but may not implement its decision until it has afforded

*the certified representative notice and an opportunity to bargain . . . "*

This reasoning was applied by the secretary in Brewster-NEA v. USD 314, Brewster, KS, 72-CAE-2-1991, and upheld by the Kansas Court of Appeals. There it was determined that as applied to the Kansas Professional Negotiations Act, a board of education could unilaterally act upon a subject of management prerogative, but if the action required alteration to mandatory subjects of professional negotiations to implement, the action could not be implemented until the action had been noticed to the exclusive professional employee representative for negotiation.

Here the District could adopt the Tech Prep Initiative unilaterally pursuant to its managerial prerogative over curriculum. However, when that curriculum change called for a change in the class periods from six to seven, a term and condition of professional service subject to mandatory negotiations, that change could not be implemented until NEA-Topeka had been given the opportunity to negotiate.

## *ISSUE 2*

WHETHER THE U.S.D. 501 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 FAILING TO PROVIDE ITS NEGOTIATING TEAM WITH SUFFICIENT AUTHORITY TO REACH AGREEMENT.

### Authority to Negotiate

[9] 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).

While there is no question that the District's representative did not have authority to offer a proposal on salary issues until May, 1994, there is nothing in the record to indicate that this lack of authority was the result of an intent on the part of the District to frustrate or delay negotiations. There is sufficient evidence that extenuating circumstances existed that made the formulation of a proposal almost impossible, included among those

being the tardiness of the legislature to act on legislation that would have increased the funding available to school districts and the settlement of the Brown v. Board of Education litigation.

The record also demonstrates NEA-Topeka was not prejudiced by the lack of authority of the District's representative to present a salary proposal earlier in the negotiations. There is no evidence of demands or protests from NEA-Topeka relative to that lack of authority. Additionally, of import, is that NEA-Topeka also failed to place its own proposal on the negotiation table until early May. On the basis of the record as a whole, it cannot be said that the District acted in bad faith in failing to give its representative authority to present or negotiate financial proposals until May.

#### **Appropriate Remedy**

The determination of the appropriate remedy is frustrated by the fact that the complained of unilateral changes have been implemented, and the school district has been operating under those changes for seven months. To attempt to return the parties to the status quo that existed at the time the complaint was filed would be impractical. When facing this same problem under the Public Employee Relations Act, the Public Employee Relations Board concluded:

*"Upon determination that the public employer has committed a prohibited practice the Public Employee Relations Board could justifiably direct the public employer to restore the situation existing prior to*



the reassignment of the support unit. But this appears impractical as the Support Unit has been reassigned for a considerable period of time, at least one bid period has past, and to reinstate the Support Unit would require pure speculation as to what, if any Acting Sergeant's pay would have been earned by Officer's Campbell and Roberts and overtime pay earned by the support officers; matters peculiarly suitable for resolution within the collective bargaining . . . The appropriate remedy, therefore, is to attempt to recreate in some practical manner the situation that would have existed had the Respondent afforded the Petitioner an adequate opportunity to bargain over the effects of the decision to reassign the Support Unit." F.O.P Lodge No. 4 v. City of Kansas City, KS, PERB Case No. 75-CAE-4-1991.

Since it is impossible, at this stage of the school year to eliminate the extra ten minutes of class time added to each school day, if the District adopted a plan that calls for changes in the amount of time a teacher must devote to daily class instruction, preparation or other professional non-instructional responsibilities specifically specified in Article 25, paragraph 2, and those change have been implemented without negotiation; or to restore the six period day at the secondary schools. The parties can, however, negotiate compensation for the effect that those changes had on the teachers.

### **ORDER**

IT IS HEREBY ORDERED that as to the issue of the District implementing a calendar which increases the number of duty days the District is found to have committed a prohibited practice as set

forth in K.S.A. 72-5430(b)(5) for the reasons set forth above. Respondent shall cease and desist refusing to negotiate the number of inservice and parent-teacher conference days to be included in the school term.

**IT IS FURTHER ORDERED** that as to the issue of the District increasing the duty day by ten minutes, if the District adopted a plan that calls for changes in the amount of time a teacher must devote to daily class instruction, preparation or other professional non-instructional responsibilities specifically specified in Article 25, paragraph 2, and those change have been implemented without negotiation, then the District has committed a prohibited practice, as set forth in K.S.A. 72-5430(b)(5) for the reasons set forth above. The District shall cease and desist refusing to negotiate, and proceed with professional negotiations pursuant to the instructions set forth above.

**IT IS FURTHER ORDERED** that as to the issue of the District changing the number of class periods at the secondary schools from six to seven as part of the "Tech Prep Initiative" the District has committed a prohibited practice, as set forth in K.S.A. 72-5430(b)(5) for the reasons set forth above. The District shall cease and desist refusing to negotiate, and proceed with professional negotiations pursuant to the instructions set forth above.

IT IS FURTHER ORDERED that as to the issue of the District failing to provide its negotiating team with sufficient authority to reach agreement is found not to have committed a prohibited practice as set forth in K.S.A. 72-5430(b)(5) for the reasons set forth above.

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

Dated this 20th day of March, 1995



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 April 3, 1995 addressed to: Secretary of Human Resources, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

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### CERTIFICATE OF SERVICE

The undersigned employee of Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 20 day of March, 1995, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

David M. Schauner, Attorney  
Kansas National Education Association  
715 W. 10th Street  
Topeka, Kansas 66612

Wesley A. Weathers, Attorney  
WEATHERS & RILEY  
P.O. Box 67209  
Topeka, Kansas 66667

A handwritten signature in black ink, appearing to read 'Wesley A. Weathers', is written over a horizontal line.