BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

| | | |
|---|---|---|
| HAYSVILLE EDUCATION ASSOCIATION, Complainant, | * | |
| vs. | * | Case Nos. 72-CAE-11-1985<br>72-CAE-13-1985<br>72-CAE-18-1985<br>72-CAEO-3-1985<br>72-CAEO-4-1985 |
| U.S.D. 261, HAYSVILLE, KANSAS, Respondent. | * | |

ORDER

Comes now on this 16th day of July, 1985, the above captioned cases for consideration before the Secretary of the Department of Human Resources. These cases come forth as prohibited practices and are filed in accordance with the provisions of K.S.A. 72-5413 et seq., the Professional Negotiations Act. These cases were combined for hearing purposes with the consent of the hearing examiner, Jerry Powell, designee of the Secretary of Human Resources for the administration of K.S.A. 72-5413 et seq.

APPEARANCES

For Haysville Education Association:

Mr. David M. Schauner, Chief Counsel, Kansas National Education Association.

For U.S.D. 261, Haysville, Kansas:

Mr. Arvid V. Jacobson, Attorney At Law.

PROCEEDINGS BEFORE THE SECRETARY

72-CAE-11-1985

1) Complaint filed by David M. Schauner, General Counsel for Kansas-NEA, against the Board of Education of U.S.D. 261 on March 13, 1985.

2) Complaint served on Respondent, Board of Education of U.S.D. 261, for answer on March 13, 1985.

3) Complaint reserved on Respondent for answer on March 14, 1985.

4) Answer of Respondent received by Department of Human Resources on March 21, 1985.

5) Answer of Respondent served on petitioner on March 22, 1985.

6) Pre-hearing scheduled for April 3, 1985. Notice of pre-hearing sent to parties on:

Petitioner: March 28, 1985

Respondent: March 28, 1985.

7) Affidavit received from Weldon Roberson on May 15, 1985.

8) Formal Hearing scheduled for July 16, 1985. Notice of hearing sent to parties on:

Petitioner: July 1, 1985

Respondent: July 1, 1985

9) Subpoenas issued to Wayne Holt, Assistant Superintendent U.S.D. 261, Don Frazier, Business Manager U.S.D. 261, Weldon Roberson, School Principal, and Betty Cattrell, Public Librarian on July 11, 1985.

10) Claimant's interrogatories on Jimmy Lee Barr and Marvin Charles Hoover received by Department of Human Resources on July 29, 1985.

11) Formal Hearing conducted on July 16, 1985.

12) Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, requests 30 day extension until September 20, 1985 to submit briefs regarding the unfair labor practice complaints pending in the Department of Human Resources.

13) David M. Schauner, General Counsel for Kansas-NEA acknowledges in a letter dated September 16, 1985 his acceptance of Arvid V. Jacobson's request for the 30 day extension.

PROCEEDINGS BEFORE THE SECRETARY

72-CAE-13-1985

1) Complaint filed by David M. Schauner, General Counsel for Kansas-NEA, against the Haysville Board of Education of U.S.D. 261 on May 17, 1985.

2) Complaint served on Respondent, Board of Education of U.S.D. 261 for answer on May 20, 1985.

3) Answer of Respondent received by Department of Human Resources on June 10, 1985.

4) Answer of Respondent served on petitioner on June 12, 1985.

5) Formal Hearing scheduled for July 16, 1985. Notice of hearing sent to parties on:

Petitioner: July 1, 1985

Respondent: July 1, 1985.

6) Subpoenas issued to Wayne Holt, Assistant Superintendent U.S.D. 261, Weldon Roberson, School Principal, and Betty Cattrell, Public Librarian on July 11, 1985.

7) Claimant's interrogatories on Marvin Charles Hoover and Jimmy Lee Barr received by Department of Human Resources on July 29, 1985.

8) Formal Hearing conducted on July 16, 1985.

9) Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, requests 30 day extension, until September 20, 1985 to submit briefs regarding the unfair labor practice complaints pending in the Department of Human Resources.

10) David M. Schauner, General Counsel for Kansas-NEA acknowledges in a letter dated September 16, 1985 his acceptance of Arvid V. Jacobson's request for the 30 day extension.

PROCEEDINGS BEFORE THE SECRETARY

72-CAE-18-1985

1) Complaint filed by David M. Schauner, General Counsel for Kansas-NEA, against the Board of Education of U.S.D. 261 on June 11, 1985.

2) Complaint served on Respondent, Board of Education of U.S.D. 261 for answer on June 11, 1985.

3) Answer of Respondent received by Department of Human Resources on June 26, 1985.

4) Answer of Respondent served on petitioner on June 28, 1985.

5) Formal Hearing scheduled for July 16, 1985. Notice of Hearing sent to parties on:

Petitioner: July 1, 1985

Respondent: July 1, 1985.

6) Subpoenas issued to Wayne Holt, Assistant Superintendent U.S.D. 261, Don Frazier, Business Manager U.S.D. 261, Weldon Roberson, School Principal, and Betty Cattrell, Public Librarian on July 11, 1985.

7) Claimant's interrogatories on Jimmy Lee Barr and Marvin Charles Hoover received by Department of Human Resources on July 29, 1985.

8) Formal Hearing conducted on July 16, 1985.

9) Respondent's attorney Arvid V. Jacobson requests 30 day extension until September 20, 1985, to submit briefs regarding the unfair labor practice complaints pending in the Department of Human Resources.

10) David M. Schauner, General Counsel for Kansas-NEA acknowledges in a letter dated September 16, 1985 his acceptance of Arvid V. Jacobson's request for the 30 day extension.

PROCEEDINGS BEFORE THE SECRETARY

72-CAEO-3-1985

1) Complaint filed by Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, against the Haysville Education Association on March 22, 1985.

2) Complaint served on Respondent, Haysville Education Association on March 22, 1985.

3) Answer of Respondent received by Department of Human Resources on March 25, 1985.

4) Answer of Respondent served on petitioner on March 26, 1985.

5) Pre-hearing scheduled for April 3, 1985. Notice of pre-hearing sent to parties on:

Petitioner: March 28, 1985

Respondent: March 28, 1985.

6) Affidavit received from Weldon Roberson on May 15, 1985.

7) Formal Hearing scheduled for July 16, 1985. Notice of hearing sent to parties on:

Petitioner: July 1, 1985

Respondent: July 1, 1985.

8) Subpoenas issued to Wayne Holt, Assistant Superintendent U.S.D. 261, Don Frazier, Business Manager U.S.D. 261, Weldon Roberson, School Principal, and Betty Cattrell, Public Librarian on July 11, 1985.

9) Claimant's interrogatories on Jimmy Lee Barr and Marvin Charles Hoover received by Department of Human Resources on July 29, 1985.

10) Formal Hearing conducted on July 16, 1985.

11) Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, requests 30 day extension until September 20, 1985, to submit briefs regarding the unfair labor practice complaints pending in the Department of Human Resources.

12) David M. Schauner, General Counsel for Kansas-NEA acknowledges in a letter dated September 16, 1985 his acceptance of Arvid V. Jacobson's request for the 30 day extension.

PROCEEDINGS BEFORE THE SECRETARY

72-CAEO-4-1985

1) Complaint filed by Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, against the Haysville Education Association on April 15, 1985.

2) Complaint served on Respondent, Haysville Education Association for answer on April 16, 1985.

3) Answer of Respondent received by Department of Human Resources on May 7, 1985.

4) Answer of Respondent served on petitioner on May 8, 1985.

5) Formal Hearing scheduled for July 16, 1985. Notice of hearing sent to parties on:

Petitioner: July 1, 1985

Respondent: July 1, 1985.

6) Subpoenas issued to Wayne Holt, Assistant Superintendent U.S.D. 261, Don Frazier, Business Manager U.S.D. 261, Weldon Roberson, School Principal and Betty Cattrell, Public Librarian on July 11, 1985.

7) Claimant's interrogatories or Jimmy Lee Barr and Marvin Charles Hoover received by Department of Human Resources on July 29, 1985.

8) Formal Hearing conducted on July 16, 1985.

9) Arvid V. Jacobson, attorney for Board of Education of U.S.D. 261, request 30 day extension until September 20, 1985, to submit briefs regarding the unfair labor practice complaints pending in the Department of Human Resources.

10) David M. Schauner, General Counsel for Kansas-NEA acknowledges in a letter dated September 16, 1985 his acceptance of Arvid V. Jacobson's request for the 30 day extension.

FINDINGS OF FACT

1) That Shirley Fitzgerald was employed by U.S.D. 261 as a chapter one reading teacher. (T-13)

2) That Shirley Fitzgerald was a member of Haysville Education Association and served as president of that Association in 1984 and 1985. (T-14)

3) That during the 1984-1985 year, Shirley Fitzgerald did serve on the bargaining team along with Bob Cairns, Barry Rossheim, Lori Rosebone, Evelyn Rickets, Scott Sterm, and Richard Riggs. (T-14)

4) That the Association bargaining team did draft written proposals for use at the bargaining table during the bargaining seasons. (T-16)

5) That Barry Rossheim served as spokesman for the Association team but Mr. Rossheim did not have the authority from the team or the committee to change the Association's bargaining position without consulting with the team. (T-16)

6) That prior to April 11, 1985, the Association team had discussed conceptual bargaining. (T-17)

7) That on April 11, 1985, Shirley Fitzgerald recalled a discussion between Mr. Rossheim and Mr. Jacobson during which Mr. Jacobson informed Mr. Rossheim that he wanted specific written proposals submitted to Dr. Rundice's office by 5:00 o'clock on May 2nd, or the Board would not meet with the Association on May. 3rd. (T-19)

8) That Shirley Fitzgerald was present the entire meeting on April 11th, at the Nelson School Library. (T-22)

9) That on April 30th, Dr. Rundice came by Nelson School to pick up the Haysville Education Association's written proposals from Shirley Fitzgerald. (T-24)

10) That the district's salary proposal and the district's fringe benefit proposal had not been received by the association prior to April 30th. (T-25)

11) That the parties exchanged financial proposals either on May 22nd or May 29th. (T-25)

12) That the parties stipulated that since 1976 the teams have met in the board office. (T-28)

13) That Joint Exhibit #5 denoted that the Haysville Education Association no longer wanted to meet at the office of the Board of Education. (T-31)

14) That the Association's basic reason for no longer wishing to meet at the office of the Board of Education was their belief that both sides would come prepared and be able to spend more quality time rather than so much time in looking up things. (T-32)

15) That since 1976, in Shirley Fitzgerald's opinion, there were times when the Board was not prepared to negotiate. (T-32)

16) That another express goal of the Association in wanting to meet at a neutral site, was to avoid the possibility of caucuses being overheard through the intercom system at the Board room. (T-37)

17) That according to Shirley Fitzgerald, Barry Rossheim was the first member of the committee to suggest meeting at a neutral site. (T-40)

18) That Shirley Fitzgerald indicated that the Association would have problems meeting at any other school owned by U.S.D. 261 because some of the same concerns would apply to those buildings as well. (T-42)

19) That in a letter, dated February 8th, to the Board of Education from Barry Rossheim, Mr. Rossheim suggested that a meeting site of the Haysville Library would be appropriate. (T-44)

20) That by April 11, 1985, which was the first meeting, Barry Rossheim had some of the Association's proposals prepared in writing. (T-45, 46)

21) That the Association, in a letter dated January 31, 1985 from Barry Rossheim and Shirley Fitzgerald addressed to the Board of Education, provided the Board with a list of items which were proposed to negotiate for the 1985-1986 agreement. (T-47)

22) That Shirley Fitzgerald believed that all the proposals contained in the January 31, 1985, notice to negotiate, had been

reduced to writing at the time of the April 11th meeting. (T-47)

23) That Shirley Fitzgerald stipulated that the Association did have some written salary schedules prepared by April 11th. (T-48)

24) That Joint Exhibit #1 was given to Mr. Rossheim on the evening of April 11th. (T-50)

25) That at the April 11th meeting, the Board did make a proposal on a fringe benefit package. (T-51)

26) That at the April 11, 1985 negotiating session, Mr. Vic Jacobson, attorney for the Board, asked Mr. Barry Rossheim whether he had the specific language already prepared on each of the items the Haysville Education Association had proposed and Mr. Rossheim answered that he did not have the authority to give those to Mr. Jacobson at that time. (T-50)

27) That the Association stipulated that Mr. Rossheim did not have the authority to submit written proposals to the Board on the night of the April 11th meeting. (T-52)

28) That subsequent to the April 11th meeting, the Haysville Education Association executive committee met for the purpose of putting together a package of written proposals which would be submitted to the Superintendent of Schools prior to May 3, 1985. This package was submitted on or about April 30, 1985. (T-53)

29) That Joint Exhibit #19 was delivered to the Superintendent of Schools by Ms. Fitzgerald on May 1, 1985, at approximately 9:45 a.m. (T-56)

30) That Joint Exhibit #20 was a second group of proposals that were submitted by Barry Rossheim to Dr. Rundice on May 17, 1985 at approximately 4:10 p.m. (T-56, 70)

31) That the Board established a deadline for receipt of the Association's written proposals of 5:00 p.m. on May 2nd. (T-65, 94)

32) That the Board failed to meet with the Association on May 3rd, a scheduled negotiating session. (T-65, 95, 186)

33) That the Board never accepted any of the dates proposed by the Association for bargaining. (T-64)

34) That on the evening of April 11th, Barry Rossheim was not willing to share specific written information about the Association's proposals. (T-64)

35) That at the April 11th meeting, the Board's position was that unless the proposals were submitted in writing by a specific date, they would not meet with the Association on the next scheduled meeting date. (T-65)

36) That only those proposals contained in Joint Exhibit #19 were delivered prior to the scheduled May 3 meeting and that the balance of the Association's written proposals, were delivered to the Superintendent of schools on May 17th. (T-71)

37) That Robert Cairns was a member of the Haysville Education Association and was a participant on the bargaining team during the negotiations for the 1985-86 agreement. (T-76)

38) That Mr. Cairns did participate in the drafting of a letter which was dated January 31, 1985 addressed to the Board of Education. (T-77)

39) That the Association failed to utilize the method of bargaining which requires each side committing to paper its position on a variety of issues and, in fact had chosen conceptual bargaining as their approach to negotiations. (T-79)

40) That on April 11th, May 22nd, May 29th, May 30th and May 31st, the Board did not take an opening caucus. (T-84)

41) That Barry Rossheim was the chief spokesperson for the Association. (T-86)

42) That the parties have met at the Board office for bargaining for a number of years and at no time in the past had the "place to meet" been a negotiable topic. (T-88)

43) That at the April 11th meeting, Mr. Barry Rossheim did in fact say he would be willing to negotiate any of the Association's 31 proposals. (T-93)

44) That Mr. Cairns did hear Mr. Rossheim, in an answer to Mr. Jacobson, say that he was not within his authorization to give written proposals but he did have the power to discuss with Mr. Jacobson any of those items. (T-96)

45) Barry Rossheim served as a member of the Haysville Education Association team during the 1984-85 school year and acted as chief negotiator for the teachers team. (T-117)

46) That on April 11th, Barry Rossheim gave the Board, in verbal form, the specific language of the Association proposal on leaves. (T-138)

47) That the Board of Education gave the Association specific written proposals at the April 11th meeting. (T-181)

48) That Mr. Jacobson is the chief spokesperson for U.S.D. 261 and either on or before April 11, 1985 he scheduled a negotiations meeting for May 3, 1985. (T-184)

49) Tim Rundice is employed by U.S.D. 261, as Superintendent of Schools. (T-204)

50) Weldon Roberson, is currently employed by U.S.D. 261 Sedgwick County, Kansas as principal of Campus High School. (T-212)

51) Weldon Roberson was a teacher at U.S.D. 261 from 1967 to 1975, and during this period of time was involved in professional negotiations in the capacity of a negotiator for the teachers, the President of the Teachers Association on two different occasions, and one year served as chief negotiator for the Board of Education. (T-214)

CONCLUSIONS OF LAW/DISCUSSION (72-CAE-11-1985 & 72-CAEO-3-1985)

The two cases presently under consideration by the examiner are very nearly mirror images of one another. The central issue in case number 72-CAE-11-1985 may be stated as:

> "Is it a prohibited practice for a Board of Education to refuse to meet at a neutral bargaining site?"

The central issue in case number 72-CAEO-3-1985 may be stated as:

> "Is it a prohibited practice for a professional employee's organization to demand that the bargaining representatives meet at a neutral site?"

The examiner, after having fully considered all the evidence and testimony presented relative to these cases, is of the opinion that a true refusal to bargain did not occur in either case. The record reflects that the parties did, in fact, meet at the Nelson Elementary School Library. It appears to the examiner that both parties "refusal" to meet was based upon location rather than an attempt to avoid the process "per se". The distinction identified by the examiner may well be only technical but does provide great insight into understanding the "true" nature of the problem between the parties. Considerable information was provided to explain why the parties adopted their respective positions relative to the site for bargaining. Notwithstanding either parties rationale, suffice it to say that both parties have the right to approach the table as equals with their own sets of concerns and ideas for the resolution of those concerns. The concerns referred to by the examiner are not those defined as "terms and conditions of professional service" but are rather referred to in labor relations as "shape of the table" issues or disputes. A meeting site is a classic "shape of the table" issue. While not enumerated as a mandatorily negotiable subject, logic dictates that the issue must in some way be resolved. The premise that the parties are equal negates the possibility that either party has the right to unilaterally establish the meeting site.

The examiner is of the opinion that many subjects qualify as "shape of the table" issues, and believes that those issues

are best addressed via "ground rules for negotiations", mutually agreed to by the parties. Certainly not all such issues will lend themselves to mutual agreement and when such a condition exists, the rights of each party must be honored by the other.

In the instant case both parties voiced their concerns regarding the meeting place or at very least their desires relative to a meeting place. They were unable to reach an agreement but failed to acknowledge or honor the rights of the other. Barring an agreement on a meeting site, the examiner is of the opinion that the deadlock should have been resolved by alternating the meeting place, meeting first at the place of choice of one party and meeting next at the place of choice of the other. A solution of this type maintains the equality of the parties, prevents either party from pre-conditioning the bargaining process, and allows the parties to advance into bargaining in spite of these peripheral stumbling blocks.

The examiner finds, therefore, that while both parties may have committed technical violations of the act, those acts were not of a willful nature and thus no finding of bad faith may be made. The examiner notes that such acts could in the future constitute evidence of bad faith and therefore directs the parties to henceforth resolve "shape of the table" disputes in the above described manner.

IT IS SO ORDERED THIS 18th DAY OF December, 1985.

Jerry Powell

Jerry Powell, Designee of the Secretary
Labor Relations & Employment Standards
Section - Department of Human Resources
512 W. 6th
Topeka, KS 66603-3178

CONCLUSIONS OF LAW/DISCUSSION (72-CAE-13-1985)

The central issue in this case may be stated as:

> "Is it a prohibited practice for a Board of Education to unilaterally cancel a scheduled negotiating session?"

The examiner will address this question as both a general question and as a specific question in light of the facts presented.

As a general rule, the parties to the negotiations process have the right to approach the bargaining table as equals. When they meet at the table the Secretary has long encouraged the parties to commence their meetings with the establishment of ground rules for negotiations. The ground rules established should resolve "shape of the table" disputes such as meeting times, dates, places, length of meetings, calling of special meetings, calling of caucuses, length of caucuses, dealings with the press, minutes of meetings, recess from meetings, adjournment of meetings, cancellation of meetings, and a host of other procedural issues relative to the actual bargaining. Shape of the table issues have been addressed previously in this order relative to cases 72-CAE-11-1985 and 72-CAEO-3-1985.

Absent a set of ground rules allowing the unilateral cancellation of a negotiating session, the general rule again would dictate attendance by both parties. A finding of good faith or bad faith may not be based, however, on general principles but must take into consideration all of the relevant facts surrounding the event alleged to evidence bad faith.

A review of the facts in the instant case reveals that parties had not exchanged written proposals on all issues noticed for negotiations by the date of the May 3, 1985 meeting which was cancelled by the Board. The record further reflects that the Association did in fact have written proposals prepared on at least a portion of those items noticed for negotiations (Joint Exhibit 19) well in advance of the May 2nd - 5:00 PM deadline set by the Board but chose not to provide them earlier when requested.

The examiner has ruled in this order on case 72-CAEO-4-1985 that the Board had the right to request and receive written proposals in a timely fashion. Stipulation of the parties indicates that there were two such "packets" of written proposals found as Joint Exhibit 19 and Joint Exhibit 20. Joint Exhibit 19 was delivered to the Board of Education on May 1, 1985 and Joint Exhibit 20 was delivered to the Board on May 17, 1985. The fact that the Association had in part fulfilled their obligation to provide written proposals and had done so in advance of the deadline set by the Board does not automatically lead the examiner to a finding of bad faith on the part of the Board. Even if the Association had provided all of their written proposals by the deadline established by the Board, logic dictates that the parties be allowed adequate time in which to review those proposals and identify any areas of confusion, misunderstanding, or areas giving rise to questions. That right to a period of consideration cannot be denied but can be given up. The representative for the Board has testified that he was willing to waive his right to a period of consideration based upon his belief that the Association proposals had not been reduced to writing when originally requested at the April 11th meeting. The representative for the Board further testified that his decision to cancel the May 3rd meeting was predicated on his discovery that the Association had, but refused to supply the Board with, their written proposals on April 11th, and his belief that the actions of the Association placed the Board at a disadvantage in negotiations.

The action of the Board in cancelling the May 3rd meeting could give the <u>appearance</u> of being punitive in nature in retaliation for the above stated actions of the Association. The examiner does not condone any punitive action taken by either party against the other but is not convinced that the action of the Board <u>was</u> necessarily punitive. The examiner believes that the action of the Board in agreeing to the May 3rd meeting was designed to expedite bargaining which was rapidly approaching June 1st

the statutory date of impasse. The Board had supplied their written proposals to the Association and sought simply to have their reciprocal right to written proposals honored in return. The agreement to meet on May 3rd was a meeting of accomodation on the part of Board based on their belief that written proposals had not been in existence when requested on April 11th. When the representative of the Board became aware that proposals had been in existence in writing when requested on April 11th he chose to reclaim his right to a period of consideration and revoke his offer of accomodation. All evidence and testimony presented indicates that the Board was attempting to accomodate the Association, facilitate and expedite the bargaining process. The record further reflects that the Association was engaged in a course of conduct which could only frustrate and unnecessarily prolong the process, or serve to deny the Board certain rights accorded them by statute. The examiner rejects the idea that the Board should now be penalized for an act caused by the conduct of the Association.

Assume for a moment that the examiner found the Board's action to constitute bad faith. In reality, the examiner would be telling the Board that they should have attended the meeting but would have no authority to dictate what should have transpired at that meeting. The Board could have taken the posture at the meeting that they had had insufficient time in which to consider or even fully read the Association's proposals. Such a posture could hardly be found to be unreasonable. In essence, the Board's physical attendance at the May 3rd meeting would have changed nothing. The examiner believes that a finding of bad faith requires considerably more than the actions engaged in by the Board in light of all the facts evident in this case.

Based on all the foregoing, the examiner finds that the Board of Education did not engage in bad faith by unilaterally cancelling the May 3, 1985 negotiating session. Accordingly,

the complaint of petitioner in this matter is dismissed as being without merit.

It is so ordered this 18th day of December, 1985.

Jerry Powell

Jerry Powell, Designee of the Secretary
Labor Relations & Employment Standards
Section - Department of Human Resources
512 West Sixth
Topeka, Kansas 66603-3178

CONCLUSIONS OF LAW/DISCUSSION (72-CAE-18-1985)

In the instant case, it appears to the examiner that the petitioner seeks a finding of bad faith based on actions of the Board during negotiations relative to the deletion of three permissive items from a successor agreement.

Some confusion exists in the mind of the examiner, however, in determining exactly what act constitutes an alleged violation. It appears that two conditions could be determined to qualify as violations.

First, the Secretary has held that no item once placed in a labor agreement, whether permissive or mandatory, may in practical application be changed unless properly noticed and negotiated. If this is the substance of petitioners claim, it appears that the complaint has been filed prematurely. To the knowledge of the examiner, no successor agreement has been reached nor has a unilaterial "contract" been issued and it is therefore impossible to determine whether any item has been changed. The examiner is obviously unable to predict what will transpire in the future and is likewise, therefore, unable to find that any prohibited act has occurred.

Even if it were possible to accurately foresee a violation, the examiner would be without authority to act until the violation had taken place.

A conspiracy to act may well be illegal in some areas of law. The examiner is not convinced, however, that an intent to act in violation of the law was proven or may be construed in this case to be a prohibited practice.

The second act which the examiner very well might find to constitute a prohibited practice would be coercion based on the Board's stated intention. If the Board used the threat of deletion of items as a tool to gain concessions from the Association, a violation of the Act would be clear. The evidence in the record, however, does not indicate such a series of events. It appears to the examiner that the statement of the Board's representative was the product of a "tit for tat" exchange at the

table. The evidence indicates that the Association took the position that the unnoticed permissive item of Board Management Rights automatically dropped out of any successor agreement. That argument was rejected by the Board and is similarly rejected by the examiner. When the Association's position was made known to the Board, the Board countered that the three articles on Academic Freedom, Professional Rights and Responsibilities, and Assignment and Transfer had been included in the Association's February 1st notice and it would therefore be the position of the Board that they be deleted from any successor agreement. Obviously, the Association has rejected the rationale of the Board as evidence by the instant complaint and again the examiner also rejects the interpretation espoused by the Board. The examiner is not convinced however that even the Board was attempting to indicate that its rationale was valid.

It appears to the examiner that the Board was countering with a rhetorical position in an attempt to emphasize its disagreement with the interpretation of the law demonstrated by the Association. It does not appear to the examiner that the Board was attempting to use its position to coerce a concession on any proposal but rather was using its position to encourage an alteration in the Association's interpretation of the law. The examiner does not believe that the negotiations table is the appropriate place for the parties to exchange their beliefs and interpretations of the Professional Negotiation's Act, but also does not believe that such an act can be categorized in this case as a prohibited practice.

The examiner believes that in order to clarify his opinion, some discussion of his interpretation of the law is in order. The court, in Dodge City National Association v. U.S.D. 443 addressed the illegality of changing a mandatory negotiable item which had not been noticed or negotiated. The examiner is of the opinion that the same restriction on change applies to permissive items. The examiner bases his opinion in large part on K.S.A.

72-5423 wherein it states:

> "Notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party."

The statute makes no reference to mandatory items and a contract may certainly contain permissive items. Therefore, the examiner concludes that any change to an existing agreement requires the submission of proper notice. In practice, the parties seem to have recognized their obligation to serve notice on those mandatory subjects they propose to change. Somehow that practice has been expanded in some areas to include a "notice" being served relative to both mandatory and permissive items proposed for no change. The practice appears to have further evolved to a point where the Association contends that an item not "noticed for no change" automatically expires and drops from the agreement. The examiner finds nothing expressly wrong with notifying the other party to the process of those items on which no change is proposed. Similarly, however, the examiner sees no particular purpose served by such an act. Simply stated, the examiner is of the opinion that the only items on which a notice is needed are new items or existing items in which a change is proposed.

In this case, the Association was in error in assuming that an item "not noticed for no change" would drop from the agreement. Likewise, the Board was in error in assuming that an item "noticed for no change" was "opened" for purposes of negotiations. The erroneous assumptions expressed by the parties, however, would not constitute a prohibited practice in either case.

Based on the foregoing, the examiner does not find that any prohibited practice has occurred and therefore dismisses petitioners complaint as unmerited.

IT IS SO ORDERED THIS 18th DAY OF December, 1985.

Jerry Powell

Jerry Powell, Designee of the Secretary
Labor Relations & Employment Standards
Section - Department of Human Resources
512 West Sixth
Topeka, Kansas 66603-3178

CONCLUSIONS OF LAW/DISCUSSION (72-CAEO-4-1985)

The issue in the instant case may be stated in the following manner:

> "Is it a prohibited practice for the certified representative of the professional employee's to refuse to provide the Board of Education with specific written proposals on the items noticed for negotiations?"

In answer to that question, the Secretary believes that a review of the bargaining process is in order. Of specific interest in that review are the rights granted to the parties by the statute. K.S.A. 72-5414 deals with the rights accorded to professional employees and states in part:

> "Professional employees shall have the right to form, join or assist professional employees' organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service."

K.S.A. 72-5423 (a) then states in part:

> "Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education, except that the boards of education are required to comply with this act, and the act of which this section is amendatory, in recognizing professional employees' organizations, and when such an 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."

Clearly from the above cited statutes, both parties have the right to expect the other to participate in the negotiations process in regard to "terms and conditions of professional service." The statute then defines "terms and conditions of professional service" at K.S.A. 72-5413 (l) wherein it states:

> "'Terms and conditions of professional service' means (1) salaries and wages, including pay for duties under supplemental contracts; hours and amounts of work; vacation allowance, holiday, sick, extended, sabbatical, and other leave, and number of holidays; retirement; insurance benefits; wearing apparel; pay for overtime; jury duty; grievance procedure; including binding arbitration of grievances; disciplinary procedures; resignations; termination

> and nonrenewal of contracts; re-employment of professional employees; terms and form of the individual professional employee contract; probationary period; professional employee appraisal procedures; each of the foregoing is a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; and (2) matters which relate to privileges to be accorded the recognized professional employees' organization, including but not limited to, voluntary payroll deductions, use of school or college facilities for meetings, the dissemination of information related to the professional negotiations process and related matters to members of the bargaining unit on school or college premises through direct contact with members of the bargaining unit, the use of bulletin boards on or about the facility, and the use of the school or college mail system to the extent permitted by law, reasonable leaves of absence for members of the bargaining unit for organizational purposes such as engaging in professional negotiating and partaking of instructional programs properly related to the representation of the bargaining unit; and (3) such other matters as the parties mutually agree upon as properly related to professional service. Nothing in this act, or acts amendatory thereof or supplemental thereto, shall authorize the diminution of any right, duty or obligation of either the professional employee or the board of education which have been fixed by statute or by the constitution of this state. Except as otherwise expressly provided in this subsection, the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiation proposal would not prevent the fulfillment of the statutory or constitutional objective. 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 negotiation." (Emphasis Added)

It is interesting to note that the above cited definition again denies the diminution of any right, duty or obligation of either party but goes on to state that negotiations on those rights, duties, or obligations are not absolutely precluded. The converse of that premise is that those rights, duties, or obligations may be negotiated with consent of the parties. Restated, your rights as granted by statute are yours to maintain or to

bargain as you so choose. Those items you choose to bargain, as contrasted with those items you must bargain, are referred to as "permissive" subjects. Many rulings from the Secretary and from the courts have attempted to define which items qualify as "mandatory", "permissive", and "illegal" subjects of bargaining. In addition, the Secretary has issued numerous letters of opinion regarding negotiability. It seems quite evident that there exists a great deal of "gray area" in the minds of many relative to the question of what must and what need not be mandatorily discussed. The statute dicates good faith negotiations on defined "terms and conditions of professional service" and characterizes a refusal as a prohibited practice.

The statutory directive to bargain mandatory subjects, and the right to refuse to bargain permissive subjects places the parties in a serious dilemma, especially in light of the confusion between those subjects. That dilemma is further compounded by the fact that some negotiations proposals combine both mandatory and permissive elements within the same article, while in still other cases permissive subjects are sometimes categorized under the headings of mandatorily negotiable subjects.

Recognizing the inherent problems faced by the parties relative to "negotiability", and the bounded further recognizing time frame for bargaining, the Secretary has encouraged the parties to identify and resolve negotiability questions very early in the negotiations process. Petitioner in this case specifically requested written proposals from the employee association with the stated intent of determining their opinion regarding the negotiability of those proposals. Respondent appears to argue that written proposals are not necessary in order that a determination of negotiability may be made. Respondent indicates that proposals may be discussed in a forum identified by Respondent as "conceptual bargaining" to the point of determining negotiability. The examiner does not accept Respondent's logic. The examiner believes that the written language of a proposal

serves to clearly delineate the boundaries of that proposal and gives the parties something tangible to review in order to determine its negotiability. If the examiner were to condone "conceptual bargaining" he would be requiring the parties to bargain all subjects, in abdication of their right to refuse to bargain permissive subjects, until such time as something was discussed which might be perceived as a permissive subject. While the association's purpose in attempting to negotiate "conceptually" may be laudable, in practice the process inherently contains the potential for a denial of the rights afforded to the parties by law. The examiner does not believe that the Act ever contemplated such a cavalier treatment of the rights of either party. Certainly the Secretary of Human Resources has never and would never issue a ruling on negotiability without the exact language of the proposal before him. It seems ludicrous to expect either party to make such determinations based solely on oral discussions. In addition, the practice of "conceptual bargaining" provides the users with tremendous latitude in which to expand or contract a proposal, and a general ability to vascilate on their positions.

Certainly the Act contemplates extensive discussion and explanation of proposals and positions on those proposals. The examiner does not believe, however, that either party has the right to expect the other to engage in that exchange until such time as they have had the opportunity to see the entirety of what they are being asked to discuss. If proposals have been reduced to writing, those writings will establish the original parameters of the proposal and may be reviewed by the other side to determine their negotiability. Then and only then does either side have the right to expect a response or counter from the other.

If the examiner embraced the "conceptual bargaining" approach to negotiations, a board of education could take the posture that none of the items were negotiable as they understood the oral presentations. At that point in time the Secretary would be asked

to rule and, as stated earlier, would not attempt to do so without the written proposals before him. It seems, therefore, that the conceptual approach serves to impede rather than facilitate timely, meaningful bargaining. Testimony from association witnesses indicates a fear that the written word may be misconstrued. The examiner offers that good faith dicates that the parties engage in an exchange of ideas designed to resolve those areas of confusion. The discussions are not unlike the ones described as "conceptual bargaining" but take place subsequent to the exchange of written proposals and the resolution of negotiability issues.

A final point the examiner wishes to address is the timeliness of the exchange of written proposals. The Secretary, as stated earlier, has encouraged that exchange "early on" in the negotiations process. Obviously, "early on" is an impossible point to identify on a clock or a calendar. That point in time will vary from district to district and from year to year. The examiner believes that point may be identified, however, by applying the gauge of "good faith". Good faith dictates participation, and participation dicates preparation. The parties are intimately familiar with the time frame for bargaining and have the ability to anticipate and plan for the future. At some point in time they must ascertain the posture of their constituents, and at that point they should start their "homework". That preparation includes the completion of written proposals. If one truly acknowledges the rights of the other party and has a sincere desire to act in "good faith", those written proposals should be finalized as soon as possible. The examiner believes that this obligation applies to both parties equally and to do less is to engage in bad faith.

If the law were not interpreted and applied in the above described manner, the law could easily be reduced to a shambles. An unscrupulous employer could "conceptualize" until the statutory impasse date, participate in mediation and fact-finding, and issue a unilateral contract without ever truly participating in the process envisioned by the legislature. The examiner does not

believe that anyone in good conscience can allege the Act was to be so easily rendered useless.

In the instant case, the Association asks the examiner to condone their act of withholding written proposals from the Board in spite of the fact that those proposals were available. The examiner counters that the Association had an obligation to provide the Board with their written proposals, did have those proposals finalized and available, but chose rather not to supply those proposals until faced with an ultimatum by the Board. The examiner finds the above described acts to be not only counter-productive but a blatant denial of certain rights accorded to the Board. Such acts can be found to constitute nothing other than bad faith bargaining.

Based upon the foregoing, the examiner finds that a refusal to provide specific written proposals on items noticed for negotiations does constitute a refusal to bargain in good faith. The examiner notes, further, that the practice of "conceptual bargaining" may be used in the State of Kansas subsequent to the exchange of written proposals. The examiner finds further, that Respondent's act was willful in nature in that written proposals were available but not supplied in a timely manner. The examiner orders, based upon all the foregoing, that the Respondent cease and desist in its illegal act and henceforth engage in professional negotiations in good faith.

IT IS SO ORDERED THIS 18th DAY OF December, 1985.

Jerry Powell

Jerry Powell, Designee of the Secretary
Labor Relations & Employment Standards
Section - Department of Human Resources
512 W. 6th
Topeka, Kansas 66603-3178