BEFORE THE DEPARTMENT OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Derby - National Education Association, Petitioner, v. Board of Education of Unified School District No. 260 Derby, Kansas, Respondent.	Professional Negotiations Act: Prohibited Practice Complaint No. 72-CAE-12-1995 Pursuant to K.S.A. 72-5413 et seq. and K.S.A. 77-501 et seq.

INITIAL ORDER

On the 22nd and 23rd days of May, 1995 this matter came on for formal hearing in Derby, Kansas before Don Doesken, presiding officer.

The Petitioner Derby-NEA appeared by David M. Schauner, chief counsel to Kansas-NEA, and by David Kirkbride, South-Central Kansas Uniserv Director; and called Eric Stiffler, Patsy Miracle-Pickens, Kevin Miller, Debra Murray, Dixie Kelley, Cortez Copher, Linda Johnson, Arden Koehn, Melva Owens, and Donald Brigham as witnesses. All of the Petitioner's witnesses were Derby Middle School teachers, except for Melva Owens, the Derby Superintendent of Schools, and Eric Stiffler, a former middle school principal in the Derby school district.

The Respondent Board of Education of U.S.D. 260, Derby, Kansas appeared by William Dye and Jay Rector, counsel, from the law firm of Foulston & Siefkin, and by Michael Redburn, Assistant Superintendent of Human Resources. Mr. Redburn also testified as a witness.

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After the hearing, a transcript of the proceedings was prepared, and the parties filed simultaneous briefs setting forth their arguments and authorities. Those briefs were received on July 12, 1995 and July 13, 1995. Each party then filed a written response to the other party's briefs. Those responses were received on July 28, 1995 and July 31, 1995.

Questions Presented

1. Whether there was an enforceable "past practice" between the Respondent and its middle school teachers, which gave Derby Middle School teachers the unrestricted right to use the time from 8 a.m. to 8:20 a.m. each school day as they saw fit.

2. Whether Respondent violated the agreement between the parties for the 1994-1995 school year, when the Derby Middle School principal issued a duty schedule which required all middle school teachers to spend five weeks each semester supervising students in the hallways, gym, and other common areas between 8 a.m. and 8:20 a.m. each school day.

3. Whether the school district's refusal to rescind the before-school duty schedule was a willful "refusal to negotiate in good faith" in violation of K.S.A. 72-5430 (b)(5).

4. Whether damages should be awarded to individual teachers to compensate them for supervising students from 8 a.m. to 8:20 a.m.

Findings of Fact

1. Petitioner Derby NEA is the exclusive bargaining representative of the professional employees of Unified School District No. 260, Derby, Kansas.

2. Respondent is the elected school board which administers the public schools in U.S.D. 260.

3. Under the Professional Negotiations Act K.S.A. 72-5413 et seq., Petitioner and Respondent are required to negotiate in good faith with each other about the terms and conditions of professional service of the teachers in the school district, and they must avoid the "prohibited practices" described in K.S.A. 72-5430, which are considered evidence of bad faith in professional negotiations.

4. Petitioner has complained that the Respondent failed to negotiate in good faith in violation of K.S.A. 72-5430(b)(5), because the principal of the Derby Middle School unilaterally issued a duty schedule which required all teachers to take turns supervising students before and after school (December 14, 1994 Complaint, at ¶2). Copies of the duty schedule and the principal's cover memo to teachers were introduced as exhibits at the hearing (Joint Exhibits # 3 and #12).

5. Petitioner's original complaint concerned duties which had been assigned to Derby Middle School teachers, both in the morning, before school, and in the afternoon, after classes were dismissed. However, after the hearing, the Petitioner withdrew its

complaint about after-school assignments. Petitioner's complaint now concerns only those duties which were assigned to Derby Middle School teachers between 8 a.m. and 8:20 a.m. (Statement of Issues, Petitioner's July 12, 1995 Brief, at p. 1).

6. The master contract between Petitioner and Respondent for the 1994-95 school year defines the "professional day" as beginning 30 minutes before the first class and ending 25 minutes after the last class at the school attendance center (Def. #15, Joint Exhibit # 1, p. 2). In the Derby Middle School, teachers are required to report to work at 8 a.m. and be on the premises until 3:35 p.m. (Tr. pp. 87-88, 222-223).

7. Each teacher normally has five class periods, plus a 30-minute duty-free lunch, a 45-minute team planning period, and a 45-minute personal planning period (Tr. pp. 72-73, 105-106). Article IV, Section Q of the master contract specifically reserves to teachers 225 minutes per week, or 45 minutes per day, of personal planning time (Joint Exhibit # 1, pp. 37-38). Article IV, Section T of the master contract guarantees teachers a 30-minute, duty-free lunch period (Joint Exhibit # 1, p. 44).

8. The parties agree that, even though there is no specific statement to that effect in the master contract, teachers are required to be outside their classroom door between 8:20 and 8:30 a.m. to monitor student activities in the hallway (Tr. pp. 171, 194, 331-332, 357). The parties also agree that, twice each month, teachers are required to attend faculty meetings, which normally begin at 7:45 a.m. and run until 8:20 a.m. (Tr.

pp. 152-153, 195, 361-362). However, the parties do not agree whether other duties can be assigned to teachers between 8 a.m. and 8:20 a.m. on days when there is no faculty meeting.

9. Petitioner claims that the agreement between teachers and the school district grants teachers the right to use the time between 8 a.m. and 8:20 a.m. as they see fit, without restriction, whether for meetings with students or parents or preparing for class, so long as there is no faculty meeting that day. Petitioner claims this right has become part of the master contract as a result of a longstanding "past practice".

10. Respondent contends that teacher time at the beginning of the school day is to be used to meet the needs of the building, whatever those needs may be; and that the district has never agreed to guarantee teachers 20 minutes of unassigned time at the beginning of the professional day, in addition to the 45 minutes of daily personal planning time set forth in Article IV, Section Q , and the 30-minute duty-free lunch set forth in Article IV, Section T, of the master contract (Tr. p. 325, 384-387).

11. Respondent also contends the Petitioner's allegation of an agreed-upon past practice concerning the use of the time from 8 a.m. to 8:20 a.m. is inconsistent with the plain language of Article VII of the master contract, which states:

"Article VII: Management Rights

The management of USD 260 and the assignment and direction of

its employees, including, but not limited to, the rights to hire, promote, suspend, layoff, reassign, and discharge, subject to the terms of this agreement, are the exclusive function and responsibility of the BOE, or its authorized representative, as provided by law.

The BOE and its authorized representatives have the right to take whatever action may be necessary to carry out its mission in emergency situations, i.e. any unforeseen circumstance or combination of circumstances which call for immediate action which is not expected to be of a recurring nature. Any issue, function, or procedure which relates to the operation of the school district, which is not specifically addressed in the negotiated agreement, shall be retained as a right of management, even if such issue is subject to mandatory or voluntary negotiations as provided by law. This shall include all policies and regulations pertaining to the operation or structure of the school district.

The BOE recognizes that this provision does not waive or limit the negotiability of any item which had been determined by the legislature or by any court of competent jurisdiction to be negotiable. Nor does this provision remove the BOE's statutory requirement to negotiate in good faith the impact of any subject noticed for negotiations as such may relate to its effect upon wages, hours and conditions of employment of the members of the bargaining unit as outlined in K.S.A. 72-5413 et seq.

No change, under paragraph (3) above, which affects mandatorily negotiable items, which has been questioned by the D-NEA, will be implemented without consultation with the D-NEA. "

-- Joint Exhibit #1, at p. 55.

12. The master contract for 1994-95 also specifically provides that teachers are expected to be available during the professional day for certain duties, as follows:

"Article IV, Section M: Fulfilling Responsibilities

During the professional day, it is expected professional educators will have time for preparation to carry out responsibilities. Professional educators are expected to be available for:

1. faculty meetings (not to exceed the professional day by more than 15 minutes),
2. individual conferences between the administrator and the professional educator,
3. student and parent conferences, and
4. reasonable school extra-curricular duties."

-- Joint Ex. 1, at p. 34.

Unfortunately, these enumerated items do not include or specifically exclude the supervision of students before and after school. It appears the written contract for 1994-95 is silent as to what other duties may be required of teachers during the professional day (Tr. p. 282, 322, 381, 390).

13. Until the 1994-95 school year, students at the Derby Middle School were monitored before school by individual teachers who either volunteered for this duty or who were asked to volunteer (Tr. pp. 20-21, 34, 40-41, 44-46, 284, 338, 355). However, when the Middle School moved to a larger building (formerly the Derby High School), several teachers informed the principal that they were no longer willing to volunteer for before-school supervisory duties (Tr. p. 45-46, 339-340). At that point, the school principal, Mr. Brown, decided to change the way this function would be carried out. His response was to assign the problem to a Building Improvement Team subcommittee for study (Tr. pp. 336-337); and eventually he issued a duty schedule which apportioned the morning duties equally among all the teachers (Tr. pp. 162-165).

This action was consistent with the school district's Shared Decision Making Procedures for the Derby Middle School. Under those procedures, the building staff could make recommendations about before- and after-school duties, but the building administrator would make the final decision (Joint Exhibit # 14, p. 1).

According to Mr. Brown's memo announcing the new schedule, the morning duties were apportioned among all teachers "because we do not have enough volunteers to handle specific areas, such as the cafeteria and gym". Mr. Brown characterized the duty schedule as "the only fair and equitable way to handle this duty" (May 17, 1994 Memo to Faculty: Joint Exhibit #3).

14. Both before and after the duty schedule was implemented in the fall of 1994, teachers complained about the duty schedule at faculty meetings. They also complained to their Derby-NEA building representatives, who then met with the school principal and with the superintendent of schools to discuss the matter (Tr. p. 209, 311-312, 344-348, 350). However, neither the principal nor the superintendent would agree to rescind the duty schedule, so the executive committee of Derby-NEA voted to file a prohibited practice complaint (Tr. pp. 138-141, 144-145).

15. Although formal collective bargaining negotiations began in April, 1994 between the Petitioner and the Respondent, and were not concluded until January, 1995 (Tr. pp. 113), the duty schedule was never noticed for negotiations by either side, and

was not discussed at the bargaining table during negotiations for the 1994-95 school year (Tr. pp. 110-112, 142, 394).

Conclusions of Law

1. Petitioner has alleged that Respondent has committed a prohibited practice. As the complaining party, the Petitioner has the burden of proving its allegation by a preponderance of the evidence.

2. The specific prohibited practice alleged in this case is defined in K.S.A. 72-5430(b)(5) as follows::

> "(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:
>
> (5) refuse to negotiate in good faith with representatives of recognized professional employees' organizations, as required in K.S.A. 72-5423 and amendments thereto; ..."

3. Under the Professional Negotiations Act, a particular topic is mandatorily negotiable if it is a "term and condition of professional service", as defined in K.S.A. 72-5413 (l). For our purposes, the relevant portion of that definition is found in part (1):

> (l) "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 procedure; resignations; termination and nonrenewal of contracts; reemployment of professional employees; terms and form of the individual professional

> employee contract; probationary period; professional employee appraisal procedures; each of the foregoing being a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; ... "
>
> --- K.S.A. 72-5413 (l)(1).

This definition arguably includes the subject whether teachers should have unassigned, duty-free time at the beginning of the school day. This subject comes under the topic "hours and amounts of work".

4. After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 *et seq.*, then during the time the agreement is in force, the board, acting unilaterally may not make changes in items which are mandatorily negotiable, but which were not noticed for negotiations by either party, and which were neither discussed during negotiations nor included within the resulting agreement. See Dodge City National Education Association v. USD 443, 6 Kan. App. 2d 810, Syll. ¶ 1, 635 P.2d 1263, review denied 230 Kan. 817 (1981); NEA - Wichita v. USD 259, 234 Kan 512, Syll. ¶4, 674 P.2d 478, 117 L.R.R.M. (BNA) 3137, 15 Ed. Law Reporter 948 (1993).

The Petitioner has contended that the use of the time between 8 a.m. and 8:20 a.m. has already been decided between the parties, through an agreed-upon past practice which has become implied into the master contract. If the Petitioner can prove the

existence of an agreed-upon past practice, then it follows that the Respondent must negotiate before making any change to that past practice.

However, to prove an agreement by past practice, the Petitioner must show that the written agreement does not already set forth the intentions of the parties. Four situations are recognized in which evidence of past practices may be used to ascertain the parties' intentions: (1) To clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement. See IAFF Local 3309 v. City of Junction City, PERB Case No. 75-CAE-4-1994, Syll. ¶ 3.

In addition, to establish an enforceable past practice, the Petitioner must prove both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown. Five indicators of this mutual intent are: (1) clarity and consistency throughout the course of conduct; (2) longevity and repetition creating a consistent pattern of behavior; (3) acceptance of the practice by both parties; (4) mutuality in the inception or application of the practice; and (5) consideration of the underlying circumstances giving rise to the practice. Lindskog v. USD 274, Syll. ¶ 10, PNA Case No. 72-CAE-6-1992 (1992), citing Rhode Island Court

Reporters Alliance v. State, 591 A.2d 376, 379-80 (R.I. 1991).

Furthermore, for a past practice to be binding on the parties, it must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice, and mutually accepted by the parties. See In Re: Southwest Forest Industries 81 Labor Arbitration Reporter 421 (1983).

Finally, when an alleged past practice is not consistent with the plain language of a bargained-for written agreement, the terms of the written agreement must control. See Griffith v. Proctor & Gamble Co., S.D. Ohio 1991, 796 F.Supp. 273, affirmed 958 F.2d 371; Allied Industrial Workers, AFL-CIO Local Union No. 289 v. N. L. R. B., C.A. D.C. 1973, 476 F.2d 868, 155 U.S. App. D.C. 112.

5. Although the Petitioner claims there was an established past practice which guarantees teachers the exclusive right to use the period of time between the period of 8 a.m. and 8:20 a.m. as they saw fit, the evidence in the record is insufficient to prove an agreement to that effect by a preponderance of the evidence.

Instead, Petitioner's claim of an established past practice is undermined by the expressed written language in the master contract. Not only is there a broad reservation of management rights in Article VII of the master contract, there are also specific provisions concerning duty-free time in Article IV, Sections Q, R, and T of the master contract. Article IV, Sections Q and R of the contract specifically guarantee teachers a

certain number of minutes of duty-free planning time, and provide for additional pay if a teacher agrees to work during their planning period; while Article IV, Section T specifically guarantees teachers a 30-minute duty-free lunch period.

If the parties had intended to guarantee teachers additional duty-free time from 8 a.m. to 8:20 a.m., they could have easily incorporated their agreement to that effect into the express provisions of Article IV of the master contact. However, they did not do so. The fact that there is no mention of the alleged guarantee of duty-free time from 8 a.m. to 8:20 a.m. in the master contract, when other duty-free times are spelled out in great detail, tends to show that the parties did NOT have an agreement reserving to teachers the right to refuse assignments during that time period.

Furthermore, the record shows undeniably that the existing past practice DID include a reliance on teachers to supervise students before school. Not only were all teachers required to stand outside their classroom door between 8:20 and 8:30 a.m., to monitor activities in the hallways, some teachers were relied upon to volunteer to supervise students in the common areas from 8 a.m. until 8:20 a.m. each day. As such, the agreed-upon past practice appears to have been that teachers DID perform the function of supervising students before school. The only question to be resolved by the school principal was WHICH of the teachers should carry out this duty between 8 a.m. and 8:20 a.m., once it appeared there were not enough volunteers.

Certainly the principal's announcement of the duty schedule did require some teachers to help supervise students in the common areas of the school, when in the past they had not done so. However, the duty schedule also freed up other teachers who in the past had volunteered for that duty, and had carried a disproportionate share of that work load (Tr. p 365). It appears to this presiding officer that, when individual teachers failed to volunteer in sufficient numbers for a duty which had long been carried out by teachers, it was not unreasonable for the school principal to assign the duty to be shared by all teachers. Moreover, the issuance of the duty schedule was consistent with, and authorized by, paragraphs 1 and 2 of the management rights clause set forth in Article VII of the master contract.

9. Under the circumstances of this case, it would be unfair and inequitable for teachers to bargain for and obtain specified guaranteed planning time in the master contract, and then obtain additional duty-free time, outside of the written agreement, by claiming a past practice which is inconsistent with the written agreement. There is simply no clear evidence in the record that the school district ever agreed that teachers would be free to reject duty assignments between 8 a.m. and 8:20 a.m.

It appears the school district took action in this case, not as a unilateral change in an enforceable past practice, but as a response to a change in the needs of the school which resulted in part from the move to the new building, and in part from the actions

of teachers, who were no longer willing to volunteer in sufficient numbers to supervise students before school. Since neither party noticed up this subject for negotiations, the matter was left within the managerial discretion of the school district to implement an appropriate policy under the terms of the existing master contract.

Order

Under the circumstances of this case, the Respondent was within its contractual rights when it unilaterally implemented a before-school duty schedule. Accordingly, the Petitioner's prohibited practice complaint must be found to be without merit, and the Petitioner's request for a remedy must be denied.

IT IS SO ORDERED this 18th day of April, 1996.

Don Doesken, Presiding Officer
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Notice of Right to Review

This is an Initial Order issued by a presiding officer pursuant to K.S.A. 77-526. This order will become a Final Order pursuant to K.S.A. 77-530 unless reviewed by the Secretary of Human Resources pursuant to K.S.A. 77-527.

Any party seeking review of this order must file a Petition for Review with the office of the Secretary of Human Resources within 18 days after the mailing of this order, or by the close of business on Monday, May 6, 1996.

Certificate of Service

I, Don Doesken, do hereby certify that on this 18th day of April, 1996 true and correct copies of the foregoing Initial Order were deposited in building mail and in the United States Mail, first-class, postage pre-paid, addressed to:

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