BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

NEA-Seaman,	)	
	)	
Petitioner,	)	
	)	
v.	)	Professional Negotiations Act
	)	Prohibited Practice Complaint
	)	Case No. 72-CAE-14-1995
Board of Education of	)	
Seaman U.S.D. No. 345,	)	
Topeka, Kansas,	)	
	)	
Respondent.	)	
	)	

Pursuant to K.S.A. 72-5413 *et seq.* and K.S.A. 77-501 *et seq.*

INITIAL ORDER

NOW ON THIS 19th day of July, 1995, this matter comes regularly on for decision before Susan L. Hazlett, Presiding Officer. Briefs were filed in this matter by Petitioner NEA-Seaman by and through counsel, Marjorie A. Blaufuss, on May 24, 1995, and by Respondent Board of Education of Seaman U.S.D. No. 345, Topeka, Kansas, by and through counsel, Robert D. Hecht, on May 26, 1995. The parties have stipulated to the facts of the case and have waived formal hearing previously scheduled for May 26, 1995.

Attached to the briefs of both parties, and incorporated by reference were the following documents: Stipulated Facts; Agreement Between the Board of Education of Seaman USD No. 345 and NEA-Seaman for the 1994-95 School Year; Salary Placement Schedule for the 1994-95 School Year; Terry Scheuerman Probation Requirements dated August 15, 1994; Grievance Memorandum dated September 23, 1994; Superintendent's memorandum to Terry Scheuerman dated October 14, 1994; Grievant's memorandum to the Board of Education dated October 25,

1994; and Decision of the Board dated November 14, 1994.

On June 9, 1995, counsel for the Respondent filed a motion for enlargement of time to file a reply brief, and the motion was granted by the Presiding Officer with reply briefs to be filed by Friday, June 16, 1995. However, neither party filed a reply brief.

ISSUES PRESENTED

I. WHETHER OR NOT THE KANSAS DEPARTMENT OF HUMAN RESOURCES HAS JURISDICTION TO HEAR NEA-SEAMAN'S PROHIBITED PRACTICE COMPLAINT AGAINST SEAMAN U.S.D. NO. 345.

A. Whether or not NEA-Seaman is precluded from filing a prohibited practice complaint with the Kansas Department of Human Resources when the professional employee involved in the relevant grievance procedure failed to file an appeal of the Board of Education's decision with the District Court pursuant to K.S.A. 60-210(d).

B. Whether or not the doctrines of res judicata and collateral estoppel preclude NEA-Seaman from filing a prohibited practice complaint with the Kansas Department of Human Resources.

II. WHETHER OR NOT SEAMAN U.S.D. NO. 345 COMMITED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 72-5430(b)(5) BY MAKING UNILATERAL CHANGES TO THE PROFESSIONAL AGREEMENT REGARDING MANDATORIALLY NEGOTIABLE ITEMS.

A. Whether or not the issuance of a probation document to a professional employee constituted a disciplinary procedure which was not negotiated or included in the professional agreement.

B. Whether or not requiring a professional employee to obtain a doctor's statement for any sick leave requested constituted a unilateral change in the sick leave policy agreed to in the professional agreement.

FINDINGS OF FACT

The parties stipulated to the following facts in their briefs:

1. Seaman Unified School District No. 345 (Board or District) is a school district duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.

2. Pursuant to the Professional Negotiations Act (PNA), K.S.A. 72-5413 *et seq.*, NEA-Seaman (Association), is the duly recognized exclusive representative for all full and part-time teachers employed by the District.

3. The Board and NEA-Seaman have entered into a collectively bargained negotiated agreement which governs the terms and conditions of professional employees' service for the 1994-95 school year.

4. Terry Lynn Scheuerman is employed as a physical education teacher by the District and has been so employed for the last eighteen years.

5. Mr. Scheuerman has a B.S.E. from Emporia State University in physical education and psychology and a Masters degree from Emporia State University in elementary (K-9) counseling.

6. During the 1994-95 school year, Mr. Scheuerman has been assigned to Elmont Elementary School, Logan Junior High, and to Seaman High School where he teaches physical education and health.

7. Mr. Scheuerman was formally evaluated during the 1990-91 school year but was not formally evaluated during the 1991-92, 1992-93, nor the 1993-94 school years.

8. One week before the end of the 1993-94 school year, Mr. Scheuerman was called to meet with district superintendent of schools, Dr. D. Kent Hurn.

9. During that meeting, Dr. Hurn stated that the Seaman board of education was requesting Mr. Scheuerman's resignation.

10. Dr. Hurn stated that if Mr. Scheuerman's resignation was not forthcoming, Mr. Scheuerman would be placed on probation during the 1994-95 school year and would be fired at the end of that year.

11. Mr. Scheuerman chose not to resign.

12. On August 15, 1994, Elmont Principal Larry Beam gave Mr. Scheuerman a document entitled "Terry Scheuerman Probation Requirements."

13. Mr. Scheuerman filed a timely grievance regarding these "probation requirements," and exercised his rights to the grievance procedure through a hearing before the Seaman Board.

14. The Seaman Board issued a decision denying the grievance on November 14, 1994.

15. No appeal of the Board's decision was taken to district court.

16. During one of their required weekly meetings in December 1995, Principal Beam told Mr. Scheuerman that he had been directed to require Mr. Scheuerman to submit a doctor's statement anytime he took sick leave.

17. Mr. Scheuerman has used a total of 2.5 days for sick leave during the 1994-95 school year leaving a balance of 91.5 days.

18. Mr. Scheuerman completed the required book reports of the probation and continues to submit lesson plans to Principal Larry Beam.

19. The District did not nonrenew Mr. Scheuerman's employment contract on April 10, 1995.

CONCLUSIONS OF LAW AND DISCUSSION

I. Jurisdiction

The Respondent contends that the Petitioner's prohibited practice claim filed pursuant to K.S.A. 72-5430(b)(5) cannot be heard by the Kansas Department of Human Resources (KDHR) because the professional employee (Scheuerman) elected his remedies by choosing to utilize the contractual grievance procedure. Since Scheuerman failed to utilize his K.S.A. 60-2101(d) right of appeal to the district court, Respondent contends that the Petitioner is now barred by the

doctrines of election of remedies, res judicata and collateral estoppel, as well as a finality from seeking to present in their forum that which has already been litigated.

The Petitioner concedes that the exclusive remedy for a party aggrieved by the action of a school board exercising a quasi-judicial function is an appeal pursuant to K.S.A. 60-2101(d), citing *Francis v. U.S.D. No. 457*, 19 Kan. App. 2d 476, 871 P.2d 1297 (1994). However, Petitioner claims that principle is not applicable to the instant case for two reasons. Petitioner first contends, that the Board's decision in this case was a legislative-type decision, rather than quasi-judicial; and second, that NEA-Seaman's prohibited practice complaint is an independent cause of action rather than an attempt to circumvent the requirements of K.S.A. 60-2101(d) by means of a collateral attack on the Board's decision.

Petitioner cites two cases which distinguish quasi-judicial decisions from legislative-type decisions. Petitioner, however, incorrectly concludes that the decision in the instant case was of the latter type. In *Boatright v. Board of Trustees of Butler County Junior College*, 225 Kan. 327, 590 P.2d 1032 (1979), cited by Petitioner, the Court concluded that, because the grievance procedure in the negotiated contract did not provide for an evidentiary hearing before an impartial hearing body, Boatright's breach of contract action had been properly filed in the district court, and no appeal was necessary under K.S.A. 60-2101. In essence, Boatright's Court found the decision was not quasi-judicial. In this case, however, Mr. Scheuerman's hearing before the Board was an evidentiary hearing, with witnesses, testimony, and an evidentiary record. Furthermore, despite Petitioner's implications that the Board was not an impartial hearing body, both the Association and the Board agreed in their Professional Agreement that the Board would

be the decision maker in all grievance hearings. As a result, the Board's decision was, in fact, a quasi-judicial decision. Nevertheless, the prohibited practice complaint filed with the KDHR is an independent action brought by the Association, and not a collateral attack on the Board's decision. In *U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources*, 247 Kan. 519, 523 (1990), the district court first ruled that the NEA's prohibited practice claim was moot due to the settlement by individual teachers of their claims. However, the Court of Appeals reversed and remanded that case to the district court for a decision on its merits.

In support of their claim that KDHR lacks jurisdiction, the Respondent appears to rely in part on cases in which a petitioner has attempted to file a separate action in district court instead of filing an appeal pursuant to K.S.A. 60-2101(d). Respondent cites *Schulze v. Board of Education*, 221 Kan. 351, 559 P.2d 367, in which the Court held that the Board functioned in a quasi-judicial manner and therefore plaintiff's district court action for injunction was precluded by K.S.A. 60-2101. In contrast, the instant case involves a petitioner filing a separate claim with a state agency specifically empowered with the authority to oversee the professional negotiations between teachers and public school boards and having the specific authority to consider the Petitioner's complaint. See *NEA-Fort Scott v. U.S.D. No. 234*, 225 Kan. 607 (1979).

The Respondent also cites *Neunzig v. Seaman USD #345*, 239 Kan. 654, 722 P.2d 569, a case which involved a teacher who had exercised his rights under the Teacher's Tenure Act, and who filed a claim with the Kansas Commission on Civil Rights, rather than appeal to the district court. In *Neunzig*, the Court held that res judicata precluded a second administrative proceeding, when the first administrative proceeding had already provided procedural protections similar to a

court proceeding and, further, that the doctrine of res judicata was applicable to an administrative agency's decision whenever the agency was acting in a judicial capacity.

For Respondent's argument to have merit, however, the elements of res judicata must be present in order for a second administrative proceeding to be precluded. Res judicata prevents the relitigation of claims previously litigated and contains four elements: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits. As the Petitioner has correctly contended, such elements are lacking in the instant case.

In Scheuerman's grievance, he claimed that the principal of the school was arbitrary and capricious and unreasonably abused his authority, by assigning lunchroom supervision and by failing to reveal the contents and complainants of alleged complaints. Mr. Scheuerman also claimed that the district had violated, misapplied, and misinterpreted the Master Agreement and the Grievance Procedure. The Association, on the other hand, is now claiming that the District committed a prohibited practice under the Professional Negotiations Act by refusing to negotiate in good faith with the representative of the recognized professional employees' organization as required in K.S.A. 72-5423. Thus, the present case clearly involves a different claim brought by a different party, the recognized professional employees' organization. The Association incorrectly argues that Scheuerman would not even have had standing to bring a prohibited practice claim, citing *Diane Marie Taylor v. Unified School District 501, Topeka, Kansas*, Case no. 72-CAE-2-1981. However, the result is the same. The *Diane Marie Taylor* case was reviewed by the district court and remanded after holding that both the professional employee and the recognized professional employees' organization could bring the prohibited practice claim. See *Diane Marie*

Taylor, December 9, 1986, Order

The final two elements of res judicata are also lacking in the present case. Scheuerman could not have raised the prohibited practice claim in the grievance procedure because only the Secretary of the Kansas Department of Human Resources has the authority to hear a prohibited practice claim. Furthermore, there was a final judgment on the merits of Scheuerman's claims to the Board, but there has not been a final judgment on the merits of the prohibited practice claim.

The Respondent also raises the issue that the Secretary does not have jurisdiction to hear the prohibited practice action based on the doctrine of collateral estoppel. However, Respondent provided no arguments or authorities on this issue in their brief.

II. Unilateral Changes

By placing Scheuerman on probation and issuing the document entitled, "Terry Scheuerman Probation Requirements," Petitioner contends that the Board unilaterally imposed new disciplinary procedures without negotiating the change with the Association. The Professional Negotiations Act specifically lists "sick leave," "disciplinary procedure," and "professional employee appraisal procedures" among those items that are "terms and conditions of professional service," as noted by Petitioner. See K.S.A. 72-5413(l). As such, they are topics that are mandatorily negotiable, and failure to negotiate an item that by its nature is mandatorily negotiable is a prohibited practice under K.S.A. 72-5430. See *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137, 785 P.2d 993 (1990) and *U.S.D. No. 314 v. Kansas Dept. of Human Resources*, 18 Kan.App.2d 596, 856 P.2d 1343 (1993). As Petitioner also points out, the Kansas

Supreme Court has held that once a negotiated agreement has been reached between a board of education and the professional employees' exclusive representative, then during the time that agreement is in force, the board of education, acting unilaterally, may not make changes in items which are mandatorily negotiable, even when the items were not noticed for negotiation by either party and were neither discussed during negotiations nor included in the resulting agreement. See *NEA-Wichita v. U.S.D. 259*, 234 Kan. 512 (1983).

The parties stipulated that Scheuerman was not evaluated for the past three years, including the 1993-1994 school term. Therefore, the probation document could not have been a change in the agreed upon evaluation procedure. The question then becomes whether the probation document was a change in the disciplinary procedure, which the parties never negotiated. Respondent attempts to portray the probation document as a "managerial tool."

The record reveals that Scheuerman was issued the probation document because of some deficiencies in his performance, deficiencies which could not have been ascertained from an evaluation of his performance, as he was not formally evaluated. It appears that these deficiencies were based upon some complaints received by the District against Scheuerman. Thus, putting Scheuerman on probation with plans to terminate him at the end of the term because of the complaints, appears to have been a disciplinary measure. As noted by the court in *Board of Regents v. Pittsburg State Univ.*, 233 Kan. 801 (1983), negotiations may extend to all matters relating to conditions of employment "except proposals relating to employer and employee rights defined by the Act. K.S.A. 75-4330(a)." K.S.A. 75-4326 provides that the right to negotiate does not extend to matters of inherent managerial policy. For example, the Court in *U.S.D. No.*

352 v. NEA-Goodland made a distinction between managerial decisions and policies (not mandatorily negotiable) and the mechanics of such policies (mandatorily negotiable). That Court held that evaluation *procedures* are mandatorily negotiable under K.S.A. 72-5413(l) and evaluation *criteria* are not. Likewise, issuing Scheuerman a probation document would appear to have been the mechanics, or procedure, for implementing a decision by the Board that Scheuerman was not performing according to the Board's expectations or policies. There is no evidence that the Board gave the Association any opportunity to negotiate that new procedure.

The foregoing theories apply equally to the "doctor's statement" which Scheuerman was directed by the Board to begin submitting any time Scheuerman took sick leave. As shown above, sick leave is a mandatorily negotiable item. Even though the Professional Agreement provided that a letter from a physician was required for extended sick leave, nothing was agreed to concerning ordinary sick leave. It would appear that the parties did not intend for extended and ordinary sick leave to be treated the same in the Agreement. Again, it becomes an issue whether it was simply a managerial perogative to make this change, or whether it was a unilateral change in the negotiated sick leave policy. The requirement that Scheuerman, or any other professional employee, submit a doctor's statement appears to be a new procedure to implement the Board's determination or policy that only so much sick leave should be allowed.

Respondent also contends that the Board's unilateral actions regarding the probation document and the sick leave requirement were authorized under the "management rights clause" in the Professional Agreement. In *NEA-Wichita*, the Court stated that "the inclusion of the management rights clause...cannot enlarge the authority or power granted to the Board by the

legislature." That Court further stated that "a closure clause is nothing but a diluted form of waiver. The general rule is that a waiver of a union's right to bargain must be clear and unmistakable." *NEA-Wichita* at 518, citing *N.L.R.B. v. R.L. Sweet Lumber Company*, 515 F.2d 785, 795 (10th Cir. 1975). Therefore, the Court held in that case that the management rights clause and the closure clause, whether viewed separately or read together, failed to justify the Board's unilateral change to the Professional Agreement.

In the instant case, there does not appear to be evidence in the record that the purported waiver was fully discussed and consciously explored during negotiations, or that the Association otherwise consciously yielded or clearly and unmistakably waived its interest in the matter. As Petitioner contends, in the absence of such evidence, the Board cannot make such unilateral changes to the Professional Agreement.

The burden of proving a prohibited practice complaint is on the Petitioner. The Petitioner, in this case, has met that burden and the evidence shows that the Board made unilateral changes to the Professional Agreement regarding items that are mandatorily negotiable in violation of the Professional Negotiations Act.

ORDER

1. The Kansas Department of Human Resources has jurisdiction over Petitioner's prohibited practice claim.

2. The Board of Education of Seaman U.S.D. No. 345, Topeka, Kansas, has violated K.S.A. 72-5430(a), as defined by K.S.A. 72-5430(b)(5) by refusing to negotiate in good faith

with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto.

3. The Board of Education of Seaman U.S.D. No. 345, Topeka, Kansas, shall cease and desist from enforcing any new disciplinary procedures and any new sick leave procedures until such time as it negotiates those procedures with NEA-Seaman.

4. The Board of Education of Seaman U.S.D. No. 345, Topeka, Kansas, shall remove any reference to discipline imposed under the unilaterally imposed discipline procedure from the personnel files of any professional employees in the District.

5. NEA-Seaman's request that Terry Scheuerman be reimbursed at the contract rate for the work performed by him after school hours under the plan of assistance is hereby denied due to a lack of evidence in the record of the amount of hours performed by him for such work.

IT IS SO ORDERED this 19th day of July, 1995.

Susan L. Hazlett, Presiding Officer

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, August 7, 1995.

Certificate of Service

I do hereby certify that on this 19th day of July, 1995, true and correct copies of the foregoing Initial Order were deposited in the building mail and in the United States Mail, first class, postage pre-paid, and properly addressed to the following:

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