BEFORE THE SECRETARY OF THE DEPARTMENT OF LABOR
OF THE STATE OF KANSAS

NEA-KCK Petitioner	)	
vs.	)	Case No. 72-CAE-2-2011
Unified School District No. 500, Kansas City, Wyandotte County, Kansas Respondent.	)	

INITIAL ORDER OF THE PRESIDING OFFICER
Pursuant to K.S.A. 72-5430a

NOW ON this 24th day of May, 2012, the above-captioned matter comes on for decision pursuant to the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, (hereinafter "PNA" or the "Act"), before presiding officer Douglas A. Hager, serving as designee of the Secretary of the Kansas Department of Labor. *See* K.S.A. 72-5413(m); K.S.A. 72-5430a(a).

APPEARANCES

The Petitioner, NEA-KCK appeared through counsel, Marjorie A. Blaufuss, Attorney at Law, Kansas National Education Association. Respondent, Unified School District No. 500, Kansas City, Wyandotte County, Kansas appeared through counsel, Deryl W. Wynn, Attorney at Law, McAnany, Van Cleave & Phillips, P.A.

BACKGROUND

Petitioner, NEA-KCK, (hereinafter "Petitioner"), alleges Respondent, Unified School District No. 500, Kansas City, Kansas, (hereinafter "Respondent" or "Employer"), has committed a prohibited practice under the Kansas Professional Negotiations Act, (hereinafter

"PNA" or the "Act"), K.S.A. 72-5413, *et seq.* *See* Complaint Against Employer, NEA-KCK v. Unified School District No. 500, Kansas City, Wyandotte County, Kansas, Case No. 72-CAE-2-2011, filed May 16, 2011. In its complaint, Petitioner alleges Respondent committed a prohibited practice in violation of K.S.A. 72-5430(b)(5) by refusal to negotiate in good faith before unilaterally announcing it would require employees to make up each of five days missed because of inclement weather by requiring attendance on three additional days after Memorial Day in addition to two scheduled snow days built into the 2010-2011 calendar. *Id.*, pp. 1-3. Respondent denies that its actions constituted a prohibited practice. *See* Respondent's Answer, NEA-KCK v. Unified School District No. 500, Kansas City, Wyandotte County, Kansas, Case No. 72-CAE-2-2011, received May 19, 2011. Respondent's arguments will be set forth below.

Petitioner seeks an order finding that the Employer's actions constitute a prohibited practice in violation of the Act, that the District reimburse unit members for damages,[1] customary posting and any other relief the Secretary deems equitable. Complaint Against Employer, p. 4. The parties submitted written legal argument on stipulated facts and the presiding officer considers the matter to be fully submitted and ripe for a determination.

ISSUES OF LAW

The legal issues to be addressed in this matter are:

1. Whether the complained-of actions of Employer, Unified School District No. 500 Board of Education, constituted a violation of K.S.A. 72-5430(b)(5)?

[1] "Relying on the adopted and ratified school calendar's start and end dates, one or more of the District's employees scheduled medical procedures, travel, weddings, summer employment, summer school classes and retirement." Complaint Against Employer, p. 3, item "r". In its requested remedy, Petitioner "asks that the Secretary restore the extra two days the teachers were required to work by either paying each of them their 2010-11 daily rate for each of the two days or to award each of them two extra personal days to be taken in accordance with the Negotiated Agreement." Petitioner's Brief, p. 13.

2. If so, what is an appropriate exercise of the Secretary's statutory discretion to remedy said violation?

FINDINGS OF FACT

The parties stipulated the following facts:

1. The Board is 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, K.S.A. 72-5413 *et seq.*, the NEA-KCK is the duly recognized bargaining representative of the Board's professional employees.

3. The Board and the NEA-KCK entered into negotiations and ratified an agreement governing the terms and conditions of professional service of the Board's professional employees for the 2009-2011 school years (Negotiated Agreement). *See* Exhibit 1.

4. A calendar for the 2010-2011 school year was ratified by both the board and NEA-KCK and was included as Exhibit A in the Negotiated Agreement. *See* Exhibit 1 and Exhibit 2, Board Agenda and relevant portions of Board Minutes for Wednesday, April 14, 2010.

5. At its July 20, 2010 meeting, the Board adopted a school year of not less than 1116 hours. *See* Exhibit 3, Board Agenda and relevant portions of Board Minutes for Tuesday, July 20, 2010.

6. The District closed its schools on five occasions during the winter months of 2011 due to inclement weather: January 10th, 11th, and 20th, and February 2nd and 3rd.

7. The weather conditions during the 2010-2011 school year required more Emergency Closing Days than any of the previous ten school years.

8. According to District Superintendent Cynthia Lane, it was necessary for the District to make up one of the Emergency Closing Days due to snow during the 2010-2011 school year in order to meet the statutory minimum school attendance requirement.[2]

9. Then president of NEA-KCK, Linda Hollinshed, met with Superintendent Lane on February 10, 2011, to discuss NEA-KCK's concerns with the proposed change in the negotiated calendar.

10. NEA-KCK also sent a letter dated February 16, 2011 to the Board setting out its concerns regarding the change in the negotiated calendar. Exhibit 5.

11. On February 16, 2011, the Board took action to adopt revised calendars for the 2010-2011 school year. *See* Exhibit 4, Board Agenda and relevant portions of Board Minutes for Wednesday, February 16, 2011.

12. The amended calendar required professional employees' attendance on April 22nd (a previously scheduled non-duty day), May 27th, and the three days following Memorial Day.

13. Based on available data, the District has not previously required its professional employees to make up Emergency Closing Days due to snow that were not necessary to meet the statutory minimum attendance requirement.

14. During the 2000-2001 school year, the District did require an Emergency Closing Day due to heat to be made up. The time was made up by adding 10 minutes to the end of each school day from November 6, 2000 through the end of the year after discussion with NEA-KCK.

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[2] In its Brief, Respondent notes that while "the parties are in agreement that the statement of law [expressed in stipulation no. 8] is accurate in accordance with [K.S.A.] 72-1106(e)", "this fact is disputed to the extent that it expresses or implies that Superintendent Cynthia Lane originated the statement or legal principle this it was necessary for the District to make up one of the Emergency Closing Days due to snow during the 2010-2011 school year in order to meet the statutory minimum school attendance requirement." Brief of Respondent Unified School District No. 500 (hereinafter "Respondent's Brief"), NEA-KCK v. Unified School District No. 500, Kansas City, Kansas, Case No. 72-CAE-2-2011, November 2, 2011, pp. 1-2.

15. Once over the last ten years, during the 2003-2004 school year, the District required its professional employees to make up an Emergency Closing Day due to snow. That day was necessary to meet the statutory minimum attendance requirement. That day was made up on a school calendar day previously designated for making up Emergency Closing Days.

16. On May 16, 2011, NEA-KCK filed a Prohibited Practice Complaint alleging that the District violated K.S.A. 72-5430(b)(5).

17. The District filed its timely Answer on May 19, 2011.

18. Although NEA-KCK requested emergency treatment of the complaint based on the harm the District's professional employees would allegedly suffer if required to report on the days after Memorial Day, the parties agreed that emergency treatment was not necessary.

19. The District provided an opportunity for members of the District's professional bargaining unit to submit documentation of monetary loss that occurred as a result of reporting to work in accordance with the amended calendar adopted by the Board during the February 16, 2011 regular meeting. Eighty-four (84) employees requested relief and sixty-four (64) employees were granted relief by the District.

20. Members of the District's professional bargaining unit either worked on April 22nd, May 27th, May 31st, June 1st, and June 2nd, their leave was charged for the days they missed, or their pay was reduced by their daily rate for each of the days they missed.

DISCUSSION AND CONCLUSIONS OF LAW

A. A General Overview of the Professional Negotiations Act

Enacted by the Kansas Legislature in 1970, Kansas Session Laws, 1970, Ch. 284, § 1, the Professional Negotiations Act, codified at K.S.A. 72-5413 *et seq.*, is the statutory framework authorizing collective negotiations between school boards and teachers in Kansas. *Teachers and*

the School Board—Negotiations in Kansas, 15 WASHBURN L. J. 457 (1976). The statute's "underlying purpose . . . is to encourage good relationships between a board of education and its professional employees." *Liberal-NEA v. Board of Education*, 211 Kan. 219, 232 (1973). To promote these ends, the statute authorizes that a school district's 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" as well as the right to refrain from such activities. K.S.A. 72-5414. In pertinent part, the Act provides that "(1) terms and conditions of professional service":

> "means (A) 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 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. . . .
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> . . . .
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> (2) Nothing in this act, and amendments 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 (l), 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.
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> (3) 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.

K.S.A. 72-5413(*l*)(1).

The PNA requires boards of education to comply with its terms:

> "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 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 teachers' contracts. 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, such notices shall be in writing and delivered to the chief administrative officer of the board of education or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired. . . ."

K.S.A. 72-5423(a). The Act also provides a mechanism for gaining adherence to its requirements, deeming it a prohibited practice for a board of education to refuse to negotiate in good faith with representatives of a recognized professional employees' organization. K.S.A. 72-5430(b)(5). Only by meeting and negotiating in good faith over mandatory topics at issue, and by completing the statutory impasse process in good faith will the parties to professional negotiations have satisfied their statutory duty under the Kansas PNA. When good faith bargaining has reached impasse and the impasse procedures set forth at K.S.A.72-5426 through K.S.A. 72-5428 have been completed in good faith, the employer may take unilateral action on the subjects upon which agreement could not be reached. K.S.A. 72-5428a.

The Professional Negotiations Act places an obligation upon boards of education to meet and negotiate in good faith with their professional employees' exclusive representative regarding the terms and conditions of their employment. K.S.A. 72-5423(a). Under K.S.A. 72-5430(b)(5), it is a prohibited practice for a Board of Education willfully to refuse to negotiate in good faith

with its professional employees' chosen bargaining representative. A well established labor law principle is that unilateral changes[3] by an employer in terms and conditions of employment are *prima facie* violations of its professional employees' collective bargaining rights. *N.L.R.B. v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962)("*Katz*"); *see also*, 1 Charles J. Morris, The Developing Labor Law, 563 (2d ed. 1983)("[u]nilateral changes by an employer during the course of a collective bargaining relationship concerning matters which are mandatory subjects of bargaining are normally regarded as *per se* refusals to bargain").

Any controversy concerning alleged prohibited practices under the PNA may be submitted to the Secretary of Labor for determination. K.S.A. 72-5430a(a). Upon considering the dispute, "[t]he secretary shall either dismiss the complaint or determine that a prohibited practice has been or is being committed, and shall enter a final order granting or denying in whole or in part the relief sought." K.S.A. 72-5430a(b).

ISSUE ONE

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[3] One should note the following principles when evaluating unilateral *action* as an unfair labor practice:

> "[A] unilateral change is not *per se* an unfair labor practice. First, because 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 term. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 185, 92 S.Ct. 383, 400, 30 L.Ed.2d 341 (1971). Second, 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. R. Gorman, *Basic Text on Labor Law,* 450-54 (1976). Finally, even if there has actually been a unilateral change in a term and condition of employment, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain. The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith. *N.L.R.B. v. Cone Mills, Corp.,* 373 F.2d 595, 64 LRRM 2536 (4th Cir.1967); Gorman, *supra,* 400, 443-45."

Foley Education Association v. Independent School District No. 51 (Minn.1984), 353 N.W.2d 917, 921, 120 L.R.R.M. 2367, 2369-70.

WHETHER RESPONDENT COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 72-5430(B)(5) BY REFUSAL TO NEGOTIATE IN GOOD FAITH BEFORE UNILATERALLY ANNOUNCING IT WOULD REQUIRE EMPLOYEES TO MAKE UP EACH OF FIVE DAYS MISSED BECAUSE OF INCLEMENT WEATHER BY REQUIRING ATTENDANCE ON THREE ADDITIONAL DAYS AFTER MEMORIAL DAY IN ADDITION TO TWO SCHEDULED SNOW DAYS BUILT INTO THE 2010-2011 CALENDAR?

A. Petitioner's Arguments

In this matter, NEA-KCK alleges the District violated K.S.A. 72-5430(b)(5) by "making a unilateral change in the number of days its professional employees were required to report for duty." Brief of Petitioner NEA-KCK (hereinafter "Petitioner's Brief"), NEA-KCK v. Unified School District No. 500, Kansas City, Kansas, Case No. 72-CAE-2-2011, p. 1. As previously noted, Petitioner seeks an order finding that the Employer's actions constitute a prohibited practice in violation of the Act, that the District reimburse unit members for damages, customary posting and any other relief the Secretary deems equitable.

Petitioner urges that the action taken by Respondent comes within the express statutorily-listed terms and conditions of professional service, "hours and amounts of work" and "vacation allowance[, holiday, sick, extended, sabbatical, and other leave, and number of holidays]". Petitioner's Brief, p. 5. Petitioner notes that:

> "the Board and the Association entered into negotiations and ratified an agreement governing the terms and conditions of professional service of the Board's professional employees for the 2009-2010 school years. (Exhibit 1.) The Negotiated Agreement provided the following:
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> > The primary contract shall require 186 duty days for all full-time teachers who have completed their initial year of employment with the district. 189 duty days shall be required during the first full year of service. Excluded shall be all days on which a teacher is not required to be present for professional services. If emergency conditions require the closing of

> school, schedule modifications will be made. (Exhibit 1, page 2, Article IV DUTIES AND RESPONSIBILITIES A. Term of employment.)
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> . . . .
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> The calendar was adopted by the Board and ratified by NEA-KCK. (Stipulated Fact No. 4; Exhibit 2.) There were two "Make up" days built into the calendar on May 26 and 27, 2011, to be used if emergency conditions required the closing of school. (Exhibit A of Exhibit 1.)"

Petitioner's Brief, p. 6. Petitioner concedes that boards of education may close schools within its district when there is inclement weather, but notes that under K.S.A. 72-1106(e), "when a school district cancels school for more days that it has scheduled as make-up days, it does not have to make up all of the missed days to meet the statutory minimum." *Id.*, p. 7. Petitioner observes that "for each hour it has included as make-up in its calendar, it can count an equal number of missed hours in its official 1,116 hour school term." *Id.* Therefore, "[b]ecause the District had designated two make-up days in its calendar and reported these days as such to the Kansas State Department of Education (KSDE), pursuant to K.S.A. 72-1106(e), the District would not have to make up a third and fourth snow day . . . . when the District canceled school on five days due to inclement weather, it only had to make up its two built in make-up days and one additional day in accordance with Kansas law." *Id.* Petitioner argues that "[a]fter a negotiated agreement has been reached between a Board of Education and the exclusive representative of professional employees pursuant to K.S.A. 72-5413 *et seq.*, then during the time that agreement is in force, the Board of Education, acting unilaterally, may not make changes in items included in that agreement," nor "changes in items which are mandatorily negotiable, but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included in the resulting agreement." Petitioner's Brief, p. 7 (citations omitted). Petitioner alleges that Respondent's change to the school calendar was inconsistent with the parties' past practices and

notes that the revised calendar required attendance after the previously-scheduled and ratified start of summer vacation. Petitioner's Brief, pp. 8-9. Petitioner's past practices analysis, and Employer's response, will be addressed in more detail later.

Petitioner notes that NEA-KCK's President contacted Respondent's Superintendent "to request bargaining on any changes to the amounts of work and the vacation already negotiated and ratified" by the parties, but that on February 16, 2011, the Board unilaterally adopted a revised calendar requiring the "professional staff to make up all five snow days, [including] three duty days after the previously scheduled beginning of summer vacation following Memorial day." Petitioner's Brief, p. 11. Petitioner asserts that the Act grants the Secretary broad power to fashion appropriate relief when a prohibited practice has occurred. Petitioner reasons that since K.S.A. 72-1106 only requires the District to make up three of the five days missed because of inclement weather, its professional employees should be paid their daily rate for each of the two extra days worked or they should be granted two additional personal days to be used at their discretion. *Id.*, pp. 11-12. For those teachers who were allowed to take leave after Memorial Day for previously scheduled plans, Petitioner asks that the Secretary reinstate the leave they were charged or reimburse them their daily rate for any day their pay was docked for missing school due to previously scheduled activities. *Id.*, p. 12.

B. Respondent's Arguments

Respondent acknowledges that Kansas school boards must "manage their schools within the confines of the Professional Negotiations Act, which generally requires them to negotiate with recognized bargaining units of the professional employees on the 'terms and conditions of professional service.'" Respondent's Brief, p. 3. Respondent then suggests that "the present

dispute rests on the negotiability of the actions taken by U.S.D. No. 500, and whether those items which are considered mandatorily negotiable were actually negotiated." *Id.* Respondent notes that the legislature has codified prior court decisions determining which topics are mandatorily negotiable, acknowledges Petitioner's assertion of "hours and amounts of work" and "vacation allowance" as the basis for its complaint and then counters that "matters which relate to the duration of the school term" are expressly excluded from mandatory negotiability. Respondent's Brief, p. 3 (*citing to* K.S.A. 72-5413(*l*)(3)). Respondent also notes that "the specific beginning and ending dates of the school term are not mandatorily negotiable." *Id.*, pp. 3-4 (*citing to NEA-KCK v. USD No. 500*, 227 Kan. 541, 543 (1980)). In support of the legal conclusion underlying its defense, that Respondent's adoption of a revised school calendar in response to emergency closing days for inclement weather was not mandatorily negotiable, Respondent urges that a decision of the Superior Court of New Jersey, applying a similar professional negotiations law under similar factual circumstances involving the unilateral adoption of a revised school calendar due to school closings during an uncharacteristically harsh winter, is instructive to the determination in this matter. Respondent's Brief, pp. 4-6. In that case, a New Jersey school board, without first negotiating the revisions with the teachers' bargaining unit representative, unilaterally adopted a revised calendar changing previously scheduled recess days to duty days and adding duty days onto the end of the June school year in order to make up for 12 school day closings due to inclement winter weather. *Id.*, p. 4 (*citing to Piscataway Township Education Association v. Piscataway Township Board of Education*, 307 N.J. Super. 263 (1998)). In that matter, the bargaining unit representative noticed the school calendar revisions for negotiations, the school district declined to negotiate the issue and an unfair labor practice charge ensued. *Piscataway*, 307 N.J. Super. at 268. A hearing examiner dismissed the matter, ruling that the

Board had a contractual right to reschedule school days and did not have an obligation to negotiate over the impact of calendar changes on unit members. *Id.* Among the indicia of impact of the calendar changes on unit members were effects such as financial losses, for example the costs of non-refundable ticket prices for previously-scheduled vacation events. *Id.*

On appeal, the Superior Court bifurcated the issues. *Piscataway* at 270. With regard to the first issue, mandatory negotiability of the Board's decision to unilaterally change the school calendar, the Court ruled that such a decision was an exclusive managerial prerogative, not mandatorily negotiable. *Id.*

> "The law governing the question of the need to negotiate a change in the school calendar is clear. Such a change is a managerial prerogative of the school administration which cannot be bargained away. As such, it need not be negotiated. *Burlington Cty. College Faculty Ass'n v. Bd. Of Trustees*, 64 N.J. 10, 311 A.2d 733 (1973)."

Piscataway, p. 265.

With regard to the second issue, negotiability of the resulting effects, or impact, of the Board's school calendar revision on employee's terms and conditions of employment, the Court noted that the law was "equally clear, although widely misunderstood." *Id.* The Court engaged in a detailed analysis and discussion, concluding that the determination turns on whether negotiating over the effects or impact of the decision would significantly or substantially encroach upon the management prerogative. *Id.*, p. 276. "If the answer is yes, the duty to bargain should give way. If the answer is no, bargaining should be ordered." *Id.* "[T]erms and conditions of employment arising as impact issues are indeed mandatorily negotiable unless negotiations would significantly interfere with the exercise of the related prerogative." *Piscataway*, p. 265. Negotiability would not "involve the actual change in the [school calendar],

but rather would be limited to ways to ameliorate the effects of these changes on the employees." *Id.*, p. 273.

Respondent urges that changes made in its school calendar in response to inclement weather school closings were non-negotiable due to necessity and as a managerial prerogative, and that even if it is obligated to engage in professional negotiations over the effect of its calendar changes on unit members' terms and conditions of professional service, it has already done so to the extent required by law. *See* Respondent's Brief, pp. 8-11. Respondent also urges that its calendar revision did not constitute a unilateral change to an enforceable past practice[4]. The presiding officer concurs. Parties to a labor bargaining relationship cannot convert a subject that is something other than mandatorily negotiable to a mandatory subject of bargaining by contract nor by means of past practices. *See, e.g., Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971)("even if industry practice commonly regards retirees'

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[4] 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' further relationship. *Lindskog v. U.S.D. 274*, Case No. 72-CAE-6-1992, at syl. ¶ 8 (December 11, 1992). A past practice can effectively become one of the "terms and conditions of employment even though not explicitly included in the collective bargaining agreement." *City of Jeannette v. Pennsylvania Labor Relations Boards,* 890 A.2d 1154, 1159 (Pa.Cmwlth.2006). In *Lindskog* the Secretary, applying the Kansas Professional Negotiations Act, recognized four situations in which evidence of past practices may be used to ascertain the parties' intentions. These four situations are:

> "(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." *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 381 A.2d 849 (1977).

Unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. The party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract. *Port Huron Education Association v. Port Huron Area School District*, 452 Mich. 309, 550 N.W.2d 228, 238-239 (1996).

benefits as a statutory subject of bargaining", that "practice cannot change the law and make" a topic that is other than mandatorily negotiable into a mandatory topic of negotiation); *Union County School Corporation Board of School Trustees v. Indiana Educational Employment Relations Board*, 471 N.E.2d 1191 (1985)(employer's past practice of paying teachers extra for make-up days does not elevate the subject of make-up days to mandatorily bargainable status). Further, an employer does not violate its duty to negotiate in good faith by unilaterally changing a subject that is not mandatorily negotiable, even if the subject is covered by an existing contract. *See* 1 Charles J. Morris, The Developing Labor Law, 771 (2d ed. 1983). The change may, however, constitute a breach of the parties' memorandum of agreement, in which case their remedy is pursuant to their contractual grievance mechanism. *Id.* Examination of the parties' remaining arguments follows.

C. Analysis and Application of Kansas Law to the Facts of Record

As noted above, the mandatory duty to bargain exists only when the matter concerns a term and condition of professional service. *See, e.g., Board of Education, Unified School District No. 314 v. Kansas Department of Human Resources*, 18 Kan.App.2d 596, 856 P.2d 1343 (1993) ("[f]ailure to negotiate an item that by its nature is mandatorily negotiable is a prohibited practice under K.S.A. 72-5430"). *See also, Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971)(holding that 'modification' of a collective bargaining contract, even if unilateral and mid-term, is a prohibited unfair labor practice only when it changes a term which is a mandatory rather than permissive subject of bargaining). The Act defines "terms and conditions of professional service" as follows:

(*l*)(1) "Terms and conditions of professional service" means (A) 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; (B) matters which relate to privileges to be granted the recognized professional employees' organization including, but not limited to, voluntary payroll deductions; use of school or college facilities for meetings; dissemination of information regarding the professional negotiation 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 negotiation and partaking of instructional programs properly related to the representation of the bargaining unit; any of the foregoing privileges which are granted the recognized professional employees' organization through the professional negotiation process shall not be granted to any other professional employees' organization; and (C) such other matters as the parties mutually agree upon as properly related to professional service including, but not limited to, employment incentive or retention bonuses authorized under K.S.A. 72-8246 and amendments thereto.

(2) Nothing in this act, and amendments 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 (*l*), 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.

(3) 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.

K.S.A. 72-5413(*l*).

It is not unlawful for an employer to make unilateral changes when the subject is not a "mandatory" bargaining item. *National Education Association-Wichita v. Unified School District No. 259, Wichita, Kansas*, 234 Kan. 512, 674 P.2d 478 (1983). *See also, N.L.R.B. v. Katz*,[5] 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962)(employer's unilateral changes in conditions of employment were characterized by the Court as follows: "A refusal to negotiate in fact as to any subject which is within §8(d) and about which the union seeks to negotiate violates §8(a)(5) [unfair labor practice provision prohibiting refusal to bargain in good faith] though employer has every desire to reach agreement with union upon overall collective agreement and earnestly and in all good faith bargains to that end.") In *Katz*, the Court did note, however, that certain circumstances might justify unilateral employer action, and exceptions dealing with necessity, among others, have been developed. 1 Charles J. Morris, The Developing Labor Law, 564 (2d ed. 1983).

The difficulty in making any scope of negotiations determination under the Professional Negotiations Act is that the Act mandates negotiations on terms and conditions of professional service while simultaneously reserving to the school district what is commonly referred to as "managerial prerogatives" *See* K.S.A. 72-5423(a); K.S.A. 72-5413(*l*)(2). This creates an overlap problem in that almost any given subject is, arguably and in varying degrees, both a term and condition of professional service and a prerogative which should be reserved to management. *See, e.g., St. Paul Fire Fighters, Local 21 v. City of St. Paul*, 336 N.W.2d 301, 302

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[5] In a notable early decision concerning the scope of negotiations under the Professional Negotiations Act, the Kansas Supreme Court commented that in that matter, the Petitioner bargaining representative "complains most bitterly" that Respondent school board engaged in "unilateral action of the kind condemned in ordinary labor relations law as an unfair labor practice or a 'refusal to bargain,'" citing to the Supreme Court's *N.L.R.B. v. Katz* decision. National Education Association of Shawnee Mission, Inc. v. Board of Education of Shawnee Mission Unified School District No. 512, Johnson County, 212 Kan. 741, 755, 512 P.2d 426 (1973)(hereinafter "*Shawnee Mission*").

(Minn. 1983)(court recognized that "areas of 'inherent managerial policy' and 'terms and conditions of employment' oftentimes overlap"); *Board of Education, LeRoy Community Unit School District No. 2 v. Illinois Educational Labor Relations Board*, 199 Ill.App.3d 347, 556 N.E.2d 857 (1990)(in making scope of negotiations determination, the Illinois Educational Labor Relations Board must first determine whether action has direct impact on wages, hours, or terms and conditions of employment, but also involves inherent managerial policy; if overlap exists, the agency must balance employee's right to bargain with policy of protecting inherent managerial rights and determine whose interests are more at risk). As head of the administrative agency charged with the task of reconciling these inherently conflicting provisions of law, the Secretary of Labor has attempted, through his or her designee, to craft a principled means of administering the law, balancing the *grant of rights to professional employees* under the Act against the *reservation of rights to public employers* under the Act. Balancing these conflicting considerations has proven a challenging task, one which must be analyzed and administered on a case-by-case, item-by-item basis. Indeed, in many instances, an issue or proposal must be subdivided, with differing elements of the topic or proposal given differing treatments in regards to negotiability. *See, e.g., Chee-Craw Teachers Association v. Unified School District No. 247*, 225 Kan. 561, 593 P.2d 406 (1979)("[i]f a particular proposal covers more than one subject, the district court may divide the proposal" in determining questions of mandatory negotiability); *Unified School District No. 501 v. Secretary of Kansas Department of Human Resources*, 235 Kan. 968, 685 P.2d 874 (1984)(after noting that the Secretary had divided a negotiating proposal into three areas of concern, the court affirmed the Secretary's conclusion, stating that "the decision to reduce staff is a managerial decision for the school board . . . not mandatorily negotiable. . . . [but] the *mechanics* for termination or nonrenewal of teachers as a result of a

reduction of staff are mandatorily negotiable items"); *Board of Education, U.S.D. No. 352, Goodland v. NEA—Goodland*, 246 Kan. 137, 138, 785 P.2d 993 (1990)(professional employee appraisal procedures, involving the 'mechanics' and the 'how' and 'when' of employee evaluation, are mandatorily negotiable; professional employee evaluation criteria include the 'what' or 'standard' used to evaluate areas of performance by employees thus determining the quality of work to be expected, which is an exclusively managerial decision.")

In researching the parties' arguments, the presiding officer notes that in a majority of other states that have considered the question, matters relating generally to school calendars are not mandatorily negotiable. *See, e.g., West Hartford Education Association v. DeCoursey*, 162 Conn. 562, 295 A.2d 526 (1972)(under provisions of Teacher Negotiations Act, teachers' hours of employment determine students' hours of education and was an important matter of educational policy, that is, those matters that are fundamental to the existence, direction and operation of the enterprise, and are reserved to school board; length of school day and school calendar not mandatory subjects of negotiations); *City of Biddeford by Board of Education v. Biddeford Teachers Association*, 304 A.2d 387 (Me. 1973)(court modified arbitration panel decision by striking determinations concerning class size, length of teachers' working day, scheduling and length of school vacations and of the commencement of the school year as beyond the arbitrators' statutory jurisdiction); *School Committee of Burlington v. Burlington Educators Association*, 7 Mass.App.Ct. 41, 385 N.E.2d 1014, 1017 (1979)("power to determine the number of days that the schools shall be open in any school year is specifically reserved" to the employer); *Eugene Education Association v. Eugene School District 4J*, 46 Or.App. 733, 613 P.2d 79 (1980)(teachers' association proposal on summer vacation, specifying beginning and ending dates was inextricably intertwined with comprehensive school calendar and could not be

reconciled with Court of Appeal's holding that setting school calendar was within school district's prerogatives, and thus was not mandatory subject of bargaining); *Board of Education of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association*, 81 N.J. 582, 410 A.2d 1131 (N.J. 1980)(establishing school calendar in terms of when school commences and terminates is a non-negotiable managerial decision); *Eastbrook Community School Corp. v. Indiana Education Employment Relations Board*, 446 N.E.2d 1007 (1983)(emergency closing contingency of make-up days did not change total number of hours or days teachers were required to teach, and this was within employer's managerial prerogative, a right which the school board is prohibited from bargaining away; in order for the school board to maintain the efficiency of school operations and to take actions necessary to carry out the mission of the public schools, it must retain sufficient flexibility in making educational policy decisions and in modifying these decisions as the need arises, thus to require school board to bargain with teachers' association as to rescheduling school days should an emergency closing occur would unduly impede the board in exercising its fundamental duty to insure the children's right to quality education); *University Education Association v. Regents of University of Minnesota*, 353 N.W.2d 534 (1984)(the academic calendar is a matter of inherent managerial policy); *Union County School Corporation Board of School Trustees v. Indiana Educational Employment Relations Board*, 471 N.E.2d 1191 (1985)("make-up days which do not change the amount of time teachers agreed to teach" do not mandate bargaining); *Montgomery County Education Association, Inc. v. Board of Education of Montgomery County*, 311 Md. 303, 534 A.2d 980 (1987)(court affirmed decision of state board that calendar was non-negotiable, reasoning that the calendar affected not only teachers, but other school employees, community at large, students and parents); *Northwestern School Corporation of Henry County Board of School*

Trustees v. Indiana Educational Employment Relations Board, 529 N.E.2d 847, 852 (1989)("[w]e have held that school calendar is a matter of educational policy and, therefore, is a non-negotiable, managerial decision. . . . absent the grandfather provision, calendar could not be a proper subject of bargaining"); *Public Employee Relations Board v. Washington Teachers' Union Local 6, AFT*, 556 A.2d 206 (D.C. 1989)(beginning date of school year and Good Friday's status as holiday were not mandatory subjects of collective bargaining); *Piscataway Township Education Association v. Piscataway Township Board of Education*, 307 N.J. Super. 263, 704 A.2d 981 (1998)(establishment of a school calendar is not a term and condition of employment entitling public employees to negotiate such terms and conditions, but is a major educational determination which traditionally has been the exclusive responsibility of school administrators).

Likewise in Kansas, matters relating to school calendars are generally not mandatorily negotiable. *See, e.g., NEA-KCK v. Unified School District No. 500*, 227 Kan. 541, 543, 608 P.2d 415 (1980)("specific beginning and ending dates for the school term are not mandatorily negotiable"); *Parsons-National Education Association v. Unified School District No. 503, Parsons*, 225 Kan. 581, 582, 593 P.2d 414 (1979)(teachers' proposal concerning number of basic teacher contract days and handling of credit days earned for in-service training days are not mandatorily negotiable). *But see, Parsons-National Education Association v. Unified School District No. 503, Parsons*, 225 Kan. 581, 583, 593 P.2d 414 (1979)(the number of days of in-service training to be required in excess of the minimum 180 day school calendar is mandatorily negotiable).

Were the analysis to end there, no doubt Petitioner's unfair labor practice charge would be dismissed. Under Kansas law, however, school districts have only the power and authority delegated to them. *National Education Association—Wichita v. Unified School District No. 259, Sedgwick County*, 234 Kan. 512, 674 P.2d 478 (1983). While Kansas school boards have been

granted the power to establish a school's calendar, including beginning and ending dates of its terms, *NEA-KCK*, 227 Kan. at 543, this authority must be exercised within certain other statutory restrictions. For example, the legislature has mandated that "[s]ubject to the other provisions of this section, a school term during which public school shall be maintained in each school year by each school district organized under the laws of this state shall consist of *not less than 186 school days* for pupils attending kindergarten or any of the grades one through 11 . . . ." K.S.A. 72-1106(a). Consistent with this statutory mandate, the parties' Negotiated Agreement for 2010-2011 provides that "all full-time teachers who have completed their initial year of employment with the district" will be paid for 186 duty days. Exhibit 1, p. 2, Article IV, Section A Term of Employment.

As the parties concede, school boards also have authority to cancel school for inclement weather and to schedule make-up dates. K.S.A. 72-1106(e). This authority is limited as follows:

> ". . . . Consonant with the other provisions of this section, a board may schedule any number of days or hours in excess of the regularly scheduled school days or school hours which the board determines will be necessary to compensate for those school days or school hours that schools of the district will remain closed during the school term due to hazardous driving conditions. If the number of days or hours schools remain closed due to hazardous driving conditions exceeds the number of days or hours scheduled by the board to compensate for such school days or school hours, the excess number of days or hours, not to exceed whichever is the lesser of (1) the number of compensatory days or hours scheduled by the board or (2) five days or the number of school hours regularly scheduled in five days, that schools remain closed due to such conditions shall be considered school days or school hours."

Id. Pursuant to the first sentence of the provision set out above, Respondent scheduled two days "in excess of the regularly scheduled school days . . .which the board determine[d would be] necessary" to compensate for inclement weather. *See* Petitioner's Brief, table at p. 4. Those two days, commonly referred to as "snow days", were May 26 and May 27, 2011. *Id.* The number

of days the school remained closed due to inclement weather, (five), were in excess of the two "snow days" scheduled by the board to compensate for inclement weather. By operation of law, "the excess number of days", (three), "not to exceed whichever is the lesser of [] the number of compensatory days . . . scheduled by the board", (two), or "five days . . . that schools remain closed due to such conditions shall be considered school days". Of the five days that Respondent's schools were closed for inclement weather, two of those days, according to the legislative mandate, "shall be considered school days". Thus, by operation of law, two of the five days Respondent's schools were closed due to inclement weather were considered to be "school days", counted toward the statutory minimum school term "of not less than 186 school days". K.S.A. 72-1106(a). In light of the provision of law set forth above, it is clear that by requiring its professional employees to make up all five missed days, as opposed to the statutorily mandated three, Respondent unilaterally increased its professional employees' "hours and amounts of work" both beyond that required by state law, and beyond that for which the parties had contracted and by which there were bound with adoption and ratification of their 2010-2011 Negotiated Agreement, *Shawnee Mission*, 212 Kan. at 432. Petitioner asks that its members be made whole for this two-day increase in the "hours and amounts of work" required by Respondent's unilateral action. Reply Brief of Petitioner NEA-KCK, pp. 9-10. Of apparently equal or even greater concern to Respondent's professional employees, were other effects wrought by Respondent's unilateral adoption of calendar revisions. Those concerns ranged from "retirement; medical appointments and procedures; travel itineraries; outside employment; weddings (where the employee is in the wedding party); graduations (where the employee or an immediate family member is graduating); and child care expenses." *See* Respondent's Brief, Exhibit A, Item No. 2. With regard to such effects, Respondent's actions were a violation of

K.S.A. 72-5430(b)(5) and the presiding officer notes that it appears Respondent understands its obligation to adjust the effects of its actions on members. *See, e.g.*, Respondent's Brief, p. 9 ("[t]he District provided an opportunity for members of the NEA-KCK to submit documentation of monetary loss suffered as a result of the revised calendar and 64 employees were granted relief by the District").

As with school districts' decisions regarding class sizes,[6] decisions to establish a school term's beginning and ending dates,[7] to reduce staff,[8] to institute a Student Teacher Program[9] and to establish teacher evaluation *criteria*,[10] a school district's determination to establish make-up dates for school days missed due to inclement weather is a prerogative reserved to management. When the exercise of that authority effects bargaining unit members' terms or conditions of professional service, by, for example, increasing the "hours and amounts of work" for which professional employees had contracted to teach, the law obligates school districts to engage in professional negotiations in good faith regarding this and other such effects. As in the *Piscataway* decision, 704 A.2d at 987, such negotiations will not involve the actual change in days but would be limited to ways to ameliorate the effects of these changes on professional employees' terms and conditions of professional service. It does not appear, in the experience of the presiding officer, that professional negotiations over the effects of such calendar revisions are

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[6] *Shawnee Mission*, 212 Kan. at 752.
[7] *NEA-KCK*, 227 Kan. at 543.
[8] *USD No. 501*, 235 Kan. at 973 ("the decision to reduce staff is a managerial decision . . . not mandatorily negotiable [while] the mechanics for termination or non-renewal as a result of reduction of staff are mandatorily negotiable items").
[9] *Id.*, at p. 974.
[10] *Board of Education, U.S.D. 252, Goodland v. NEA—Goodland*, 246 Kan. 137, 143-144, 785 P.2d 993 (1990)("evaluation criteria should be defined as a managerial policy solely within the domain of the Board, whereas the evaluation procedure should be defined as the mechanics of applying such criteria. . . . evaluation procedures are mandatorily negotiable; evaluation criteria are not.")

so interwoven with the prerogative, that appropriate negotiations would unduly interfere[11] with the exercise of the prerogative itself.

CONCLUSION

After careful consideration of the parties' arguments and of applicable law, the presiding officer concludes that the actions of Respondent constituted the prohibited practice of refusal to negotiate in good faith with regard to the effects, on its professional employees' terms and conditions of professional service, of Respondent's unilateral decision to revise the school calendar in response to school closings from inclement weather. In response to five days of school closings, Respondent revised its school calendar, requiring its professional employees to make up two additional days of work over and above that required by state law, days for which the parties' negotiated agreement provided no compensation.

ORDER

IT IS THEREFORE DETERMINED that the actions of Respondent, Unified School District No. 500, Kansas City, Wyandotte County, Kansas, constituted a prohibited practice in violation of K.S.A. 72-4330(b)(5) in the manner detailed above.

IT IS THEREFORE NOTED that Respondent, Unified School District No. 500, Kansas City, Wyandotte County, Kansas understands its statutory obligation to refrain from making unilateral changes to the parties' negotiated agreements, with regard to mandatorily negotiable topics; **AND RESPONDENT IS ORDERED** to resume professional negotiations over the

[11] Respondent urges that "negotiation on the effect of the revised calendar would have delayed the implementation of the revised calendar, and likely would have made it a moot issue as the proposed make up days would have passed". While this concern is noteworthy, the record of this matter provides no factual basis to sustain such a finding. Given the several weeks between the final days of winter and the end of school, adequate time exists for the good faith negotiations contemplated here.

effects on its professional employees' terms and conditions of employment of the actions in question in this matter, in the light of this determination.

IT IS FURTHER ORDERED that Respondent post a copy of this order in a conspicuous location in all facilities operated by Respondent where members of the professional employees' bargaining unit work.

IT IS SO ORDERED.

DATED, this 24th day of May, 2012.

Douglas A. Hager, Designee of the Secretary
Office of Labor Relations
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, KS 66603

NOTICE OF RIGHT TO REVIEW

This Initial Order of the Presiding Officer is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Labor, either on the Secretary's 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. 77-527(b), 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 June 11, 2012, addressed to: Chief Counsel Glenn H. Griffeth, Office of Legal Services, Kansas Department of Labor, 401 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

CERTIFICATE OF SERVICE

I, Loyce McKnight, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 24th day of May, 2012, a true and correct copy of the above and foregoing Initial Order of the Presiding Officer 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:

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