BEFORE THE SECRETARY OF THE KANSAS DEPARTMENT
OF HUMAN RESOURCES

DERBY-NATIONAL EDUCATION ASSOCIATION Complainant, vs. UNIFIED SCHOOL DISTRICT #260, Respondent.	)	Case No. 72-CAE-5-1989

ORDER
(Pursuant to K.S.A. 77-507a)

PROCEDURAL BACKGROUND

This complaint came before this Kansas Department of Human Resources hearing officer with the following procedural background:

1. Complainant filed an action on September 15, 1988, alleging:

a. That Respondent unilaterally instituted a policy whereby department chairpersons (teachers who are not administration) became evaluators in the formal evaluation process;

b. that Respondent unilaterally altered a mandatory subject of bargaining while a negotiated agreement was in force and committed a prohibited practice by doing so under K.S.A. 72-5243(b)(5) and (6);

c. that Respondent allegedly refused to negotiate a mandatory subject of bargaining, which denies Complainant its rights as an exclusive bargaining representative.

Complainant requested this agency to find a prohibited practice, issue a cease and desist order, and order the expungement of all evaluations from the teachers' files.

2. On October 6, 1986, Respondent answered and:

a. Denied that they had unilaterally instituted a new policy in 1988, but affirmatively alleged past practices of allowing some department heads to contribute to the evaluation process in some departments;

b. affirmatively alleged that the evaluation appraisal policy is a matter that is being negotiated;

c. alleged the past collective bargaining agreement provided for department chairpersons to be evaluators in the formal evaluation process.

3. This agency conducted a pre-trial hearing two months before the formal hearing (TR. pp. 6-7).

4. A formal hearing was held February 20, 1989, at Derby, Kansas. Complainant called six witnesses; Respondent called four witnesses; the 172-page transcript and approximately 170 pages of exhibits have been reviewed by this hearing officer in their entirety.

5. Complainant was represented by David Schauner, general counsel for NEA Kansas, 715 West Tenth Street, Topeka, Kansas 66612.

The Respondent was represented by Jerry L. Griffith, 101 N. Baltimore, P.O. Box 184, Derby, Kansas 67037

6. This officer has received and reviewed the March 30, 1989, post-hearing memorandum brief of the complainant. This officer was appointed by the Secretary to be his designee to review the file, issue findings of fact, issue conclusions of

law, and issue an order.

FINDINGS OF FACT

Based upon the review of the entire record, the Secretay's designee makes the following findings of fact:

1. Complainant is a certified bargaining representative for the subject teachers.

2. Respondent is the appropriate employer pursuant to Professional Negotiations Act.

3. The parties had a negotiated contract for July 1, 1985 to June 30, 1987. (Exhibit 1).

4. The parties had a negotiated agreement from July 1, 1987 to June 30, 1989. (TR. p. 46-49 and exhibit 2).

5. In the Fall of 1987 the Respondent unilaterally established a practice of utilizing department chairpersons to make formal statutory evaluations of the teachers in their department. The Respondent utilized standard forms which were identical to or very similar to the forms used by the administration officials.

6. The unilateral change was not noticed for negotiation or bargained for prior to its implementation. The change was not made a part of the parties collectively bargained for agreement from 1987 through 1989.

7. Prior to the Respondent's unilateral change, the department chairpersons were not aware of the Respondent utilized the evaluation forms to conduct the legislatively mandated and bargained for "teacher evaluations". (See K.S.A. 72-9000 et seq.)

8. That members of the complainant made their dissatisfaction concerning the Respondent's unilaterally change known to the complainant's president in early 1988.

9. That the Respondent made a unilateral alteration of the collectively bargained agreement in 1987. That Respondent required department chairpersons to actively participate in conducting formal evaluations which were the responsibility of the Respondent pursuant to the bargained for agreement

10. The teacher evaluations and appraisals are mandatory subjects of bargaining pursuant to K.S.A. 72-5413(1)(3).

11. That the Respondent relied on a "past practice defense" and refused to negotiate this mandatory subject in good faith.

12. That the department chairpersons do not have formal training in evaluation techniques.

DISCUSSION

I. Jurisdiction - Mandatory subject

Neither party contested jurisdiction in this case. However, since the secretary does not take jurisdiction concerning purely contractual disputes, a brief discussion of why the secretary has taken jurisdiction in this case appears appropriate.

Teacher evaluations and teacher appraisals are a mandatory subject of bargaining pursuant to K.S.A. 72-5413-(L)(3).

The Kansas Supreme Court in National Education Association - Wichita vs. Unified School District 259, Sedgwick County Kansas, 234 Kan. 512, 674 P.2d 478 (1983), (Here and after NEA -Wichita), held that a school board may not make unilateral changes in items

that are mandatorially negotiable pursuant to K.S.A. 72-5413(1)(3). The facts of NEA - Wichita are very similar to the facts of the instance case. In NEA - Wichita the parties had an agreement for calendar year 1981 to 1983. The parties negotiated a seven period teaching concept in 1981. The school board unilaterally changed the seventh hour of the seven period teaching concept in February of 1982. NEA filed suit in the district court, and on 3-30-83 the district court enjoined the school board from making unilateral changes without first negotiating such subjects with NEA. (See NEA - Wichita p. 513-514). The Kansas Supreme Court relied on Chee-Craw Teachers Association vs. USD 247, 225 Kan. 561, 593 P.2nd 406 (1979), Dodge City National Education Association vs. USD 443, 6 Kan. App. 2nd 810, 635 P.2nd 1263 (rev. 9 230 Kan. 817 (1981), Tri County Educational Association vs. Tri County Special Ed. 225 Kan. 781, 594 P.2nd 207 (1979); and NEA Topeka Inc. vs. USD 501, 225 Kan. 445, 592 P.2nd 93 (1979), as authority that; (a) during the time an agreement is in force, the board, acting unilaterally, may not make unilateral changes in items which are mandatorily negotiable, and (b) that if a topic is by statute part of "terms and conditions" of professional service, then the topic is by statute "mandatorily negotiable".

The Kansas Supreme Court relied on NLRB case law to decide that a closure clause is nothing but a diluted form of waiver, and the general laws that a waiver of a union's right to bargain must be clear and unmistakable. See NLRB vs. R.L. Sweet Lumber Company, 515 Fd. 2nd 785, 795 (10th circuit. 1975).

The district court, in essence, determined that the School Board of District 259 committed a prohibited practice as set forth in K.S.A. 72-5430(a)(b)(6). The prohibited practice is defined in that section, to include "among other actions, refusing to negotiate in good faith," pursuant to K.S.A. 72-5423; and denying the rights accompanying recognition recognized by K.S.A. 72-5415, to the bargaining agent.

The Kansas Supreme Court's ruling is consistant with prior decisions by this Secretary, see Unified School District 298 of Ottawa vs. The Ottawa Education Association, Case No. 72 CAE 5 -1983, in 72 CAEO-2-1983, (decision issued 8-18-83). The Secretary held in Ottawa that the parties refusal to bargain in good faith on the terms and conditions of employment (i.e. mandatory topics of negotiations) is a prohibited practice.

To rule otherwise, would allow the Board to not recognize the bargaining agent when the Board wants to change the terms and conditions of a bargained for agreement, during the life of the agreement.

The NLRB practice is to resolve contractual disputes when such resolution is necessary to the boards adjudication of an unfair labor practice charge; allow the board to defer to arbitration or the courts; or allow the board to retain jurisdiction until after arbitration. See the Developing Labor Law second edition volume one chapter 20 page 918 - 956, and NLRB vs. Electrical Workers (IBEW Local 11, 772 Fed. 2nd 571) (C.A.9,

1985) and NLRB vs. Merrill and Ring, Inc. 731 Fed. 2nd 605 (C.A.9, 1984).

This officer believes the NLRB practice is insightful to the Kansas P.N. law. Both statutes create an administrative body to decide disputes between the parties. Both statutes expect the administrative body to develop expertise in this limited area of law. Both administration bodies are faced with similar "overlapping" questions of whether a dispute is grievable, arbitrable, a prohibited practice, or good faith bargaining effort, or a matter of the Courts.

Accordingly the Secretary should look at each dispute and decide each case on its particular facts, merits and case law.

The reason for this discussion is to make clear that the Secretary does not have jurisdiction in every contractual dispute between the school boards, and the bargaining agents.

This Board notes that the parties referred the dispute to the grievance process prior to hearing , but the parties grievance process does not have binding arbitration as a final step (See exhibit 1 and 2, art. 4, sect. F - Grievance Procedure).

This board takes jurisdiction in the matter pursuant to K.S.A. 72-5430A (sub A, which states in part, "any controversy concerning prohibited practices may be submitted to the Secretary...")

II. DISCUSSION OF THE EVIDENCE AND REASONS FOR THIS DECISION.

The findings that there have been an unilateral changes, and refusal to bargain is based in part on:

a. The change in evaluation forms (TR. p. 111 and 117;

b. The formalization of the appraisal process (TR. p. 157) from the past informal practice;

c. That department chairpersons were not aware, prior to 1987, that the administration was using the forms to conduct the formal evaluation procedure (TR. pp. 87, 97, 113 thru 116);

d. A Department chairperson objected to an evaluation being attached to a teachers final 1988 evaluation. (TR. p. 116).

e. The failure to bargain is shown by the Respondent's defense of past practice.

The Respondent admitted that the use of department chairpersons was not in the negotiated contract. (TR. pp. 146 thru 149).

NEA-Wichita, citing Dodge City, held that the school board is precluded from unilaterally making changes in any item which is mandatorily negotiable, without reference to whether or not an "established practice" exists in a mandatorily negotiable area. NEA-Wichita at p. 521. Accordingly the respondent's past practice argument is not accepted by this hearing officer as it is contrary to Dodge City.

f. This officer also concludes that the Respondent has not shown by a preponderance the evidence, that the past practice was unequivocal, clearly enunciated, consistently followed over long periods of time, or shown to be mutually

acceptable to both parties. (See conflicting evidence of TR. pp. 83 thru 88, 96 thru 99, 103, 119 thru 120, 154, 163 thru 166) See the effect of past practice on the arbitration of labor disputes, (40 ARB. J. 27 1985)

g. In reviewing the contractual language which both parties cited, this officer concludes that taken as a whole it did not contemplate department chairpersons conducting the Boards evaluations and appraisals.

h. This officer also notes that Kansas statute 72-9001-9003(c) and 9005, (the Teacher Evaluations Act,) requires that all evaluation documents and responses be maintained for three years and become a part of the teachers personnel file, and be made availablE to the teacher.

If it were the practice of the school board to utilize the "past informal evaluations", all evaluations would have been placed into the teachers personnel files and made available to the teachers pursuant to the mandates of the Kansas Teacher Evaluation Act.

i. The only evidence at the hearing concerning the placement of the "pre 1987" evaluation forms in the teacher's files, was that one department chairperson specifically requested her evaluation not be placed in the file, or attached for the administrative evaluation. (TR. p. 116)

This analysis and order in no way reflects upon the well reasoned and practical rationale of the Respondent. The Respondent testified that the department heads have the training and

experience of their own department. When the administration looks for expertise in evaluating an area where the administration is not particularly strong, it is perhaps beneficial to the individual teachers for the department heads to have input. See TR. pp. 91 and 136.

By issuing this cease and desist order, the Secretary is hopeful that the matter can be resolved at the bargaining table.

III. CONCLUSIONS OF LAW AND ORDER

Pursuant to the foregoing findings of fact I conclude as a matter of law:

1. That the participation of the department chairpersons in the evaluating process is a mandatory subject to bargaining pursuant to K.S.A. 72-5413.

2. That the Respondent committed a prohibited practice by unilaterally requiring the department chairpersons be part of the formal evaluation process in late 1987 and early 1988 which was a unilateral change in a bargain for contractual provision. See NEA Wichita vs. USD #259, 234 Kan. 512, 674 P.2d 438, (1983). See The Developing Labor Law, 1983 edition, chapter 19, page 911.

3. I recommend that the Secretary issue a cease and desist order to the Respondent, and order respondent to cease and desist from having department chairpersons formally evaluate teachers in their department.

4. I decline to order the Respondent to expunge an evaluation by a chairperson in the teacher's permanent file. On the contrary, I hold that any evaluation forms performed by the

department chairpersons and relied upon by the administration be available to the individual teacher, as same is required by K.S.A. 72-9003(c).

The parties are advised this order is final and will become enforceable thirty days from this date unless appealed to the district court within that time in accordance with the provisions of the Act for Judicial Review and Civil Enforcement of Agency Action K.S.A. 77-601 et seq.

Entered in Topeka, Kansas, this 15 day of Sept., 1989.

WILLIAM J. PAUZAUSKIE
Secretary's Designee
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CERTIFICATE OF SERVICE

I hereby certify that on the 15 of Sept., 1989, the undersigned deposited a true and correct copy of the above and foregoing Order, in the United States Mail, first class postage prepaid, addressed to:

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% David N. Schauner
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