BEFORE THE SECRETARY OF HUMAN RESOURCES
STATE OF KANSAS

BRUCE LINDSKOG, REPRESENTATIVE, OAKLEY EDUCATION ASSOCIATION, Petitioner,	)	
vs.	)	Case No. 72-CAE-6-1992
UNIFIED SCHOOL DISTRICT 274, OAKLEY, KANSAS, Respondent,	)	

INITIAL ORDER

ON the 7th day of April, 1992, the above-captioned matter came on for hearing pursuant to K.S.A. 72-5430a(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Bruce Lindskog, Director
Northwest Kansas UniServ
P.O. Box 449
Colby, Kansas 67701

RESPONDENT: Appeared by Norman D. Wilks, Attorney
Kansas Association of School Boards
5401 SW 7th Avenue
Oakley, Kansas 67701

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN THEY FAILED TO ENTER INTO NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE ON THE ISSUE OF HEALTH INSURANCE PRIOR TO IMPLEMENTATION ONCE THE EXCLUSIVE REPRESENTATIVE REQUESTED NEGOTIATIONS?

   a. What is the board of education's obligation to negotiate with the exclusive representative during the term of the current contract?

b. Were the actions of the board of education and the school administration consistent with the past custom and practice within the district concerning changes in health insurance modifications during the term of the contract?

c. Based on custom and practice and the current negotiated agreement, is the Board of Education required to negotiate changes in the district-wide health plan?

2. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN IT REFUSED TO ENTER INTO NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE FOR THE BARGAINING UNIT ON THE ISSUE OF SELECTION OF AN INSURANCE CARRIER?

a. Is the issue of selection of an insurance carrier a mandatory subject of professional negotiations?

b. Based on custom and practice and the current negotiated agreement, is the Board of Education required to negotiate any or all changes in the district-wide health plan?

3. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN IT UNILATERALLY CONTRACTED WITH AN INSURANCE CARRIER FOR A HEALTH PLAN THAT CHANGED THE PRESENT HEALTH COVERAGE WITHOUT PRIOR NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE OF THE PROFESSIONAL EMPLOYEES IN THE BARGAINING UNIT?

a. Did the actions of the Board of Education result in any changes or modifications in the 1991-92 negotiated agreement?

b. Were the actions of the Board of Education and the school administration consistent with the past established custom and practice within the district concerning changes in health insurance modifications during the term or the contract?

c. Based on custom and practice and the current negotiated agreement, is the Board of Education required to negotiate any or all changes in the district-wide health plan?

4. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN IT CAUSED PARTICIPANTS IN THE SECTION 125 PLAN TO MAKE A SELECTION WITHOUT HAVING ENTERED INTO, OR COMPLETED NEGOTIATIONS ON, CHANGES TO THE HEALTH INSURANCE COVERAGE?

   a. Can professional negotiations change the manner of elections required by the Internal Revenue Code?

5. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(B)(1) WHEN THE SUPERINTENDENT PRESENTED INSURANCE PROPOSAL(S) DIRECTLY TO THE BARGAINING UNIT MEMBERS RATHER THAN THE EXCLUSIVE REPRESENTATIVES OF THE BARGAINING UNIT?

   a. Does the Professional Negotiations Act prohibit direct communication by the school administration or board of education regarding employee benefits?

6. WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(6) WHEN THE SUPERINTENDENT WITHHELD INFORMATION REQUESTED BY THE EXCLUSIVE REPRESENTATIVE IN A MEMO DATED NOVEMBER 21, 1991?

   a. What specific information is the Board of Education required to provide to the exclusive representative for the bargaining unit according to the Professional Negotiations Act?

7. WHETHER THE PROHIBITED PRACTICE COMPLAINT SHOULD BE DISMISSED BECAUSE IT WAS FILED BY BRUCE LINDSKOG WHO IS NOT A RECOGNIZED EMPLOYEE ORGANIZATION OR A PROFESSIONAL EMPLOYEE OF USD 274 AS REQUIRED BY K.A.R. 49-23-6?

SYLLABUS

1. **PROFESSIONAL NEGOTIATIONS ACT** - *Interpretation of Statutes - Use of decisions from other jurisdictions.* Where there is no Kansas case law interpreting or applying a specific section of PNA, the decisions of the National Labor Relations Board ("NLRB") and the Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1982), as well as the decisions of state appellate courts interpreting or applying similar provisions under their

state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA.

2. **PROFESSIONAL NEGOTIATIONS ACT** - *Interpretation of Statutes - How construed.* Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives.

3. **DUTY TO BARGAIN** - *Prohibited Practices - Unilateral Changes - Per Se violations.* The PNA presupposes that a board of education will not alter existing conditions of employment without first consulting the exclusive bargaining representative selected by the professional employees and granting it an opportunity to negotiate on any proposed changes. A unilateral change, by a board of education, in terms and conditions of employment is a *prima facie* violation of the collective negotiation rights of its professional employees.

4. **DUTY TO BARGAIN** - *Prohibited Practices - Remedies.* Where a prohibited practice as set forth in K.S.A. 72-5430(b)(5) is found, it is the customary policy to direct the board of education to restore the status quo ante.

5. **DUTY TO BARGAIN** - *When Duty Exists.* The duty to bargain continues during the term of the collective bargaining agreement.

6. **DUTY TO BARGAIN** - *Waiver - Unilateral changes - Necessary proof.* Where a board of education relies upon contract language as a purported waiver to establish its right to unilaterally change terms and conditions of employment not contained in the contract, the board must produce evidence to prove the matter in issue was fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.

7. **MEMORANDUM OF AGREEMENT** - *Past Practices - Effect.* The memorandum of agreement includes not just the written provisions stated therein but also the understandings and mutually accepted practices which have developed over the years. When the contract is executed the negotiators must be presumed to have accepted these understandings and practices in striking their bargain unless through the language of the memorandum of agreement or course of negotiations continuation of such understandings or practices is repudiated.

8. **MEMORANDUM OF AGREEMENT** - *Past Practices - Definitions.* 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 future relationship.

9. **MEMORANDUM OF AGREEMENT** - *Past Practices - When appropriate to use.* There are four situations in which evidence of past practices may be used to ascertain the parties' intentions: (1) To clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement.

10. **MEMORANDUM OF AGREEMENT** - *Past Practices - How established.* It must be proved both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice. Five indices that assist in determining this mutual acceptance are: (1) clarity and consistency throughout the course of conduct, (2) longevity and repetition creating a consistent pattern of behavior, (3) acceptance of the practice by both parties, (4) mutuality in the inception or application of the practice, and (5) consideration of the underlying circumstances giving rise to the practice.

11. **DUTY TO BARGAIN** - *Waiver - Direct dealing.* If the board of education decides to negotiate the subject at issue despite the existence of a waiver, it must do so only with the certified employee organization. A board of education cannot use the employee organization's waiver to circumvent the certified employee organization and negotiate directly with the teachers.

12. **DUTY TO BARGAIN** - *Requests for Information - Relevancy - Standard.* The information requested or demanded by the certified employee representative must be relevant to the relationship between the employer and the employee organization in the latter's capacity as representative of the employees. The standard of relevance is a *"discovery-type standard"* of potential relevance.

13. **DUTY TO BARGAIN** - *Requests for Information - Obligation of board.* Once a good-faith demand is made for relevant information, the employer must make a diligent effort to obtain or provide the information in a reasonably prompt manner.

14. **DUTY TO BARGAIN** - *Requests for Information - When obligation exists.* The duty to supply information applies not only during negotiations for a new or successor agreement, but also during the life of a currently existing agreement.

15. **DUTY TO BARGAIN** - *Requests for Information - Waiver.* The right to information can be waived as part of a negotiated agreement, but a certified employee representative's waiver of its statutory right to information from the employer must be clearly established.

16. **PROFESSIONAL NEGOTIATIONS ACT** - *Pleadings - Requirements liberally construed.* As a general rule, pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding. Great liberality as to form and substance is to be indulged, especially where the applicant is unrepresented by counsel. The key to pleading in the administrative process is adequate opportunity for opposing parties to prepare to defend. Fair notice is given if a party, having read the pleadings, should have been aware of the issues which it has to defend and the party bringing the charges.

FINDINGS OF FACT[1]

WITNESSES

1. Donna L. McGuire is a 2nd grade teacher at the Oakley Elementary school. She is president of the Oakley Education Association, and served on the Association's negotiating team. (Tr.p. 15-16).

2. Leroy Moos is a 3rd grade teacher at the Monument Elementary school. He is Treasurer of the Oakley Education Association, and served as spokesperson of the Association's negotiating team for the 1991-92 negotiations. (Tr.p. 48).

3. Daniel Applegate is a 4th grade teacher at the Monument Elementary school. (Tr.p. 80).

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[1] "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburg Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

4. Don Marchant is Superintendent for the Unified School District 274 ("District"), and assisted the Board of Education's negotiating team for the 1991-92 negotiations. (Tr.p. 89).

UNILATERAL CHANGES IN HEALTH INSURANCE

5. The District's health insurance program is one of the benefits included in the Cafeteria Flexible Benefit Plan adopted pursuant to Section 125 of the Internal Revenue Code of 1986 ("125 Plan). (Tr.p. 29, Ex. M).

6. A 125 Plan is a flexible benefit plan established by an employer to make a broader range of benefits available to its employees. The plan allows employees to choose among different types of benefits and select the combination best suited to their individual needs. The plan grants to eligible employees benefits which, when purchased alone by the employer, would not be taxable income, along with other benefits which are always taxable.

   By electing benefits covered by the 125 Plan an employee can have the costs of the benefits deducted from gross income, and paid by the employer. Through this means the costs do not become taxable income thereby reducing the employee's taxable liability. (Ex. M).

7. The contract year for the District's 125 Plan is January 1 to December 31. (Tr.p. 67, Ex. M). Any changes to the plan must occur prior to the beginning of the 125 plan year. (Tr.p. 97). Accordingly, benefit elections must be made prior to January 1 of each year and no election or changes are allowed after January 1. (Tr.p. 99).

8. The 1991-92 agreement contains the following provision relative to the 125 Plan and teacher benefits:

> *"Section C - Benefits*
>
> *"1. Each certified employee wishing to participate in a salary reduction plan may do so in accordance with Federal and State regulations and the local plan design."* (Ex. A, p. 2-C).

   The present language has appeared in the negotiated agreement for several years. (Tr.p. 94-95).

9. The language contained in *"Section C-Benefits"* has not always appeared in the negotiated agreements. According to Mr. Moos,

several years ago the negotiated agreement provided for a District contribution to a health insurance program through Blue Cross/Blue Shield. Subsequently, at the request of the Board of Education ("Board"), the negotiated agreement was changed to provide for District adoption of a 125 Plan (Tr.p. 67-68), and the designation of a specific health insurance carrier was deleted so that other insurance programs could be considered. (Tr.p. 58). This ultimately resulted in the District changing insurance carriers from Blue Cross/Blue Shield to the Kansas Educational Employees Fringe Benefit Pool ("KEEP"). (Tr.p. 32).

10. During those years the language in *"Section C - Benefits"* appeared in the negotiated agreement, the District has changed carriers, as noted above, (Tr.p. 57, 95) and benefits (Tr.p. 98) without negotiating first with the Association. (Tr.p. 98). Changes in the health insurance program have included changing the third party administrator, deductibles and *"more specific changes concerning some exclusions within certain areas."* (Tr.p. 98).

11. It was common for the amount of the health insurance premiums to change during the school year (Tr.p. 18), and consequently during the term of the collective bargaining agreement. (Tr.p. 42). The change in insurance premiums corresponded to the contract date of the health insurance program. (Tr.p. 18). The health insurance program contract year of January 1 to December 31 corresponds to the 125 Plan agreement year. (Tr.p. 18-19).

12. Over the past 5-7 years there have also been changes in the benefits provided in the insurance plans, which occurred around January 1 of each year. (Tr.p. 66).

13. Health insurance was one of the subjects noticed by the Association for the 1991-92 negotiations. (Tr.p. 34).

14. During the 1991-92 negotiations specific proposals and language concerning health insurance were exchanged by the parties (Tr.p. 99), and benefits were specifically addressed (Tr.p. 17, 34, 99-100). The Association presented a proposal on health insurance which included, among other items that:

    1. *"The board shall provide a fringe benefit payment equal to the amount of a full family medical and dental premium for each teacher."*

2. *"The board shall provide a fringe benefit plan which complies with Section 125 of the IRS code. The plan shall provide the following options:*
   a. *Full family and extended health, hospital, surgical, major medical and dental insurance;*
   b. *Disability income and Salary protection insurance;*
   c. *Unreimbursed Medical Expenses;*
   d. *Dependent Care;*
   e. *Term Life Insurance;*
   f. *Cancer; and*
   g. *Cash."*

3. *"The companies which offer these benefits will be selected by majority vote of the teachers."*(Ex. O).

The Association dropped its proposal (Tr.p. 107) and none of the language requested by the Association was included in the 1991-92 agreement. (Tr.p. 100, Ex. A).

15. During the negotiations for the 1991-92 agreement the District presented a proposal that would allow for changing the health insurance carrier. It was considering membership in the Southwest Kansas Insurance Group that was a self-insuring type of organization. (Tr.p. 48-49). The parties discussed the possibility but could not reach agreement on changing insurance carriers from KEEP to the Southwestern Insurance Group. (Tr.p. 17-18, 50).

16. During negotiations for 1991-92 there were no proposals presented to require specific benefits or to designate a specific carrier. (Tr.p. 94, Ex. B. C, D, E).

17. The 1991-92 negotiations resulted in an agreement which presented teachers with two options for their final contract. The first option was a straight salary schedule, and the second option was a reduced salary schedule with a payment made by the District toward a health insurance program. (Tr.p.50). The teachers voted for higher salaries with the District making no contribution toward the cost of health insurance. (Tr.p. 36, Ex. D, E).

18. The wording of the 1991-92 agreement remained unchanged from the 1990-91 agreement as it relates to insurance benefits and identity of the insurance carrier in that the only reference to benefits appears in the above-cited *"Section C - Benefits."* (Tr.p. 94-95, Ex. A). There is nothing in the 1991-92 agreement designating specific insurance carriers or exactly

what benefits are to be provided in the insurance programs. (Tr.p. 36, 79, Ex. A).

19. The Association believed when the 1991-92 negotiations concluded without any negotiated changes in the 1990-91 insurance program, the same benefits would be continued for the 1991-92 school year (Tr.p. 42), and that the then current insurance carrier (KEEP) would continue throughout the term of the agreement. (Tr.p. 50).

20. When the teachers returned to school in August, 1991 their insurance benefits were unchanged from the benefits existing at the end of the school year in May, 1991 (Tr.p. 18, 51), and the teachers were under the assumption there would be no changes for the 1991-92 school year other than a possible increase in premiums. (Tr.p. 18). It was common knowledge among the teachers of U.S.D. 274 that there could be an increase in premiums when the new health insurance program contract became effective in January, 1992. (Tr.p. 19).

21. In September of 1991 the District was informed by the KEEP insurance group that rates could escalate dramatically for the 1992 contract year. Several of the other Districts participating in KEEP indicated they were seeking outside agencies to take over their insurance coverage. The District likewise decided it advisable to seek proposals from other carriers. (Tr.p. 90, 104).

22. Following discussions with Superintendent Marchant, a representative from Central Benefits insurance came to an October, 1991 meeting to discuss insurance programs (Tr.p. 105), and gathered information from those teachers who might be included in the health insurance program to obtain data upon which a proposal could be prepared.

23. In past years, Superintendent Marchant has held informal meetings with the teachers usually in late November of each year to discuss changes in insurance program premiums, benefits and carrier (Tr.p. 31-32, 85, 101). Three meetings were called by Superintendent Marchant to provide information to the teachers on the 1992 insurance program, and to allow representatives of different insurance companies the opportunity to make presentations. All teachers were invited to attend. (Tr.p. 19-20, 37, 82, 89, Ex. 2, 3A-D, 4A-E, 5A-E, 6A-C, 7A-B).

24. On November 18, 1992 at an in-service meeting the teachers received a presentation from Central Benefit. (Tr.p. 24-25, 52, Ex. 6A-C).

25. By the second meeting on November 27, 1991 the District had received proposals from three companies (KEEP, Central Benefits and Farmers Union Ventures, Inc.) which were discussed and materials distributed. (Ex. 2, 3A-D, 4A-E, 5A-E, 7A-B).

26. A third meeting was held December 10, 1991 at which information received from Call Insurance Services of Great Bend was distributed to the teachers. (Tr.p. 25, Ex. 8A-I).

27. There were only 12 individuals participating in the District's health insurance plan out of 49 eligible employees. (Tr.p. 91). With the current levels of participation in the insurance program, no carriers other than KEEP offered a proposal. (Tr.p. 90-92). The deadline for teacher enrollment in the Cafeteria 125 plan for Plan Year 1992 (January 1 to December 31), which included deductions for health insurance premiums, was December 10, 1991. (Ex. K). This was approximately the same time frame as in past years. (Tr.p. 102-03). The Board had no other option than to accept the insurance program offered by KEEP. (Tr.p. 111).

28. By the November 18, 1991 meeting, the Association had knowledge that the District was considering changes in the present health insurance program. (Tr.p. 19, 22, 39, Ex. 2). The Association took no immediate action concerning the meetings. (Tr.p. 20).

29. The Association did ultimately contact Bruce Lindskog, UniServ Director, when it was determined the District had decided to make changes relative to health insurance. (Tr.p. 20-21). The Association was of the belief that any changes had to be submitted to professional negotiations prior to implementation. (Tr.p. 21).

30. On November 21, 1991 Bruce Lindskog, on behalf of the Association, wrote to the Board and Superintendent Marchant requesting to bargain the issue of insurance benefits, and suggesting certain dates to meet. (Ex. 1). It would appear that among the issues sought to be negotiated were "a) the carrier, b) coverage, c) deductibles, d) coinsurance, and the district's contribution toward a fringe benefit." (Ex. N).

31. In past years when the Association became aware of potential changes in the insurance carrier or insurance program by the district, the Association did not request negotiations. (Tr.p. 41).

32. The Board at its regular meeting on December 10, 1991, discussed the fact that the Educator's Insurance Group may be breaking up making it necessary for the District to find its own insurance agency to insure District employees. (Tr.p. 26, 109, Ex. F). Mr. Lindskog was present at the meeting and asked to set up a time with the Board to discuss health insurance. (Ex. F). The Board voted to schedule a special meeting for December 16, 1991 at 7:30 p.m. "for the purposes of discussing health insurance." (Tr.p. 109, Ex. F).

33. At the December 16th special Board meeting the Association and Mr. Lindskog appeared based upon a belief that they were going to negotiate with the Board the issue of health insurance. No meeting occurred because the Board did not have the quorum necessary to conduct business. (Tr.p. 27, 28, 110, Ex. 9). During the meeting Superintendent Marchant stated that the Board would not negotiate the identity of the insurance carrier. (Tr.p. 28).

34. The parties attempted but could not agree upon a new date to meet to negotiate the insurance issue. (Tr.p. 28). By letter dated December 18, 1991 to Superintendent Marchant, Bruce Lindskog suggested future dates "to begin bargaining the issues related to health insurance." The dates suggested were:

> *"January 2, 3, 4, 11 after 3:00 p.m., 12 after 2:00 p.m., 13, 25, and 30." (Tr.p. 101, Ex. N).*

Neither the Board nor Superintendent Marchant responded to Mr. Lindskog's letter of December 18, 1991, and no meetings were held. (Tr.p. 110).

35. According to Superintendent Marchant, there was no response to the December 18, 1991 letter because the money to pay the premiums for the health insurance program beginning January 1, 1992 had to be withheld the last pay day in December, 1991, and the dates proposed by the Association were all too late making negotiations impossible before the deductions had to be made. (Tr.p. 102).

36. Changes in the KEEP health insurance program beginning January 1, 1992 are set forth in Exhibit 3A and include freezing the

deductible at $500.00, and eliminating prescription service. (Tr.p. 56, 105, 125). Any changes in the KEEP insurance program benefits originated with the carrier and were not the result of any action by the Board. (Tr.p. 111).

37. The Association never participated in negotiations relating to changes in the health insurance program prior to the Board contracting with KEEP for 1992. (Tr.p. 56).

38. The Cafeteria Flexible Benefit Plan agreement adopted by the District for 1992 was not the subject of negotiations with the Association nor was it agreed to by the teachers. (Tr.p. 106, Ex. M).

39. The Cafeteria Flexible Benefit Plan designates KEEP as the health insurance program carrier. (Tr.p. 96-97, Ex. M). Prior to January 1, 1992 KEEP was the carrier of the District's health insurance plan. After January 1, 1992 KEEP remained the carrier. (Tr.p. 66).

40. The 1991-92 agreement has a duration clause that states:

> *"The negotiated package will go into effect July 1, 1991 and will expire June 30, 1992. Further negotiations on this contract will only take place by mutual consent of both parties."* (Ex. A, p. 1-A).

41. The 1991-92 agreement has a unilateral changes clause that states:

> *"It is further agreed that the Board of Education has the specific right to make any and all unilateral changes in policies, rules, regulations and practices not in conflict with this negotiated agreement, as long as these are not matters or subjects termed mandatorily negotiable under the provisions of K.S.A. 72-5413(l)."* (Ex. A, p. 10-C).

REQUEST FOR INFORMATION

42. The November 21, 1991 letter from Bruce Lindskog to the Board and Superintendent Marchant also made a request for information including:

1. Copies of all current bids;
2. Copies of specific insurance contracts represented by the current bids;
3. A copy of the current insurance contract; and
4. The current individual employee cost of the policy and the proposed cost for that coverage. (Tr.p. 21, 23, 57, 109, Ex. 1).

43. According to Donna McGuire, the Board considered the request at the December 10th Board meeting and directed the Superintendent to send Mr. Lindskog the information he had requested in his November 21, 1991 letter. (Tr.p. 26). The minutes of the December 10th meeting do not indicate any such direction being given. (Ex. F).

44. According to Donna McGuire, the Association never received the information requested in the November 21, 1991 Lindskog letter. (Tr.p. 26-27, 40).

45. Superintendent Marchant admits that neither he nor the Board provided the information requested by the Association in the Lindskog letter of November 21, 1991. (Tr.p. 112).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN THEY FAILED TO ENTER INTO NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE ON THE ISSUE OF HEALTH INSURANCE PRIOR TO IMPLEMENTATION ONCE THE EXCLUSIVE REPRESENTATIVE REQUESTED NEGOTIATIONS?

ISSUE 2

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN THEY REFUSED TO ENTER INTO NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE FOR THE BARGAINING UNIT ON THE ISSUE OF SELECTION OF AN INSURANCE CARRIER?

ISSUE 3

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN THEY REFUSED TO ENTER INTO NEGOTIATIONS WITH THE EXCLUSIVE REPRESENTATIVE FOR THE BARGAINING UNIT ON THE ISSUE OF SELECTION OF AN INSURANCE CARRIER?

ISSUE 4

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(5) WHEN IT CAUSED PARTICIPANTS IN THE SECTION 125 PLAN TO MAKE A SELECTION WITHOUT HAVING ENTERED INTO, OR COMPLETED NEGOTIATIONS ON CHANGES TO THE HEALTH INSURANCE COVERAGE?

Positions of the Parties

The Oakley Education Association ("Association") asserts that health insurance benefits and identity of the carrier are mandatory topics for bargaining which must be submitted to professional negotiations prior to any changes being made by the U.S.D. 274 Board of Education ("District) in existing insurance carriers or programs. Since the District unilaterally implemented the changes to the health insurance program without submitting the topic to professional negotiations, the Association alleges it violated the duty to bargain in good faith required by K.S.A. 72-5423(a), and committed a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

The District does not deny taking the complained-of action. However, in its defense the District argues the Association either (1) specifically waived its right to negotiate by the terms of the

1991-92 memorandum of agreement, or (2) implicitly waived its rights as a result of the past practices of the parties relating to unilateral changes in insurance carriers and benefits during the term of a negotiated agreement. Under either theory, the District maintains it is relieved of any duty to negotiate prior to implementing the proposed changes.

K.S.A. 72-5423(a) of the Professional Negotiations Act ("PNA") provides, in pertinent part:

> *"Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education, except that 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. . . ."*

"Professional negotiation" is defined in K.S.A. 72-5413(g) to mean:

> *"meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."*

K.S.A. 72-5430(b) then makes it a prohibited practice for a board of education or its designated representative willfully to:

> *"(1) Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414;*
>
> * * * * *
>
> *"(5) refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto."*

[1] The issues of waiver and past practices represent questions of first impression in Kansas. Where there is no Kansas case law interpreting or applying a specific section of PNA, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA. *See* Kansas Association of Public Employees v. State of Kansas, Department of Administration, 75-CAE-12/13-1991, p.26 (Feb. 10, 1992)[Federal and state decisions appropriate sources for interpreting the Kansas Public Employer-Employee Relations Act].[2]

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[2] Kansas Association of Public Employees v. State of Kansas, Department of Administration, 75-CAE-12/13-1991, p.26 (Feb. 10, 1992) contains the following explanation for the use of interpretation NLRA and other state labor statutes in interpreting PEERA which is equally applicable to interpreting PNA:

The Kansas Supreme Court had the opportunity to address the application of K.S.A. 75-4333(e) in Kansas Ass'n of Public Employees v. Public Service Employees Union, 218 Kan. 517 (1976):

> "KAPE cites us a number of decisions under the National Labor Relations Act to the effect that material misrepresentations, particularly concerning wages won by a union in other contracts, made just prior to a representation election when the opponent has no opportunity to refute them, may constitute such an interference with the voting employees' free choice as to require setting the election aside. Our act, in K.S.A. 1975 Supp. 75-4333(e), points to the 'fundamental distinctions' between private and public employment and admonishes us that 'no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent.' We nevertheless see no reason why the rule announced in the federal cases should not be applicable to a representation election among public employees . . ." Id. at 517.

The court reached a similar decision in U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531-32 (1990), wherein it recognized the NLRA differs from the Kansas statute but determined "the federal cases which have dealt with this statute provide guidance in the present case."

At least twenty-two state appellate courts have relied upon NLRB decisions or federal court decisions interpreting the NLRA in interpreting their own state public employee relations laws. Alaska, Public Safety Employees Ass'n v. State, 799 P.2d 315, 318 (1990); California, Fire Fighters Union, Local 1186, Etc. v. City of Vallejo, 526 P.2d 971 (1974); Connecticut, West Hartford Ed. Ass'n v. DeCourcy, 295 A.2d 526 (1972); District of Columbia, WTU v. District of Columbia, 126 LRRM 2650 (1987); Delaware, State v.

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American Fed. of State, Ct., M. Emp., Local 1726, 298 A.2d 362 (1972); Florida, School Bd. of Dade City v. Date Teachers Ass'n, 421 So.2d 654 (1982); Illinois, Sev. Emp. Int'l v. Ill. Educ. labor Rel. Bd., 153 Ill. App.3rd 861 (1987), Rockford Twp. Highway Dep't v. ISLRB, 153 Ill.App.3rd 863 (1987); Iowa, Mt. Pleasant Sch. Dist. v. PERB, 121 LRRM 2968 (1984); Massachusetts, Kerrigan v. City of Boston, 278 N.E.2d 287 (1972); Michigan, Detroit Police Officer's Ass'n v. City of Detroit, 214 N.W.2d 803 (1974); Minnesota, Intern. Bro. of Tmstrs., Etc. v. City of Mpls., 225 N.W.2d 254 (1975); Montana, Young v. City of Great Falls, 112 LRRM 2789 (1972); Missouri, Baer v. St. Louis Police Officers, 128 LRRM 2343 (1989) citing Missouri NEA v. Missouri State Bd. of Mediation, 695 S.W.2d 894; Nebraska, Larson v. Transit Auth. of Omaha, 120 LRRM 2550 (1985); New Jersey, New Jersey v. Council of N.J. College Locals, 92 LRRM 323 (1976); Oklahoma, Stone v. Johnson, 120 LRRM 2816 (1984); Oregon, AFSCME Local 2623-A v. State of Oregon, 113 LRRM 2580 (1981); Pennsylvania, Commonwealth v. PLRB, 113 LRRM 3052 (1983); South Dakota, Aberdeen Ed. Ass'n v. Bd. of Ed., 85 LRRM 2801 (1974); Vermont, Vt. Faculty Fed. v. State Colleges, 107 LRRM 2626 (1980); Washington, Public Employees Ass'n v. Community College, 114 LRRM 2762 (1982); Wisconsin, Racine Sch. Dist. v. WERC, 87 LRRM 2489 (1977). Appellate court decisions of fourteen states were found that cited the decisions from other state courts. More thorough research would certainly reveal additional states. Alaska, Public Safety Employees Ass'n v. State, 799 P.2d 315, 321 (1990); Delaware, State v. American Fed. of State, C & M. Emp., Local 1726, 298 A.2d 263 (1972); Illinois, Decatur Bd. of Educ. v. Ed. Labor Rel., 536 N.E.2d 743 (1989); Iowa, Mason City v. PERB, 113 LRRM 3354 (1982); Minnesota, Foley Educ. Ass'n v. School Dist. No. 51, 120 LRRM 2367 (1983); North Dakota, Rapid City Ed. Ass'n v. School Dist., 120 LRRM 3424 (1985); New Hampshire, Appeal of Berlin Ed. Ass'n, 121 LRRM 3521 (1984); New Jersey, Patterson Police Local 1 v. City of Patterson, 112 LRRM 2367 (1981); Oklahoma, Stone v. Johnson, 120 LRRM 2205 (1981); Oregon, AFSCME Local 2623-A v. State of Oregon, 113 LRRM 2580 (1981); Pennsylvania, Fire Fighters v. City of Scranton, 113 LRRM 3622 (1981); South Dakota, Rapid City Ed. Ass'n v. Rapid City Area Sch. Dist., 376 N.W.2d 562 (1985); Washington, Spokan Educ. Ass'n v. Barnes, 85 LRRM 2604 (1974); Wisconsin, City of Beloit, Etc. v. Wisc. Employment, Etc., 242 N.W.2d 231 (1976).

Respondent cites National Education Association v. Board of Education, 212 Kan. 741, 749 (1973) as dispositive of the Kansas Supreme Court's position on the "relative lack of utility of public sector case law." (Respondent's Reply Brief at 4).

> "We note in closing that we have examined a wealth of material dealing with the new and rapidly evolving field of collective negotiations in public employment. Cases from other jurisdictions proved to be of little value in construing our own statute because each state has its own philosophy and each statute has its own peculiar phraseology; none has the legislative history of our act." Id. at p. 757.

However, since the decision in National Education Association, the Kansas Supreme Court has looked to court opinions from other states in attempting to interpret Kansas public employee relations legislation, U.S.D. 352 v. NEA-Goodland, 246 Kan. 137, 143 (1990); Liberal-NEA v. Bd. of Education, 211 Kan. 219, 228 (1973); Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 835 (1983). In Pittsburg State, Id. at p. 819, the court specifically cited the Nevada case of Clark Co. Sch. Dist. v. Local Gov't, 530 P.2d 114 (1974), as being "persuasive precedent" although admitting the public employee relations "statutes of the two state are of course different." Id. at 821. The court then proceeded to cite decisions from Wisconsin and New Jersey as further support for its conclusion without setting forth in the opinion an evaluation of whether "the language, philosophy and history of the statutes underlaying these cases is comparable to PEERA before relying on them" as Respondent maintains is a precondition to reliance on such decisions. (Respondent's Reply Brief at p. 8.)

The National Labor Relations Act far predates PEERA and the collective bargaining laws of those states authorizing public employee collective bargaining. It is not surprising, therefore, that public employee labor law has been influenced by the private sector labor movement. Historically, many benefits secured by the public sector resulted from the fact that the private sector labor union had already secured such benefits. Project: Collective Bargaining and Politics in Public Employment, 19 U.C.L.A. L.Rev. 887, 893 (1972). As noted in The Ohio SERB and Representation Campaign Issues, 18 Univ. of Toledo L.Rev. 339, 341 (1987):

> "Following the private sector model, which has evolved over the past fifty years, has many advantages. In a state which has only recently enacted a comprehensive bargaining bill, following NLRB precedent would give the system predictability and some certainty of application. Parties would be able to plan their actions with some degree of confidence. Further, the NLRB and federal courts have generally developed an expertise based on familiarity with labor law issues and experience. One would expect that a state new to collective bargaining could benefit from this experience and expertise."

To the extent that a state public sector labor relations law is patterned after the NLRA, it is logical and appropriate for the state administrative agency responsible for implementing the law and the state courts to refer to federal case law as instructive in resolving public sector labor law questions. The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, 19 Stetson Law Review 511, 564 (1990). The Illinois Education Labor Relations Board addressed the issue of reliance upon NLRB decisions in Hardin County Educ. Ass'n v. IELRB, 174 Ill.App.3d 168, 174 (1988):

> "The decisions of the National Labor Relations Board (NLRB) and the Federal courts interpreting similar provisions under the National Labor Relations Act (NLRA) (29 U.S.C. §151 et seq. (1982)) are persuasive authority. The Labor

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The reason for examining decisions from other jurisdictions can be compared to the way human knowledge advances, best described over three hundred years ago by Sir Isaac Newton, *"If I have seen farther, it is by standing on the shoulders of giants."*

A review of the NLRA and the PNA reveal that although the PNA is modeled on the NLRA, the two statutes are not identical in all aspects. Because there are differences between the two acts, the rationale of decisions under the NLRA can be applied to cases arising under PNA insofar as the provisions of the two acts are similar or the objectives to be attained are the same. It should therefore be noted that Section 8(d) of the NLRA and K.S.A. 72-5423(a) of the PNA place upon an employer a similar duty to bargain

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Board [IELRB] is not, however, bound to interpret the Act as the NLRB or the Federal courts have interpreted the NLRA."

The Kansas Supreme Court appears to have adopted this reasoning in its interpretation of public employee relations statutes under the Professional Negotiations Act ("PNA"). In its decisions the court recognized the differences between collective negotiations by public employees and collective bargaining as it is established in the private sector but determined those differences did not prevent use of federal decisions, only prohibited them being regarded as "controlling precedent." NEA-Wichita v. U.S.D. 259, 234 Kan. 512, 518 (1983). In U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources, 247 Kan. 519, 531-32 (1990), the court concluded an examination of the federal Labor-Management Relations Act "provides us with guidance" in interpreting public sector legislation. See also NEA-Topeka Inc. v. U.S.D. 501, 225 Kan. 445, 448 (1983); Liberal-NEA v. Bd. of Education, 211 Kan. 219, 232 (1973).

There is no reason to believe the Kansas Supreme Court will establish a different standard when interpreting PEERA. See e.g. Kansas Ass'n of Public Employees v. Public Service Employees Union, 218 Kan. 509, 517 (1976); Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801 (1983). This standard is consistent with K.S.A. 75-4333(e) as both the statute and the statements of the court make it clear that NLRB decisions and other jurisdiction case law are not controlling precedent, i.e. statements of law which must be followed in deciding an issue.

In summary, where there is no Kansas case law interpreting or applying a specific section of PEERA, the decisions of the National Labor Relations Board (NLRB) and the Federal courts interpreting similar provisions under the National Labor Relations Act (NLRA) (29 U.S.C. §151 et seq. (1982)), as well as the decisions of state appellate courts interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting PEERA. The Pubic Employee Relations Board ("PERB") is not, however, bound to interpret PEERA as the NLRB or the Federal courts have interpreted the NLRA or other states have interpreted their pubic employee relations laws. Reference to and consideration of such opinions can enrich PERB orders. In some instances PERB will find support for its positions, either in decided cases, dissenting opinions, or critical scholarship. In other situations, reference to and familiarity with foreign jurisdiction decisions will assist PERB consideration of alternatives. The fact that the language or philosophy of other jurisdiction public employee relations laws differs from PEERA is only a factor to be considered in determining the degree of persuasion or guidance the decisions provide in interpreting PEERA, and not a prohibition to its use.

with the certified representative about employee wages, hours and other mandatory terms and conditions of employment. The language of K.S.A. 72-5430(b)(1) & (5) is almost identical to the language of Section 8(a)(1) and (5) of the NLRA.

[2] Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives. *See* Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979). The Professional Negotiations Act was designed to accomplish the salutary purpose of promoting harmony between boards of education and their professional employees. A basis theme of this type of legislation *"was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement."* H.J. Porter Co., Inc. v. NLRB, 397 U.S. 99, 103 (1969); City of New Haven v. Conn. St. Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979); West Hartford Education Ass'n., Inc. v. Decourcy, 295 A.2d 526 (Conn. 1972).

[3] The United States Supreme Court in NLRB v. Katz, 369 U.S. 735 (1962) held that the NLRA Section 8(d) duty to bargain is violated when an employer, without first consulting a union, institutes a unilateral change in conditions of employment during the time the employer is under a legal duty to bargain in good faith is the very antithesis of bargaining. As the NLRB and

federal courts have held, good faith compliance with section 8(a)(1)&(5) of the NLRA presupposes that an employer will not alter existing conditions of employment without first consulting the exclusive bargaining representative selected by his employees and granting it an opportunity to negotiate on any proposed changes. *See* Armstrong Cork Co. v. NLRB, 211 F.2d 843 (CA 5, 1954). Although Katz was a private sector case, the principle set forth in Katz is equally applicable to public sector bargaining. *See* Burlington Fire Fighters v. City of Burlington, 457 A.2d 642, 643 (Vt. 1983).

It is a well established labor law principle that a unilateral change by a board of education in terms and conditions of employment presents a *prima facie* case that the employer has violated its professional employees' collective negotiation rights. Brewster-NEA v. USD 314, Brewster, Kansas, Case No. 72-CAE-2-1991, p. 23 (Sept. 30, 1991); Katz, supra. It is also well settled, however, that a unilateral change is not *per se* a prohibited practice. Brewster, at p.23. As the court concluded in NLRB v. Cone Mills, Corp., 373 F.2d 595 (CA 4, 1967):

> *". . ., we think it is incorrect to say that unilateral action is an unfair labor practice per se. See Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1423 (1958). We think it more accurate to say that unilateral action may be sufficient, standing alone, to support a finding of refusal to bargain, but that it does not compel such a finding in disregard of the record as a whole. Usually, unilateral action is an unfair labor practice -- but not always."*

After a negotiated agreement has been reached between the board of education and the exclusive representative of professional employees pursuant to K.S.A. 72-5423 *et seq.*, during the time that agreement is in force, the board of education, acting unilaterally, may not make changes in items included in the agreement or 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 agreement. *See* NEA-Wichita v. U.S.D. 259, 234 Kan. 512 (1983); Brewster-NEA v. USD 314, Brewster, Kansas, Case No. 72-CAE-2-1991, p. 23 (Sept. 30, 1991); Kinsley-Offerle-NEA v. U.S.D. 347, Kinsley, Kansas, 72-CAE-5-1990, Syl. 2, (October 10, 1990). A board of education must bargain during the existence of a bargaining agreement in regard to any mandatory subject of bargaining not specifically covered by the contract or unequivocally waived by the employee organization, regardless of whether the contract contains a reopener clause. *See* Elizabethtown Water Co., 97 LRRM 1210 (1978).

[4] Where it is determined that the board of education has taken unlawful unilateral action, to the detriment of its professional employees, which would constitute a failure to negotiate in good faith as required by K.S.A. 72-5423(a) and K.S.A. 72-5413(g), and which would be a prohibited practice as set forth in K.S.A. 72-5430(b)(5), it is the customary policy of the Secretary of Human Resources to direct the board of education to

restore the status quo ante. *See* Leeds v. Northrup Co., 64 LRRM 1110 (1967).

Whether the unilateral change is viewed as beneficial or detrimental is irrelevant to the determination of whether there was an unlawful unilateral change in terms and conditions of employment. Brewster, supra at p. 25, citing with approval School Bd. of Indian River County v. Indian River County Education Ass'n, Local 3617, 373 So.2d 412, 414 (Fla.App. 1979), wherein the court reasoned:

> *"A unilateral increase in benefits could foreseeably do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."*

A prohibited practice can be found despite the absence of bad faith, even where there is a possibility of substantive good faith. See Morris, The Developing Labor Law, Ch. 13, p. 564. As the United States Supreme Court explained in Katz, 369 U.S. at 743, even in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively with the chosen

representatives of his employees in much the same manner as a flat refusal to bargain.[3]

Unilateral action is *prima facie* unlawful because of the high degree of probability that it may frustrate a bargaining opportunity. Howver if there has 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. As the court noted in Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984):

> *"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 so that the union waived its right to bargain, courts will not find bad faith."*

The duty to bargain exists only when the matter concerns a term and condition. It is not unlawful for an employer to make unilateral changes when the subject is not a mandatory bargaining item. See Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Also, since only unilateral changes are

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[3] In O., C. & Atomic Wkrs Int. Union, AFL-CIO v. NLRB, 547 F.2d 575, 582 (DC Cir. 1976), the court concluded the applicable principle was stated in NLRB v. Katz, 369 U.S. 736, 743, 747, 82 S.Ct. 1107, 1111, 1114, 8 L.Ed.2d 230 (1962):

"Clearly, the duty thus defined [by section 8(d)] may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact . . ..

"Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment . . . and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified b;y an;y reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of over-all subjective bad faith."

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, p. 450-54 (1976).

Mandatorily Negotiable Subjects

Health Insurance Benefits

There is no question health insurance benefits are mandatory subjects of professional negotiations. K.S.A. 72-5413(l) defines *"Terms and conditions of professional service"* to include:

> *"(1) salaries and wages, including pay for duties under supplemental contracts; hours and amounts of work; vacation allowance, holiday, sick, extended, sabbatical, and other leave, and number of holidays; retirement; insurance benefits; wearing apparel; pay for overtime; jury duty; grievance; including binding arbitration of grievances; disciplinary procedure; resignations; termination and nonrenewal of contracts; re-employment of professional employees; terms and form of the individual professional employee contract; professional employee appraisal procedures; each of the foregoing is a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; . . ."* (Emphasis added).

If a topic is by statute made a part of the terms and conditions of employment, then the topic is by statute made mandatorily negotiable. *See* NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, Syl. 5 (1983).

Insurance Carrier

While it cannot be argued that insurance benefits are clearly a mandatory subject of professional negotiations, there is little precedent on the question whether a change in the carrier for an employee group health insurance program is a mandatory subject of negotiations. Generally, such questions have been decided on a case-by-case basis. *See e.g.* Allied Chemical & Alkali Workers, Local 1 v. Pittsburg Plate Glass Co., 404 U.S. 157, 177 (1971).

Justice Pell, in his dissenting opinion in Keystone Steel & Wire, Etc. v. NLRB, 606 F.2d 171, 181 (C.A. 7 1979), strongly took the position that the identity of the carrier *per se* is not a subject of mandatory bargaining:

> *"If the bargaining were solely as to the identity of the administrator, and the union did not bargain as to the actual benefits to be received under the insurance plan, admittedly a subject of mandatory bargaining, then it seems to me that this court should deny enforcement, or at the very least remand for a determination as to whether the real issue in negotiations was the identity of the administrator or whether it was the broader issue that the change in administrator affected the substantive terms of the benefit plan."*

By contrast, in Grandinette v. Com., Unempl. Comp. Bd., 486 A.2d 1040, 1044 (Pa. 1985), the court rejected the school district's contention that the decision to change insurance carriers was inherently managerial and therefore not mandatorily negotiable. The court concluded a decision on who carries the insurance program affects the wages and terms of employment.

In Bastian-Blessing v. NLRB, 474 F.2d 49 (C.A.6 1973), the company, without prior bargaining with the union, unilaterally terminated the employees contributory group health insurance plan and instituted a company self-insurance program. It was found that the change materially affected the employees because the new plan, among other things, completely omitted two 'significant' benefits and deleted other pertinent prior provisions governing the payment of benefits which caused an 'adverse impact on the employees' previously-negotiated benefits.' The court concluded that under those circumstances the specific insurance carrier for an employee group health program was a mandatory subject of bargaining.

For purposes of the Professional Negotiations Act, the identity of the insurance carrier is not a *per se* subject of mandatory negotiations. However, where the change in carrier will directly impact terms and conditions of employment of the professional employees by changing the benefits offered, or other pertinent provisions of the existing insurance program, it becomes mandatorily negotiable.

Requirement of Notice

The NLRB and the federal courts have long held that an employer has no duty to bargain where the union has not signified its desire to negotiate. Montgomery Ward & Co., 50 LRRM 1162, 1164 (1962); *See* Union Screw Products, 22 LRRM 1319 (1948); NLRB v.

Columbian Enameling & Stamp Co., 306 U.S. 292 (1938). The duty to bargain arises upon request; but where an opportunity exists to bargain and no request is made, a waiver may result. *See* Dove Flocking & Screening Co., 55 LRRM 1013 (1963); NLRB v. Spun-Jee Corp., 66 LRRM 2485 (CA 2, 1967); U.S. Lingerie Corp., 67 LRRM 1482 (1968); NLRB v. Island Typographers, Inc., 705 F.2d 44 (CA 2, 1983); Justensen's Food Stores, Inc., 63 LRRM 1027, 1028 (1966).

The NLRB continues to hold that where unions receive timely notice of contemplated employer action but fail to seek bargaining about such action they are precluded from claiming that the employer has refused to bargain about said action. Timely notice must include information that allows the union to make an informed decision as to what action it wishes to take on the matter. However, where a union receives notice contemporaneous with the action itself or where a demand to bargain would be futile, there is no waiver by inaction.

Moreover, formal notice of the intended unilateral change is not necessary as long as the union has actual notice. U.S. Lingerie Corp., 67 LRRM 1482 (1968). While the union need not receive formal notice, it must receive sufficient notice of the change to give it the opportunity to make a meaningful response. Dove Flocking & Screening Co., 55 LRRM 1013 (1963). In addition, the failure to protest unilateral action or the failure to request bargaining despite knowledge of a contemplated unilateral change

may directly result in a waiver. Nevertheless, consistent with the traditional common law view of waiver, the Board and the courts have construed the waiver doctrine strictly and have been reluctant to infer a waiver.

The November 21, 1991 letter from Bruce Lindskog states, in pertinent part:

> *"The bargaining team of OEA has asked me to send this formal request to bargain the issue of insurance benefits. Please contact me at 462-8631 to verify negotiation dates. I would suggest setting aside any or all of the following dates for negotiations: December 2 at 7:00 p.m., December 5 at 4:30 p.m. and December 10 at 4:30 p.m."* (Emphasis added).

Both the language used and the proposal of "negotiation dates" and times clearly indicates the Association's desire to negotiate the anticipated changes in the health insurance program, which could directly impact upon who the carrier will be, and satisfies the notice requirement necessary to trigger the District's duty to enter professional negotiations.

Specific Waiver by Contract Language

It is recognized that a union may relinquish its statutory right to bargain over mandatorily negotiable subjects if, as a part of the bargaining process, it elects to do so. Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (CA 6, 1963); NLRB v. Auto Crane Co., 92 LRRM 2363 (CA 10, 1976). The District maintains it reached agreement with the Association on a contract for the 1991-

92 school year covering July 1, 1991 to June 30, 1992. *"Section A - Duration Clause"* of that agreement provides:

> *"The negotiated package will go into effect July 1, 1991 and will expire June 30, 1992. Further negotiations on this contract will only take place by mutual consent of both parties."* (Emphasis added).

According to the District *"the parties by contract have limited the opportunity to change or modify the existing contract and made such limitations subject to the mutual agreement of the parties."* (Respondent's Brief, p. 6). By the specific language of the negotiated agreement, the District argues, neither the board of education nor the Association was under an obligation to further negotiate on the existing contract unless both parties agreed. Since no such agreement was forthcoming from the District concerning the Association's November 21, 1991 request to negotiate health insurance benefits, the District was under no duty to negotiate. According to the District's argument, the Association, by agreeing to the 1991-92 contract containing *"Section A - Duration Clause"*, specifically waived its statutory right to negotiate items covered by the agreement during its term.

[5] NLRB v. Jacobs Manufacturing Co., 196 F.2d 680 (CA 2, 1952), stands for the general proposition that the duty to bargain continues during the term of the collective bargaining agreement. Among the arguments often raised in defense of unilateral changes is the contention that the charging party has waived its right to bargain about the particular subject matter. As stated above, the

certified professional employee organization may relinquish its statutory right to bargain if, as a part of the bargaining process, it elects to do so. Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (CA 6, 1963); NLRB v. Auto Crane Co., 92 LRRM 2363 (CA 10, 1976).

The Association does not here assert that any clause of the memorandum of agreement was violated by the District's offer of a new health insurance program offering benefits different from the existing program. The District also points to no contract clause specifically authorizing termination of the existing health insurance program relying instead upon "*Section A - Duration Clause*"; which can best be characterized as a catchall zipper clause. The issue then is whether this zipper clause constituted a waiver of bargaining over existing employment terms to which the memorandum of agreement contract is otherwise silent.

[6] In order for memorandum of agreement language to effect a waiver of bargaining rights, it must be "*clear and unmistakable.*" Where a board of education relies upon agreement language as a purported waiver to establish its right to unilaterally change terms and conditions of employment not contained in the agreement, the board must produce evidence to prove the matter in issue was "*fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably*

waived its interest in the matter."[4] Southern Cal. Edison Co., 126 LRRM 1324 (1987); TTP Corp, 77 LRRM 1097 (1971); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (CA 6, 1963).

A waiver by contract may be found where the language of the agreement is specific, or where the history of prior contract negotiations suggests that the subject was discussed and *"consciously yielded."* Waiver will not be inferred from a contract's silence on the subject, from a generally worded management prerogatives clause, or from a *"zipper clause." See* Miami v. F.O.P., Miami Lodge 20, 131 LRRM 3171, 3177 (1989); TTP Corp, 77 LRRM 1097 (1971).

It is a recognized labor law principle that catchall zipper clauses do not constitute a waiver of employees' interest in specific existing terms and conditions of employment so as to privilege the employer's termination or change of such terms and conditions without bargaining. Rather, such a waiver may be accomplished only by *"clear and unequivocal"* language. As

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[4] Elizabethtown Water Co., 97 LRRM 1210 - 1212 (1978). The situation presented in February 1922 was a novel one -- for the first time during the relationship between the parties, a provision in the current collective-bargaining agreement would expire during the term of the Agreement. The Board has declined to find that a party to a contract has waived its rights to bargain concerning mandatory subjects of bargaining simply because it failed to mention the subject; instead, the Board requires 'a conscious relinquishment by the union, clearly intended and expressed.' Although, as noted above, the history of collective bargaining between the parties did not include midterm bargaining, the Union was not thereby obligated to request in 1976 a provision which would allow bargaining concerning the Plan in 1977. Rather, since neither party sought to bargain with respect to providing a mechanism whereby bargaining could occur when the Plan became subject to change, and since the Agreement does not reflect any understanding on the provisions under which a retirement plan may operate after February 1, 1977, we find that the Union did not clearly relinquish and thereby waive its statutory right to bargain about the Plan.

explained in Radioear Corp., 87 LRRM 1330, 1133-34 (1974) (Fanning and Jenkins dissenting):

> *"To find that a catchall clause, couched in the most general language and intended merely to forestall bargaining about what might be termed 'new' subjects, effectively operates as a 'conscious knowing waiver' of bargaining over modification or termination of an established condition of employment is, in our view, illogical."*

The Florida Supreme Court, in a case involving a claimed waiver of bargaining rights by public employees through a *"zipper clause,"* said that such clauses *"are generally interpreted only to maintain the status quo of a contract, and are not to be used to allow an employer to make unilateral changes in working conditions without regard to bargaining."* Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 1221, 1226 (Fla. 1985). As the Florida court later reasoned in Miami v. F.O.P., Miami Lodge 20, 131 LRRM 3171, 3177 (1989), to find waiver where an agreement does not directly speak to a particular management right would encourage public employers to refrain from raising at the bargaining table subjects which it hopes to change.[5]

The District's claim, that the Association waived its right to challenge the change in health insurance programs because of the language contained in "*Section A - Duration Clause*" of the 1991-92

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[5] When a "management rights" clause is the source of an asserted waiver, it is normally scrutinized by the Board to ascertain whether it affords specific justification for unilateral action. See Ador Corp, 58 LRRM 1280 (1965)

memorandum of agreement, must be rejected because the breadth of the language of Section A drains the zipper clause of the degree of specificity needed to infer a waiver on the part of the Association. While the zipper clause contains language that mutual agreement is required before further negotiations on the memorandum of agreement may commence, there is nothing in the language of Section A that clearly and unequivocally gives the District the right to unilaterally change the identity of the insurance carrier or benefits offered through the existing health insurance program during the term of the memorandum of agreement. Section A protects the District from being required to renegotiate the subjects covered by the memorandum of agreement during its term, but it should not be read as conferring upon the District the power of unilateral action on other matters on which the agreement is silent. *See* NLRB v. Auto Crane Co., 92 LRRM 2363, 2364 (CA 10, 1976).

Where waiver cannot be found specifically in the language of the memorandum of agreement, it may be proven from an evaluation of the negotiations that the particular matter in issue was fully discussed and consciously explored. The evidence reflects, during the 1991-92 negotiations, specific proposals and language concerning health insurance were exchanged by the parties and benefits were specifically addressed. The Association presented a proposal on health insurance that included, among other items that:

1. *"The board shall provide a fringe benefit payment equal to the amount of a full family medical and dental premium for each teacher."*

2. *"The board shall provide a fringe benefit plan which complies with Section 125 of the IRS code. The plan shall provide the following options:*
   a. *Full family and extended health, hospital, surgical, major medical and dental insurance;*
   b. *Disability income and Salary protection insurance;*
   c. *Unreimbursed Medical Expenses;*
   d. *Dependent Care;*
   e. *Term Life Insurance;*
   f. *Cancer; and*
   g. *Cash."*

3. *"The companies which offer these benefits will be selected by majority vote of the teachers."*(Ex. O).

The Association dropped this proposal and none of the language requested by the Association was included in the 1991-92 agreement.

Also during the negotiations for the 1991-92 agreement, the District presented a proposal that would allow for changing the health insurance carrier. It was considering membership in the Southwest Kansas Insurance Group, a self-insuring type of organization. The parties discussed the possibility but could not reach agreement on changing insurance carriers from KEEP to the Southwestern Insurance Group. No specific language was included in the 1991-92 agreement either allowing the District to change carriers to the Southwestern Insurance Group or any other new carrier, or prohibiting the District from so doing.

While it may be true the parties did discuss without successful agreement changing the insurance carrier and benefits to

be provided under the Section 125 cafeteria plan, there is nothing in the record to prove the parties fully discussed and consciously explored during negotiations the subject of allowing the District unilateral determination over health insurance carrier and benefits, or that the Association consciously yielded or clearly and unmistakably waived its interest in the matter by acceptance of Section A. *See also* Southern Cal. Edison Co., 126 LRRM 1324 (1987). It must therefore be concluded that Section A fails to establish that the Association consciously waived its right to professional negotiations over proposed changes in the health insurance program during the term of the agreement. *See* Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981).

Implied Waiver By Past Practices

The District next argues a "past practice" has evolved between the parties whereby the District has been allowed to unilaterally select a health insurance carrier, and thereby insurance program benefits, during the term of the memorandum of agreement, without first negotiating with the Association. As a result of that past practice, the argument continues, the Association has waived its statutory right to bargain, even though that waiver was not specifically set out in the memorandum of agreement. The question then is whether, apart from any provision in the 1991-92 memorandum of agreement, an established past practice can nevertheless be

considered a binding condition of employment. Or stated another way, is the 1991-92 memorandum of agreement an exclusive statement of rights and privileges, or does it presume continuation of existing practices.

Two views relative to the impact of past practices upon a memorandum of agreement have developed. Under the first view, it is reasoned that the only restrictions placed upon the parties are those contained in the written agreement. Each party continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. If an agreement does not require the continuance of existing conditions, a past practice would have no binding force regardless of how well established it may be. Under this view the District may abide by or disregard the practice without the Association's consent.

The second view emphasizes past practices as part of the contract, particularly those practices which have come to be accepted by employees and the employer alike, and have thus become an important part of the employment relationship. The written agreement is thought to be executed in the context of this working environment, and on the assumption that existing practices will remain in effect. Therefore, to the extent that existing practices are unchallenged during negotiations, the parties must be held to

have adopted them and made them a part of their agreement.[6] Cox and Dunlop, in an article dealing with national labor policy, urged that *"a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed."* See Cox & Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv.L.Rev., 1097, 1116-17 (1950).

[7] The latter is the more prevalent view. Smith, Merrifield & Rothschild, Collective Bargaining and Labor Arbitration, p. 253 (1970). The reasoning behind this view begins with the proposition that the parties have not set down on paper the whole of their agreement. As was observed *"[o]ne cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages."* Cox, Reflections upon Labor Arbitration, 72

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[6] The implication here that existing practices must be continued until changed by mutual consent is drawn from the nature of the agreement itself and form the collective bargaining process.

> "It is more than doubtful that there is any general understanding among employers and unions as to the viability of existing practices during the term of a collective agreement. . . . I venture to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that 'all existing practices, except as modified by this agreement, shall be continued for the life thereof, unless changed by mutual consent.' And I suppose that execution would also be blocked if the converse provision were demanded, namely, that 'the employer shall be free to change any existing practice except as he is restricted by the terms of this agreement.' The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitment, and the relentless search for cost-saving changes. . . ." Shulman, Reason, Contract and Law in Labor Relations, 68 Harv.L.Rev. 999, 1012 (1955).

Harv.L.Rev. 1482, 1499 (1959).[7] Thus the union-management contract includes not just the written provisions stated therein but also the understandings and mutually accepted practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain.

Archibald Cox not only agrees with this view but states the argument more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

> *"Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words. See* Cox & Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv.L.Rev., 1097, 1116-17 (1950).

This view has apparently been accepted by the U.S. Supreme Court. In United Steelworkers v. Warrior & Gulf Navigation Co.,

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[7] It is also argued that no matter how clear the language of the collective bargaining contract seems to be, it does not always tell the full story of the parties' intentions. Anyone familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics. It is hardly surprising, therefore, to find in the typical contract an "inartistic and inaccurate use of words that have a precise and commonly accepted meaning in law." Aaron, The Uses of the Past in Arbitration, Arbitration Today, Proceedings of the Eighth Annual Meeting of the National Academy of Arbitrators 6, 11 (1955). The language used in a contract may merely be attributable to an inexperienced or over-eager draftsman. Where contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties. The past practices of the contracting parties are entitled to great weight in determining the meaning of ambiguous or doubtful contractual terms. See Hall v. Bd. of Ed., 593 A.2d 304, 307 (N.J. 1991). Absent any original intention with respect to this problem, the long-standing practice should be controlling.

363 U.S. 574, 578 (1960), the Court concluded the collective bargaining agreement *"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."* Mr. Justice Douglas, speaking for the majority in the Warrior & Gulf case, reasoned a collective bargaining agreement may encompass more than what has been reduced to writing so in interpreting the collective bargaining agreement, one may look for guidance to various sources:

> *"The . . . source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it."*

See also Wyo. Val. West Educ. v. Wyo. Val. West Sch., 500 A.2d 907 (Pa. 1985). The common law of the shop would include, at the very least, past practices of the parties.

[8] 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 future relationship. R.I. Court Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991). Past practice may serve to clarify, implement, and even amend contract language, but these are not its only functions. Sometimes an established past practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the

continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions. Smith, Merrifield & Rothschild, Collective Bargaining and Labor Arbitration, p. 250 (1970).

Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to existing modes of procedure. Douglas V. Brown, Management Rights and the Collective Agreement, Proceedings of the First Annual Meeting of the Industrial Relations Research Association, p. 145-55 (1959), analyzed the problem as follows:

> *"But when all of the provisions are written, it will be found that many matters will affect conditions of employment are not specifically referred to. Does this mean that these matters are of no concern to the parties, or that the agreement has no meaning with respect to them? I think not. On some of these matters, the parties are satisfied with existing modes of procedure, consciously or unconsciously. On others, one party or the other may be dissatisfied but may be unable to devise better modes. On still others, one party may have preferred an alternative but may have been unable to secure agreement from the other party, or may have been unwilling to pay the price necessary for acceptance. In*

> *any event, the omission of specific reference is significant.*
>
> *". . . The agreement, no matter how short, does provide a guide to modes of procedure and to the rights of the parties on all matters affecting the conditions of employment. Where explicit provisions are made, the question is relatively simple. But even where the agreement is silent, the parties have by their silence, given assent to a continuation of the existing modes of procedure."*

In this way, practices may by implication become an integral part of the contract.[8] Past practices may be considered, even where a subject is covered by a written provision included in the memorandum of agreement, to determine what the parties intended by that provision.[9]

[9] *"Past practice"* and its uses is one of the most troublesome areas in the administration of the labor agreement. In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the Pennsylvania Supreme Court recognized there four situations in

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[8] None of this is incompatible with ordinary contract law. Williston says that a practice "for the purpose of adding a new element or term or incident, whichever one is pleased to call it, to the expressed terms of the contract" and "it may be shown that a matter concerning which the written contract is silent, is affected by a usage [practice] with which both parties are chargeable." Williston, Contracts, §652 (1936).

[9] In Ramsey County v. AFSCME Council 91, 309 N.W.2d 785, 791 (Minn. 1981), the court concluded:

> "In resolving industrial strife, [the finder-of-fact] is to ascertain the parties' intended standard of behavior. Certainly the express provisions of the contract evidence this intent. The contract is not, however, the sole evidence of the parties' will; the conduct of the parties is likewise indicative of their mutual intent."

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.*

It is situation #4 that appears applicable to the issues raised in this case as the District is seeking to establish a right to unilaterally select the insurance carrier and benefits package which is not specifically set forth in the 1991-92 memorandum of agreement.

The testimony and evidence shows the Association and the District never agreed during the 1991-92 negotiations upon any specific health insurance program. To be sure, the memorandum of agreement, "Section C - Benefits," provides only that *"Each certified employee wishing to participate in a salary reduction plan may do so in accordance with Federal and State regulations and the local plan design."* The agreement makes absolutely no reference to any specific health insurance benefits to be provided, deductible amounts, necessary contract provisions, or identity of the insurance carrier. While both parties were aware that the contract would be subject to renewal during the term of the memorandum of agreement, there is nothing in the agreement outlining the procedure to be followed, reserving to the

Association a say in the identity of the carrier or terms of the new insurance program, or placing restrictions on the District's right to change carriers or insurance plans. Since the language of the instant memorandum of agreement provides no clues regarding the parties intent, the use of past practices is appropriate in this case to determine the intention of the parties relative to Section C of the memorandum of agreement.

[10] Concerning the *"uses"* of past practice, the problems are not so much of theory as of proof -- proof of the existence of a practice which has been operative under conditions which sufficiently indicate that both parties have known of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice. Five indices that assist in determining this mutual acceptance are:

> *(1) clarity and consistency throughout the course of conduct, (2) longevity and repetition creating a consistent pattern of behavior, (3) acceptance of the practice by both parties, (4) mutuality in the inception or application of the practice, and (5) consideration of the underlying circumstances giving rise to the practice.* R.I. Court Reporters Alliance v. State, 591 A.2d 376, 379-80 (R.I. 1991).

Whether a past practice has been established, and the exact nature or such practice, is a question of fact for the presiding officer. *See* Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995 (1987); Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981).

In summary, it is a prohibited practice for a board of education to refuse to negotiate in good faith with the certified representative of its professional employees. Included in the public employer's obligation to negotiate in good faith "*is the duty to continue past practices that involve mandatory subjects of negotiation.*" Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995, 997 (1987). *See also* Bd. of Co-Op., Etc v. State, Inc., 444 N.Y.S.2d 226, 228 (1981); Carolina Steel Corp., 132 LRRM 1309 (1989) [Employer violated LRMA when without bargaining to impasse, it discontinued 20 year practice of granting christmas bonus]. A change in terms and conditions of employment is lawful when consistent with past practices or authorized by a collective bargaining agreement. *See* Gorman, Robery, Labor Law, p. 400 (1976); Maywood Bd. of Ed. v. Ed. Ass'n, 102 LRRM 2101, 2106 (1978).

Applying the indices to the facts in this case, one finds it was general knowledge among the teachers, and thereby the Association, that the health insurance program contract was subject to renewal in January of each year; mid-term of the memorandum of agreement. Likewise, it was common knowledge from past contract renewals that with the new insurance contract, there could be changes in carrier, premiums, administrators, deductibles and benefits.

Up until 1991, the District would solicit bids from insurance carriers in November of each year and select a program and carrier

to meet its obligation under *"Section C - Benefits"* to provide a 125 cafeteria plan in which teachers in the district could participate. This was done without first submitting the anticipated changes to professional negotiations with the Association. There is nothing in the record to reveal the Association ever objected to this unilateral action, sought to negotiate the changes, or had a demand for such negotiation refused by the District, until November, 1991. The teachers accepted this procedure and participated in the 125 Plan that resulted from the District's action.[10] Also, there is no evidence that the District abused its apparent authority to act unilaterally in this area, or acted other than in the best interests of the District's teachers.

The record as a whole sufficiently proves both parties knew of the practice and acquiesced in it, and thereby supports the District's position that a past practice has been established whereby it had the right to unilaterally select an insurance carrier and health insurance program without first submitting the proposed changes to the Association for professional negotiations.

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[10] It is summized the underlying reason for allowing the District unilateral authority to select the carrier and insurance program was the lack of insurance carriers interested in bidding on the contract from which to choose, due mainly from the relative small group of teachers participating in the health insurance program. The low participation rate also directly contributed to the limited ability of the District to negotiate rates or benefits contained in the insurance programs thereby basically placing the District in a position of having to accept new health insurance programs as offered or any changes in existing programs the carrier required. The District could best be characterized as being in a take-it-or-leave-it circumstance relative to health insurance programs.

Given this lack of flexibility in negotiations between the District and insurance carriers, it is safe to assume little of merit could be accomplished as a result of negotiations on carrier and benefits between the District and the Association prior to selecting the carrier or insurance program. The two parties could agree to whatever they liked, but if the carrier was not interested in bidding, or in providing the terms sought for the contract, there appears little the parties could do.

As a result of this past practice, the Association will be deemed to have waived its right to negotiate any changes in the carrier or insurance program, and that the District did not commit a prohibited practice when it effectively refused to negotiate with the Association following receipt of the November 21, 1991 request to negotiate from Bruce Lindskog.[11] The November 21, 1991 request to negotiate will not defeat the waiver. If the Association wishes to repudiate the past practice and its waiver, such must be done during the professional negotiation process for the next memorandum of agreement.

Issue 5

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(B)(1) WHEN THE SUPERINTENDENT PRESENTED INSURANCE PROPOSAL(S) DIRECTLY TO THE BARGAINING UNIT MEMBERS RATHER THAN THE EXCLUSIVE REPRESENTATIVES OF THE BARGAINING UNIT?

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[11] The facts in this case are similar to those in Unatego Non-Teaching v. Pub. Emp. R. Bd., 522 N.Y.S.2d 995 (1987). Pursuant to the collective bargaining agreement between petitioner Unatego Teachers Association and the District, the New York State Health Insurance Plan was to be offered by the District, which was to pay 90% of individual coverage and 85% of dependent coverage, without specifying any health insurance plan.

In late 1985, the State announced that it was replacing the GHI and Statewide Plan programs with the Empire Plan which, as of January 1, 1986, would be the only plan available under the New York State Health Insurance Plan to public employers for their employees. The District announced that it would remain with the New York State Health Insurance Plan and make the Empire Plan available effective January 1, 1996, which fell during the effective dates of the parties' collective bargaining agreements. It is undisputed that the Empire Plan program of benefits, costs to employees and administration is substantially different from the GHI and Statewide Plan programs. The Association filed an unfair labor practice against the District alleging the change in health insurance programs without prior negotiations violated the District's duty to negotiate in good faith.

The New York Supreme Court upheld the determination of the state PERB that found a past practice of providing health insurance programs to petitioner's members through the New York State Health Insurance Plan was established by the District and concluded that the District by continuing after January 1, 1986 to offer the health insurance program available through said plan, notwithstanding the change in the specific programs, did not deviate from the established past practice. Therefore, the District's action did not constitute a prohibited practice.

Essentially in cases where the employer's unilateral action is consistent with past practices and result in maintenance of the status quo in conditions of employment, no prohibited practice will be found.

At three meetings held in November and December, 1991, called by the District, the teachers received copies of proposals and information, and heard presentations from interested insurance carriers who responded to the District's request for bids for the 1992-93 health insurance contract. The Association argues this was an attempt by the District to negotiate directly with the teachers and thereby circumvent their certified representative. Since direct dealing violates the duty to negotiate in good faith and denies the Association its rights accompanying certification, the Association maintains, the District's action constitutes a prohibited practice. This argument raises two issues: 1) Did the past practice and resulting waiver of the Association's right to negotiate, found above, constitute a defense to the allegation of direct dealing; and 2) Did the meetings constitute negotiations as contemplated by the PNA.

While there are no PNA case decisions directly on point to provide guidance in this case, the Secretary of Human Resources in Unified School District 501, Topeka, Kansas v. NEA-Topeka, 72-CAEO-1-1982 & 72-CAEO-3-1981 (July 19, 1983), did address the issue of bypassing the board of education's representative under the Professional Negotiations Act. The principles announced in that case appear applicable to this situation. In USD 501 the Secretary determined that, when association officials directly contacted

board members to discuss subjects under negotiation, they bypassed the board of education's chosen negotiations representative and thereby violated K.S.A. 72-5433(c)(2) as interfering *"with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances."*

> *"In summary, it is clear that both parties have the right to designate a representative for negotiations purposes. Furthermore, it is a prohibited practice for either party to interfere with the other party's selection of their representative.*
>
> *"It is a well-established principle that the designation of a representative by the parties is accompanied by rights of exclusivity for negotiations purposes. The examiner is of the opinion that the legislature intended to give both parties the right to exclusive representations. . . ."*
>
> *"In the instant case, NEA-Topeka claims that the association retains the right to communicate directly with the board, regarding negotiation matters, thereby circumventing the designated representative of the board. . . .*
>
> *". . . The examiner is of the opinion that the legislature fully intended to embody the general principles of labor relations when they enacted the Professional Negotiations Act. The legislation protects the rights of teachers to organize and negotiate, through representatives of their own choosing. The school board also has the right to designate a representative. . . . Most importantly, once a school board has designated a representative, that representative is the <u>exclusive</u> representative of the board for negotiations purposes, unless the <u>board</u> indicates to the contrary.*
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> * * * * *
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> *". . . [T]he examiner believes that the association cannot be negotiating in good faith with the representative of the board if it is simultaneously negotiating directly with the Board. This would also deny the Board the right to designate a representative for negotiation purposes; a right expressly granted by the statute."*

[11] Although a past practice existed between the District and the Association whereby the District was allowed to unilaterally determine the insurance carrier and health insurance program to be offered under the 125 Plan without first engaging in professional negotiations, and although such past practice constituted a waiver of the Association's right to negotiate, it should not be concluded that the District has the right *to negotiate directly with the teachers* on those subjects. The waiver of the duty to negotiate relieves the board of education of its obligation to negotiate with the Association, and allows it to take unilateral action. However, if the board of education decides to negotiate the subject at issue, despite the existence of a waiver, the board must negotiate only with the certified employee organization. A board of education cannot use the employee organization's waiver to circumvent the certified employee organization and negotiate directly with the teachers.

Did the District, then, attempt to negotiate the issues of carrier and health insurance benefits directly with the teachers by holding the three meetings in November and December, 1991? A review of the evidence reveals the holding of meetings with teachers in November prior to the District entering into a contract with a health insurance carrier for the coming year was a common practice. The meetings provided an opportunity for the District to *explain* to the teachers changes forthcoming with the new health

insurance contract year. There is nothing in the record to indicate these past meetings were used to negotiate directly with the teachers the subjects of insurance carrier, program terms, or benefits to be offered.

The record clearly indicates the November and December, 1991 meetings were used for the same informational purposes only, and no negotiations were intended or attempted. In fact, the Association's own President testified these meetings were called *"simply for the Board to disseminate information"* (Tr.p. 31). The Association produced no evidence to establish otherwise.

There being no evidence that the District did other than disseminate information at the November and December, 1991 meetings, the District cannot be found to have engaged in direct dealing with the teachers in violation of K.S.A. 72-5433(b)(1) or (5).

ISSUE 6

WHETHER THE USD 274 BOARD OF EDUCATION OR ITS AGENT(S) VIOLATED K.S.A. 72-5430(b)(6) WHEN THE SUPERINTENDENT WITHHELD INFORMATION REQUESTED BY THE EXCLUSIVE REPRESENTATIVE IN A MEMO DATED NOVEMBER 21, 1991?

An analysis of this portion of the complaint again must begin with an examination of the applicable sections of the Professional Negotiations Act. K.S.A. 72-5423(a) provides, in pertinent part:

> *"Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education, except that 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. . . ."*

"Professional negotiations" is statutorily defined in K.S.A. 72-5413(g) to mean:

> *"meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."*

Then K.S.A. 72-5430(b)(5) makes it a prohibited practice for a board of education or its designated representative willfully to:

> *"refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto."*

The professional negotiations process requires that the bargaining parties have adequate information about the immediate subjects at issue in negotiations; otherwise the process cannot function properly. Disclosure of relevant information encourages mutual respect between the negotiators and promotes cooperation and open exchange. *See* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). A refusal to honor a legitimate request for information can foreclose further meaningful bargaining.

The duty to negotiate in good faith encompasses the duty to furnish information. *See* NLRB v. Western Wirebound Wirebox Co., 356 F.2d 88 (CA 9, 1966); Timken Roller Bearing Co v. NLRB, 325 F.2d 746 (CA 6, 1963). The employer's duty to furnish information is based upon the premise that without such information the employee representative would be unable to perform its duties properly as negotiating agent. *See* Aluminum Ore Co. v. NLRB, 131 F.2d 485 (CA 7, 1942). As the Fourth Circuit noted, certified employee representatives cannot be expected to represent unit employees in an effective manner where they do not possess information which "*is necessary to the proper discharge of the duties of the bargaining agent.*" NLRB v. Whitin Mach. Works, 217 F.2d 593, 594 (CA 4, 1954). Thus an employer is required, on request, to furnish the representative of the employees relevant information needed to enable the latter effectively to negotiate for the employees, and a refusal to do so may constitute a refusal to negotiate in good faith. *See* NLRB v. Acme Industrial Co., 385 U.S. 432 (1966); International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (CA 3, 1967); Timken Roller Bearing Co v. NLRB, 325 F.2d 746 (CA 6, 1963); NLRB v. United Brass Works, Inc., 287 F.2d 689 (CA 4, 1961); NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (CA 2, 1968). An employer's duty to furnish information is statutory, and therefore, the absence of a contractual obligation to furnish information is not

controlling. *See* Standard Oil Co. v. NLRB, 399 F.2d 639 (CA 9, 1968).

[12] The information requested or demanded must be relevant to the relationship between the employer and the employee organization in the latter's capacity as representative of the employees. *See* Transport of N.J., 97 LRRM 1204 (1977); Ellsworth Sheet Metal, Inc., 92 LRRM 1590 (1976). The standard of relevance is a *"discovery-type standard"* of potential relevance; i.e., probably or potentially relevant. *See* NLRB v. Acme Industrial Co., 385 U.S. 432 (1966). In general, requested information *"must be disclosed unless it plainly appears irrelevant"* in accordance with the prevailing rule in discovery procedures under *"modern codes."* NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947, 949 (CA 2, 1951). As the court in Yawman reasoned:

> *"[a]ny less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant. . . ."*

The information must be disclosed unless it plainly appears irrelevant. *See* Teleprompter Corp. v. NLRB, 570 F.2d 4, 8 (CA 1, 1977). This liberal definition of relevancy, requires only that the information be directly related to the certified employee organization's function as negotiating representative, *See* J.I. Case Co. v. NLRB, 253 F.2d 149 (CA 7, 1958), and that it appear *"reasonably necessary"* for the performance of this function. *See* NLRB v. Item Co., 220 F.2d 956 (CA 5, 1955). The request must be

made in good faith, but this requirement is met if at least one reason for the demand can be justified.

While certain information requested by an employee organization of an employer is presumptively relevant because it bears directly on the negotiation or general administration of a collective bargaining agreement, other information may or may not be relevant depending on the circumstances. *See* Southwestern Bell Tel. Co., 69 LRRM 1251 (1968). As a general rule, an employer's obligation to supply information will be examined on a case-by-case basis. In each case the finder-of-fact must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it. *See* White-Westinghouse Corp., 108 LRRM 1313 (1981).

A board of education's duty to supply the bargaining representative with information does not arise until the employee organization makes a request or a demand that the information be furnished. *See* NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (CA 1, 1954); Westinghouse Elec. Supply Co. v. NLRB, 196 F.2d 1012 (CA 3, 1969). A board of education is not guilty of an unfair labor practice by failing to furnish information to the certified employee representative unless the representative has demanded the information. *See* Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965).

[13] Once a good-faith demand is made for relevant information, the board of education must make a diligent effort to obtain or provide the information in a reasonably prompt manner. *See* Quaker Oats Co., 114 LRRM 1277 (1983). In general, a board of education must furnish information notwithstanding its availability from the professional employees themselves. *See* NLRB v. Twin City Lines, Inc., 425 F.2d 164 (CA 8, 1970). Even though a board of education has not expressly refused to furnish the information, its failure to make a diligent effort to obtain or to provide the information *"reasonably"* promptly may be equated with a flat refusal. *See* NLRB v. John S. Swift Co., 44 LRRM 1388 (1959),where the court stated that the *"Company's inaction spoke louder than its words"*).

[14] The duty to supply information applies not only during negotiations for a new or successor agreement, but also during the life of a currently existing agreement. The certified employee representative not only has the duty to negotiate collective bargaining agreements, but also has the statutory obligation to police and administer existing agreements, *See* J.I. Case Co. v. NLRB, 253 F.2d 149 (CA 7, 1958). Often the information sought by the certified employee representative will be used to determine if a board of education has modified or breached the terms of the collective agreement. *See* Michigan Drywall Corp., 96 LRRM 1305 (1977). The certified employee representative may require such

information for the performance of its statutory duties and responsibilities, particularly when board of education actions affect professional employees' rights under the memorandum of agreement. *See* NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). Thus, the certified employee representative's right to information, within the sphere of its function as bargaining representative, continues after an agreement is signed. *See* NLRB v. John S. Swift Co., 44 LRRM 1388 (1959)

This right was recognized by the U.S. Supreme Court in NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), wherein the Supreme Court held that the employer's duty to furnish information, like its duty to bargain, *"extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."* The duty *"does not terminate with the signing of the collective bargaining contract,"* but *"continues through the life of the agreement so far as it is necessary to enable the parties to administer the contract and resolve grievances or disputes."* Sinclair Refining Co. v. NLRB, 306 F.2d 569, 570 (CA 5, 1962). Acme Industrial emphasized the importance of relevant information to the employee representative in its effort to police and administer the collective bargaining agreement.

In a variety of contexts, an unfair labor practice has been found where an employer refused to supply the certified employee representative with information needed for the proper enforcement

and administration of the contract.[12] *See* Salt River Valley Water Users Ass'n, 117 LRRM 1295 (1984). A violation has also been found where the employer refused to supply information concerning the implementation of changes which had an effect on the wages, seniority and promotion rights of employees. *See* Boise Cascade Corp., Paper Group, 123 LRRM 1253 (1986).

[15] The right to information can be waived as part of a negotiated agreement, but a certified employee representative's waiver of its statutory right to information from the employer must be clearly established, *See* NLRB v. Taylor, 338 F.2d 1003 (CA 5, 1964), and will not be readily inferred. *See* NLRB v. Perkins Machine Co., 326 F.2d 488 (CA 1, 1964). The waiver must be in expressed terms, *See* NLRB v. Perkins Machine Co., 326 F.2d 488 (CA 1, 1964), set forth in clear and unmistakable words. *See* International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (CA 3, 1967); Timken Roller Bearing Co v. NLRB, 325 F.2d 746 (CA 6, 1963).

Is a refusal to supply requested information a *per se* violation of the duty to bargain or merely evidence of lack of good faith? The authorities appear to be split. A number of federal circuit courts have adopted the view that refusal to supply

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[12] Items of information related to "hours, and other terms and conditions of employment" have been ordered disclosed on the same basis as wage information. Insurance and pension plan information must be furnished, as well as employer's insurance plan cost information, and employee benefits thereunder. See NLRB v. Borden, Inc., 600 F.2d 313 (CA 1, 1979); NLRB v. Feed & Supply Center, Inc., 294 F.2d 650 (CA 9, 1961); NLRB v. John S. Swift Co., 44 LRRM 1388 (1959); Crane Co., 102 LRRM 1351 (1979); Skyland Hosiery Mills, Inc., 34 LRRM 1254 (1954).

information is only evidence of bad faith, not a per se violation. *See* Woodworkers v. NLRB, 263 F.2d 483 (CA DC, 1959); J.I. Case Co. v. NLRB, 253 F.2d 149 (CA 7, 1958). More recently, the First and Third Circuits have determined once it is established that information is relevant, it is a *per se* refusal to bargain for the employer to fail to produce the information on request. Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (CA 1, 1966); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965). This appears the appropriate standard to apply to requests for information under the PNA.

The employer's refusal to supply information is as much a violation of the duty to bargain as if it had failed to meet and confer with the union in good faith. *See* Curtis-Wright Corp. v. NLRB, 347 F.2d 61 (CA 3, 1965); Levingston Shipbuilding Co., 102 LRRM 1127 (1979). In NLRB v. Whitin Machine Works, 217 F.2d 593 (CA 4, 1954), the Fourth Circuit concluded that it was *"well settled that it is an unfair labor practice within the meaning of section 8(a)(5) of the NLRA for an employer to refuse to furnish a bargaining union [such information as] is necessary to the proper discharge of the duties of the bargaining agent."* This duty to furnish to the union relevant information was given explicit approval by the Supreme Court in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

The Association in its petition complains the District committed a prohibited practice when:

> *"The Superintendent withheld the necessary information requested by the exclusive bargaining representative in a memo dated November 21, 1991."*

The November 21, 1991 letter from Bruce Lindskog to the Board of Education and Superintendent Marchant made a request for health insurance information including 1) copies of all current bids; 2) copies of specific insurance contracts represented by the current bids; 3) a copy of the current insurance contract; and 4) the current individual employee cost of the policy and the proposed cost for that coverage.

Having determined the District was not obliged to negotiate the proposed changes in the health insurance program prior to implementation, any information sought by the Association for the purpose of those requested negotiations would be irrelevant. Accordingly, the District is under no duty to provide such information for the purpose of negotiations. However, given the situation at the time with the uncertainty surrounding the identity of the insurance carrier, the accompanying benefits and the cost of the ultimate health insurance program, it is not unreasonable for the teachers to be concerned for their rights under the existing agreement. The information requested by the Association could be used to determine if, by the proposed changes, the District would modify or breach the terms of the negotiated agreement. As such the request is relevant as necessary under the Association's obligation to police and administer the existing agreement.

There can be no question but that the November 21, 1991 letter constitutes a request or demand for information from the Association. The record contains no evidence indicating the District or Superintendent Marchant failed to receive the letter, or were unaware of the request. Nor is there any evidence of uncertainty or confusion as to the information sought by the Association, or that the information was unavailable or too voluminous to produce.

Applying the liberal test of relevance to the list of information requested by the Association, it is apparent the information must be disclosed. The information sought relates to either the health insurance program covered by the current agreement, or documents or data which have a direct bearing upon the selection of an insurance carrier and corresponding benefits to be offered for the new health insurance program also covered by the current memorandum of agreement. Such information directly relates to the Association's function of policing and administering the existing contract by which any health insurance program will be offered under *"Section C - Benefits,"* and appears reasonably necessary for the performance of that function. The District offered no testimony or evidence to prove lack of good faith on the part of the Association in making the request, or that the requested information *"plainly appears irrelevant."*

A good-faith demand for relevant information having been made by the Association, the District was under a statutory duty to make a diligent effort to obtain or provide the information in a reasonably prompt manner. Absolutely no evidence was introduced to show any such effort was made, or to excuse the lack of response. In fact, the District and Superintendent readily admitted their failure to provide the requested information. The District's refusal to supply information constitutes a *per se* violation of the duty to negotiate in good faith as set forth in K.S.A. 72-5430(b)(5), and as such any lack of bad faith or anti-teacher or professional employee organization animus is immaterial to the determination.[13]

ISSUE 7

WHETHER THE PROHIBITED PRACTICE COMPLAINT SHOULD BE DISMISSED BECAUSE IT WAS FILED BY BRUCE LINDSKOG WHO IS NOT A RECOGNIZED EMPLOYEE ORGANIZATION OR A PROFESSIONAL EMPLOYEE OF USD 274 AS REQUIRED BY K.A.R. 49-23-6?

The District sought the dismissal of the Association's complaint based upon the fact that the petition designates Bruce Lindskog as the party filing the complaint. Their argument is that K.A.R. 49-23-6 requires a petition be filed by a recognized

[13] Since the duty to bargain in good faith includes the duty to furnish relevant information to the certified professional employee organization, the receipt of such information becomes a right accompanying recognition of a professional employees' organization which are granted in K.S.A. 72-5415. The refusal to provide such information would therefore constitute a prohibited practice as a violation of the duty to bargain set forth in K.S.A. 72-5430(b)(5), and the denial of rights accompanying recognition set forth in K.S.A. 72-5430(b)(6).

employee organization, or a representative of that organization, or a professional employee. Mr. Lindskog was neither a recognized employee organization or a professional employee, and there was nothing in the complaint to indicate that he was acting in a representative capacity. Accordingly, Mr. Lindskog did not have standing to file the complaint and it should be dismissed.

[16] The pleadings required in an administrative proceeding are governed by statute, and the rules and regulations of the administrative body. As a general rule, administrative pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding. *See* Community of Woodston v. State Corporation Commission, 186 Kan. 747 (1960).

A complaint must set forth facts sufficient to establish all the essential elements. However, great liberality as to form and substance is to be indulged, especially where the applicant is unrepresented by counsel, as is the case here. It is generally recognized by authorities on administrative law that the key to pleading in the administrative process is adequate opportunity for opposing parties to prepare to defend. Fair notice is given if a party, having read the pleadings, should have been aware of the issues which it has to defend and the party bringing the charges.

K.S.A. 72-5430a provides that *"Any controversy concerning prohibited practices may be submitted to the secretary of human resources."* It is silent on who may or may not make such a

submission. K.A.R. 49-23-6 states that a prohibited practice petition *"may be filed with the Secretary by a professional employee organization, board of education, or a professional employee."* The operative word in the cited regulation is *"may"*. According to Black's Law Dictionary, 5th ed., *"may"* indicates an expression of ability or permission, as opposed to the word *"shall,"* which as a word of command, must be given a compulsory meaning, and is generally imperative or mandatory.

It is clear the drafters of the Professional Negotiations Act regulations were cognizant of the different meaning given the words *"may"* and *"shall"* since both are used in K.A.R. 49-23-6.[14] There is nothing in K.A.R. 49-23-6 to indicate that the list containing professional employee organization, board of education or professional employee is the exclusive list of parties authorized to file a petition pursuant to K.S.A. 72-5430a. Rather, from the use of the word *"may"*, that section of the regulations appears to be a specific itemization of parties who are empowered to file such a petition. K.A.R. 49-23-6(a) must be read as inclusive and not exclusive. Accordingly, there appears nothing in the statute or regulation to specifically prevent Mr. Lindskog from submitting the controversy to the Secretary for resolution.

[14] For example, the last sentence of subsection (a) states "The original petition shall be signed by the petitioner or his or her authorized representative."

The decision need not be based upon an interpretation of K.S.A. 72-5430a or K.A.R. 49-23-6 however. As stated previous, the purpose of administrative pleadings is to provide adequate opportunity for the party to defend the complaint. A review of the prohibited practice complaint at issue here reveals an attachment captioned as follows:

"Prohibitive Practice Charge
USD 279 Board of Education
by
Oakley Education Association"

Since the Oakley Education Association is incapable of signing the complaint pursuant to K.A.R. 49-23-6(a), it is reasonable to assume the petition was filed by its authorized representative. Here the person signing the petition is Mr. Lindskog, a person with whom both the District and District's counsel are familiar and aware serves as the representative for the Oakley Education Association. The District offered no evidence that would indicate Mr. Lindskog was functioning in other than his customary representative capacity. It must be inferred, therefore, that Mr. Lindskog is, in fact, the certified employee organization's authorized representative.

It is clear from the petition, taken as a whole, the inferences to be drawn therein, and the fact that the District is familiar with Mr. Lindskog and his relationship to the Oakley Education Association, that the District should have been aware of the issues which it had to defend and the identity of the party

submitting the controversy to the Secretary. If it were not, the appropriate course of action by the District should have been a motion for clarification rather than a motion to dismiss. There is nothing in the record to indicate the District has claimed prejudice as a result of Mr. Lindskog's name appearing on the complaint, or that the District has alleged it did not know or was surprised that the Oakley Education Association was the true party in interest, or that the district has asserted an inability to adequately prepare to defend against the accusations contained therein.

Finally, K.A.R. 49-23-6(b) allows for amending the petition at any time with the approval of the Secretary, which was done in this case at the commencement of the hearing. Accordingly, the motion to dismiss was overruled by the presiding officer and the petition amended on the record to show the complaining party to be the Oakley Education Association.

ORDER

IT IS HEREBY ORDERED that the Petitioner's complaint as it relates to Issues 1, 2, 3, 4, and 5 be dismissed for the reasons set forth above, and the remedies sought are hereby denied.

IT IS FURTHER ORDERED that as to Issue 6, the Respondent is found to have committed a prohibited practice as set forth in

K.S.A. 5430(b)(5) for the reasons set forth above. The Respondent shall therefore forthwith:

1) Cease and desist in its refusal to provide information requested by Petition needed to administer and police the memorandum of agreement; and

2) Post a copy of this order in a conspicuous location at all locations where members of the negotiating unit are employed.

IT IS FURTHER ORDERED that as to Issue 7, the Respondent's request to dismiss the prohibited practice complaint is denied for the reasons set forth above.

Dated this 11th day of December, 1992

Monty R. Bertelli, Presiding Officer
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become final fifteen (15) days from the date of service set forth below, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is received within that time with the Secretary of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 16th day of December, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Bruce Lindskog, Director
Northwest Kansas UniServ
P.O. Box 449
Colby, Kansas 67701

Norman D. Wilks, Attorney
Kansas Association of School Boards
5401 SW 7th Avenue
Oakley, Kansas 67701

Joe Dick, Secretary
Department of Human Resources
401 Topeka Blvd.
Topeka, Kansas 66603

Sharon Tunstall