BEFORE THE SECRETARY OF HUMAN RESOURCES
STATE OF KANSAS

LIBERAL-NEA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 72-CAE-8-1992
	)	
UNIFIED SCHOOL DISTRICT 480, LIBERAL, KANSAS,	)	
	)	
	)	
Respondent,	)	
	)	

AMENDED INITIAL ORDER

ON the 25th day of August, 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 attorney David Schauner
Kansas National Education Association
715 W. 10th
Topeka, Kansas 66612

RESPONDENT: Appeared by attorney Richard R. Yoxall
YOXALL, ANTRIM & YOXALL
P.O. Box 1278
Liberal, Kansas 67901

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE FILING OF THE L-NEA PROHIBITED PRACTICE COMPLAINT IS BARRED BY THE SIX MONTH STATUE OF LIMITATIONS SET FORTH IN K.S.A. 72-5430a(a).

2. WHETHER THE U.S.D. 480 BOARD OF EDUCATION'S ACTION OF ADOPTING A SUPPLEMENTAL COMPENSATION SCHEDULE ESTABLISHING A LOWER WAGE RATE THAN THE PREVIOUS YEAR FOR MIDDLE-SCHOOL TEACHERS TEACHING EXTRA CLASSES UNDER A PILOT PROJECT WITHOUT FIRST NEGOTIATING THE NEW WAGE RATE CONSTITUTES A UNILATERAL CHANGE

72-CAE-8-1992

IN TERMS AND CONDITIONS OF EMPLOYMENT IN VIOLATION OF K.S.A. 72-5430(B)(5).

a. WHETHER ACQUIESCENCE BY THE PETITIONER DURING THE PROCEEDING FIVE (5) TO SEVEN (7) YEARS IN ALLOWING THE SUPERINTENDENT TO SET THE WAGES PAID UNDER SUPPLEMENTAL CONTRACTS WITHOUT NEGOTIATIONS ESTABLISHES A "PAST PRACTICE" MODIFYING THE BOARD OF EDUCATION'S OBLIGATION TO MEET AND CONFER DICTATED BY K.S.A. 72-5423(a).

SYLLABUS

1. **PROHIBITED PRACTICES** - *Statute of Limitations - How six month period is calculated.* For purposes of the Professional Negotiations Act, the six month period provided in K.S.A. 72-5430a(a) shall be calculated by determining the date of the alleged unlawful act and then proceeding forward to the corresponding date six calendar months in the future.

2. **PROHIBITED PRACTICES** - *Statute of Limitations - Tolling of statute upon filing with Secretary.* K.S.A. 72-5430a(a) requires the filing of the prohibited practice complaint with the Secretary within six months of the alleged unlawful action. Upon receipt by the Secretary the limitations period is tolled pending service by the Secretary.

3. **PROHIBITED PRACTICES** - *Statute of Limitations - When action accrues.* In deciding whether the period for filing a prohibited practice complaint has expired the rule is adopted that the six month period begins to run from the date the injured party receives unequivocal notice of an adverse employment action rather than the time that action becomes effective.

4. **PROHIBITED PRACTICES** - *Statute of Limitations - Continuing violation.* Where the conduct challenged as unlawful involves a continuing prohibited practice that causes separate and recurring injuries to a unit employee or the employee organization, the action is deemed to be "in the nature of a continuing trespass, and a separate cause of action accrues each time the challenged conduct occurs.

5. **DUTY TO BARGAIN** - *Prohibited Practices - Unilateral Changes - Prima Facie violations.* The Professional Negotiations Act 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 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.

6. **PROHIBITED PRACTICES** - *Unilateral Changes - Effect of past practices.* Since only unilateral changes are prohibited, a prohibited practice will not be found if the change is consistent with the past practices of the parties.

7. **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 present relationship.

8. **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.

9. **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.

FINDINGS OF FACT[1]

1. Liberal-National Education Association ("L-NEA") is the exclusive bargaining representative for the professional employees of Unified School District 480, Liberal, Kansas. (Petition and Answer).

2. Kathy Peterson is an elementary school teacher employed by U.S.D. 480, and served on the Liberal - National Education Association ("L-NEA") negotiating team for 1991-92 negotiations. (Tr.p. 8, 10).

3. Gary Ewert is a history teacher at the South Middle School. He previously served as President of the L-NEA for 1989-90, and became President again effective June 1, 1991. Ewert was not a member of the L-NEA negotiating team but sat in on the bargaining sessions beginning in July, 1991. He was instrumental in preparing and explaining the L-NEA Middle School Pilot Project proposal submitted May 8, 1991. (Tr.p. 96-97).

4. Elaine Ewert is an Art teacher at the West Middle School. She accepted an extra duty assignment for 1991-92 to teach an extra class as part of the Middle School Pilot Project. (Tr.p. 166).

5. Tom Scott is a Special Education teacher at the high school, and served as a member of the 1991-92 L-NEA negotiating team. (Tr.p. 202).

6. Alan Brown is President of the U.S.D. 480 Board of Education ("Board"), and has served on the Board for eight years. He became a member of the Board's negotiating team beginning October, 1991. (Tr.p. 215-16).

7. Steve Rice is a member of the U.S.D. 480 Board of Education, and a member of its 1991-92 negotiating team. (Tr.p. 240)

8. Lou Kirby is the UniServ Director for the region which includes U.S.D. 480. (Tr.p. 250).

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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."

9. Dr. Harvey Ludwick is Superintendent of Schools for U.S.D. 480. (Tr.p. 260).

10. There are two middle schools in U.S.D. 480, West Middle School and South Middle School, and one high school. (Tr.p. 11). The middle schools consist of grades 6, 7, and 8, (Tr.p. 101), with a school day in 1990-91 consisting of seven periods, each 50 minutes in length. (Tr.p. 23-24).

11. The concept of an eight period day at the middle schools was first advanced late in the 1987-88 school year. A study committee was formed and began work during the 1988-89 school year. The committee was composed of board members, parents, teachers and administrators. (Tr.p. 71, 98).

12. The study committee issued a formal report to the Board recommending a change from a 7 period day to an 8 period day. (Tr.p. 10)., and after some delay, in April, 1991 the Board approved implementation of the eight period day for the 1991-92 school year. (Tr.p. 103-05).

13. For the 1990-91 school year the middle school day consisted of seven periods of 50 minutes in length. The teachers taught six periods and had one planning period. Under the Middle School Pilot Project the school day changed to include eight classes of 44 minutes in length. The teachers would continue to teach six periods but have two planning periods. The length of the school day remained the same. (Tr.p. 23-24, 31-32, 81-82, 130, 225, 263).

14. The eight period format at the middle schools was only temporary and was to be evaluated at the end of the 1991-92 school year. (Tr.p. 85).

15. Since the school district could not afford to hire the additional 3.5 full-time teachers required to teach the additional classes created by the Middle School Pilot Project, existing middle school teachers were offered an Extra Duty Assignment Agreement for teaching an extra class. The extra class was taught during the normal school duty day and was also 44 minutes in length. Ten such supplement contracts were required. (Tr.p. 32, 78, 89, 272, 275-76; Ex. J).

16. The duties covered by a middle school teacher's primary contract for 1991-92 included teaching six classes and having two planning periods during the duty day. The extra class taught constituted a duty outside the primary contract, the

wage for which appeared on the Supplemental Salary Schedule and was covered by an Extra Duty Assignment Agreement. (Tr.p. 11, 92; Ex. 1).

17. The term *"Supplemental Salary Schedule"* is used interchangeably with and means the same document as the *"Salary Schedule for Extra Assignment."* (Tr.p. 10-11, 317; Ex. 1).

18. The Salary Schedule for Extra Assignment is divided vertically into two major sections; High School on the left and Middle School on the right. Among the extra assignments listed on the Salary Schedule for Extra Assignment is the category *"Extra Class."* (Tr.p. 31; Ex. 1).

19. Neither the L-NEA or the Board has, in the past, noticed for negotiation changes to the Supplemental Salary Schedule, and each year the Superintendent has unilaterally made changes to it. Up until this complaint, the L-NEA has never complained to the Board about this procedure. (Tr.p. 149-50, 336).

20. For at least ten years it was known by some, if not all, U.S.D. 480 teachers that the Supplemental Salary Schedule was unilaterally established by the Superintendent. As Kathy Peterson testified:

> *"A. I've heard how it [the Supplemental Schedule for Extra Assignments] was established, but basically there was never anything in writing.*
> *Q. Could you explain to me what you had heard?*
> *A. Basically that whatever the Superintendent felt they should get, they got. If he felt they should get a raise, they got one; if not, they didn't get one.*
> *Q. They, you mean whoever took --*
> *A. The people that the Supplemental applied to.*
> *Q. And this has been -- this had been the practice or the procedure that had taken place at least during the ten years that you have been here?*
> *A. Yes sir."* (Tr.p. 57-58).

21. The L-NEA had attempted to discuss supplemental salaries during negotiations in prior years but decided to withdraw the subject when the Board indicated if the L-NEA sought to negotiate supplemental salaries it would seek to negotiate the subject of merit pay. (Tr.p. 58-59).

22. In past years, by agreement, the parties used a meet and confer process to negotiate memorandums of agreement rather than the procedure set forth in the Professional Negotiations Act. The 1991-92 negotiations marked the first time, this process did not result in an agreement, and the parties were forced to revert to the statutory process to conclude negotiations. (Tr.p. 51-52, 261-62; Ex. G).

23. The Board's negotiating team consisted of Superintendent Ludwick, Sally Cauble, Steve Rice and Melvin Corn. The L-NEA negotiating team consisted of Debbie Smith, Stephanie Woldorf, Kathy Peterson and Tom Scott. (Tr.p. 15, 17).

24. Minutes of the negotiation sessions were kept and prepared by L-NEA Secretary, Debbie Smith. (Tr.p. 19; Ex. F).

25. The Middle School Pilot Project was not included in either the L-NEA's or the Board's notice of subjects for negotiations for the 1991-92 Memorandum of Agreement. (Tr.p. 9, 21, 146; Ex. F). The subject of supplemental salaries was included among the subjects the L-NEA sought to discuss. According to the minutes of the first negotiating session in February, 1991 the L-NEA team *"[was] not interested in what each person makes but how the salaries are distributed."* (Tr.p. 20-21; Ex. F).

26. The Middle School Pilot Project became a topic of discussion for the first time during the 1991-92 negotiations on May 8, 1991. The reason the L-NEA brought up the subject was the Board action in April to implement the eight period day at the middle schools without submitting the proposal to professional negotiations. At the May 8th negotiation session the L-NEA presented a written proposal for implementation of the eight period pilot project. (Tr.p. 11, 53-56; Ex. F). Discussions concerning the pilot project after May 8th, however, did not center on whether there would be such a project. (Tr.p. 84, 86). As Kathy Peterson explained it:

> *"Q. So the discussions at the table didn't center around whether there would be or wouldn't be such a program, did they?*
> *A. No.*
> *Q. What did they center around?*
> *A. Putting something in the contract so that there would be something in writing for the teachers that it was affecting, so there would be something in writing as far as compensation, and the program would be put in there so they would*

realize that it was something that could be negotiated at the end of the year." (Tr.p. 84).

27. The L-NEA's interest in discussing the pilot project during the 1991-92 negotiations was twofold. First, to make sure the pilot project was made a part of any resulting memorandum of agreement. There was a fear among middle school teachers that the eight period per day pilot project would become permanent with the middle school teachers having to teach seven classes without additional compensation for the extra class. This fear was based upon what happened in the 1970's when the Board decided the junior high schools would go from a six period to a seven period day on a trial basis which eventually evolved into a permanent format. The L-NEA did not want that to happen again without adequate involvement by the teachers. (Tr.p. 107-08). The second interest of the L-NEA was to insure that middle school teachers who taught an extra class under the project would receive additional compensation. (Tr.p. 14). The Middle School Pilot Project proposal submitted by the L-NEA on May 8, 1991 contained a provision for compensation to be received for teaching an extra class, but the amount of compensation was left blank. No specific figure was agreed upon by the parties. (Tr.p. 126).

28. The 1990-91 school year ended June 30, 1991 without the parties having reached agreement on a 1991-92 Memorandum of agreement. (Tr.p. 28).

29. The Middle School Pilot Project was next discussed during negotiations on July 19, 1991 and finally on July 26, 1991. At the July 26th negotiating session concern was expressed by L-NEA as to whether middle school teachers would receive additional compensation for giving up one of their two planning classes to teach an extra class. (Tr.p. 24; Ex. F). Superintendent Ludwick stated to the L-NEA negotiating team that middle school teachers accepting an extra duty assignment to teach an extra class under the pilot project would be compensated according to the Supplemental Salary Schedule. (Tr.p. 13, 14, 17, 22-23, 26, 36-37, 272; Ex. F).

30. During those discussions, Superintendent Ludwick did not inform the L-NEA negotiating team he intended to reduce the amount paid to middle school teachers for teaching an extra class for 1991-92 than was paid for 1990-91 because of the reduction in class time from 50 to 44 minutes. (Tr.p. 37, 111). On July 26th, Superintendent Ludwick did not know who prepared the Supplemental Salary Schedule or the procedure

used in determining the wages paid for any of the assignments including teaching extra classes. He just assumed that extra classes were included on the Supplemental Salary Schedule from his experience with the way such extra duty was handled in other school districts. (Tr.p. 308-10).

31. After the July 26th negotiating session the issue of payment to middle school teachers for teaching an extra class was not revisited because the L-NEA thought the issue had been resolved with the Board's assurance the teachers would be compensated in accordance with the Supplemental Salary Schedule. The L-NEA negotiating team alleges it understood the reference to Supplemental Salary Schedule to mean the 1990-91 Salary Schedule for Extra Assignment given to them in the Spring of 1991 at the beginning of the negotiation process. (Tr.p. 13-14, 62-65, 111, 128; Ex. 1). As a result of the July 26th discussions, it was their belief the middle school teachers would receive compensation at the 1990-91 level even though they would be teaching a shorter class period. (Tr.p. 32-33).

The Board perceived the Supplemental Salary Schedule referred to during the July 26th negotiating session and the 1991-92 Memorandum of Agreement as the 1991-92 Supplemental Salary Schedule to be prepared as usual by the Superintendent and not the 1990-91 Supplemental Salary Schedule. (Tr.p. 288, 234-35).

The minutes do not reflect any agreement on a specific wage to be paid nor does it reference the 1990-91 Supplemental Salary Schedule as the salary schedule referred to in Article XIV. (Tr.p. 26; Ex. F, 3).

32. During the 1991-92 negotiations, the L-NEA made a conscious determination not to go forward with negotiating specific supplemental salaries or the procedures involved in determining those salaries. The L-NEA understood the dollar amounts would continue to be set by the Superintendent using the same procedure followed in the past. As Kathy Peterson testified:

> *"Q. . . . My question to you is, how did you anticipate the dollar amounts [for supplemental salaries] would be set [for 1991-92], who would do it and what procedure would be followed?*
> A. *The same procedure that had been followed in the past by the Superintendent."* (Tr.p. 59-60, 65).

33. While the L-NEA may not have anticipated the wage for teaching the extra class at the middle school would be decreased becuase the supplemental wage had never been decreased in the past, there is nothing in the 1990-91 or 1991-92 agreement or from past practices to indicate that the Superintendent was prohibited from setting the wage lower than the wage paid the previous year. (Tr.p. 60-61, 74-75).

34. Classes began August 20, 1991. The first pay period for the 1991-92 school year ended September 19, 1991 and paychecks were issued four days later on September 23, 1991. (Tr.p. 306-07). Teacher salaries for their primary contract plus any wages received for supplemental contracts are added together then divided by 12, with one-twelfth paid each month. (Tr.p. 183-84).

35. As noted in Finding of Fact #29, above, Superintendent Ludwick was unfamiliar with the Supplemental Salary Schedule as the 1990-91 schedule had been prepared before he was hired as Superintendent. According to Superintendent Ludwick, his research revealed the preparation of the Supplemental Salary Schedule was the sole responsibility of the Superintendent. (Tr.p. 279). In determining how to proceed Superintendent Ludwick sought the advise of Mary Meier. She was his secretary and had served as the secretary to the past superintendents, and she was familiar with how the Supplemental Salary Schedule had been prepared in the past. In addition, he reviewed past Supplemental Salary Schedules beginning with the 1987-88 school year. From these sources he determined the method used in determining wages for teaching an extra class at the middle schools was a proration based upon class length with the high school class length as the standard. (Tr.p. 277-78, 297-98, 308-09; Ex. A, B, C, J, M).

36. The proration formula used was explained by Superintendent Ludwick as follows:

> *"We had an amount for the high school at 55 minutes, and my computation, I suppose was rather simple, I took 55 is to however much the high school is receiving, took 44 over X and calculated out."*

The formula would appear as follows:

$$\frac{\text{Wage for extra class at high school}}{\text{55 (Minutes per high school class)}} \times \text{44 (Minutes per middle school class)} = \text{X (middle school wage)}$$

(Tr.p. 276, 302).

37. The rationale for reducing the Supplemental Salary Schedule wage for teaching an extra class at the middle schools was that with the change to an eight period day the classes would be shorter. When the new class length was inserted into the previously established formula used to calculate the differential between high school and middle school wages for teaching an extra class, Finding of Fact # 35 above, a lower rate results.

38. Superintendent Ludwick prepared a 1991-92 supplemental salary schedule and followed what he believed was the past practice of his predecessors in calculating the amounts to be paid and in preparing the schedule without first negotiating the wages with the L-NEA. This included the wage paid the middle school teachers who taught an extra class as part of the Middle School Pilot Project. (Tr.p. 288-89, 345).

39. The 1990-91 wage for an extra class supplemental contract at the middle schools was $1,481.00 while the 1991-92 wage calculated to be $1,246.00 (increased to $1,265.00 in May, 1992 when the negotiated increase was included). (Tr.p. 228-30; Ex. 1, J, M). The lower wage was never the subject of negotiations between L-NEA and the Board prior to its implementation on September 23, 1991. (Tr.p. 18).

40. The first indication the L-NEA had that the middle school teachers were being paid a supplemental wage lower than anticipated was September 23, 1991 when the teachers received their first paycheck for the 1991-19 school year. That knowledge was imparted to the L-NEA no later than September 24, 1991 when teachers contacted the L-NEA officers. (Tr.p. 18, 28-29, 65, 117).

41. On September 24, 1991, following discussions with Mr. Ewert concerning inquiries from middle school teachers about the rate of pay received for teaching an extra class, Ms. Kirby wrote a letter to Superintendent Ludwick questioning the diminution in supplemental salary for teaching an extra class at the middle school. The letter further advised unilateral

changes in mandatory subjects of negotiation constitute a prohibited practice. Finally, Ms. Kirby asserted that since supplemental contracts had not been noticed by the Board for the 1991-92 negotiations, the amount paid for supplemental duties *"must remain at the same figure previously paid [for the 1990-91 school year]."* No reply to the letter was received from Superintendent Ludwick. (Tr.p. 29-30, 134, 251-53; Ex. K).

42. While there had been speculation and rumor among the teachers concerning supplemental wages after receipt of the September 23, 1991 paychecks, the first hard evidence received by the middle school teachers of the wage to be received for teaching an extra class was the Extra Duty Assignment Agreement received October 14, 1991. (Tr.p. 259; Ex. 2). At no time prior to October 14, 1991 when the teachers received their Extra Duty assignments had the L-NEA received written evidence of what the Board proposed paying for supplemental duties. (Tr.p. 119).

43. The Extra Duty Assignment Agreement contains the following statement:

> *"EXTRA DUTY includes assignments outside a regular work schedule and is not part of the continuing contract."* (Ex. 2).

44. The first time the L-NEA received information that the procedure used by Superintendent Ludwick to determine the 1991-92 supplemental wage for teaching an extra class at the middle schools involved a proration of wages based upon length of class was during a discussion between Superintendent Ludwick, Ms. Kirby and Mr. Ewert the evening of the October 16, 1991 impasse hearing. (Tr.p. 135-36, 150, 253, 284)

45. On November 5, 1991 Ms. Kirby again wrote to Superintendent Ludwick renewing the teachers concern for the diminution of wages paid middle school teachers for teaching an extra class, and asserting the Continuing Contract Law required they be paid the same amount paid in 1990-91 until contract negotiations were completed. (Tr.p. 136-37, 254-55; Ex. H).

46. Superintendent Ludwick responded to Ms. Kirby's November 5, 1991 letter by a letter dated November 13, 1991. That letter explained the rationale for the difference in wages paid high school and middle school teachers for teaching an extra class, set forth the pro rata method used in calculating the middle

school supplemental wage, advised the L-NEA this procedure had been used for at least the last five years without negotiations, and indicated he used this established procedure to determine the wage for teaching an extra class at the middle school under the pilot project and intended to continue to compute those wages in this manner for the 1991-92 school year. (Tr.p. 255; Ex. O).

47. The L-NEA filed for impasse on August 29, 1991 but the Board denied an impasse existed since the parties had not followed the procedures set forth in the Professional Negotiations Act and consequently had not discussed prior to the impasse petition being filed, all the items the Board had noticed for negotiations. A hearing on the issue of impasse was held on October 16, 1991, and during the hearing it was agreed by the parties to return to the negotiating table at least one more time. If no agreement was reached, either party could then petition for impasse and it would be granted. The parties were unable to reach agreement and the L-NEA again petitioned for impasse on October 31, 1991. A mediator was appointed. Mediation also failed to result in an agreement. On February 6, 1992 the L-NEA requested appointment of a fact-finder. A fact-finding hearing was held on April 4, 1992, and a report issued April 15, 1992. The Supplemental Salary Schedule was not a subject discussed during mediation or fact-finding. The sole issue presented as being in dispute was *"personal leave."* The Board refused to accept the fact-finder's recommendations, and the teachers ultimately accepted the Board's offer on personal leave. (Tr.p. 13, 130; Case No. 72-I-59-1991 maintained by the Secretary).

48. The parties finally reached agreement on the 1991-92 Memorandum of Agreement on May 7, 1992. (Tr.p. 33, 43-42, 138; Ex. 3). Section XIV of the 1991-92 Memorandum of Agreement, p. 21, contains the following statement concerning compensation for teaching an extra class under the Middle School Pilot Project:

> *"If a teacher is requested to give up one of their planning periods in order to teach a class, compensation will be given to that teacher based on the Supplemental Salary Schedule."*

This language is similar, or identical, to the statement made by Superintendent Ludwick at the July 26th negotiating session and that is attribute to him in the minutes. (Tr.p. 80-81, 161, 287; Ex. 3, F).

49. The 1991-92 Memorandum of Agreement does not contain a Supplemental Salary Schedule because the parties agreed to wait and discuss the possibility of inclusion of a Supplemental Salary Schedule in the Memorandum of Agreement as part of the 1992-93 negotiations. The Supplemental Salary Schedule does appear in the 1992-93 Memorandum of Agreement. (Tr.p. 42-43, 59, 138, 287; Ex. 3).

50. At the time the 1991-92 Memorandum of Agreement was ratified in May, 1992, the L-NEA knew there was no agreement with the Board over which Supplemental Salary Schedule was referenced in Article XIV. (Tr.p. 162-64).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER THE FILING OF THE L-NEA PROHIBITED PRACTICE COMPLAINT IS BARRED BY THE SIX MONTH STATUE OF LIMITATIONS SET FORTH IN K.S.A. 72-5430a(a).

The first of two *"substantial procedural hurdles"* which must be overcome before proceeding with an analysis of the merits of the Liberal-National Education Association's ("L-NEA") prohibited practice complaint is the statute of limitations set forth in K.S.A. 72-5430a(a). That section provides:

> *"Any controversy concerning prohibited practices may be submitted to the secretary [of human resources]. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six months of the date of the alleged practice by service upon it by the secretary of a written notice, together with a copy of the charges. . . ."*

The U.S.D. 480 Board of Education ("Board") maintains the alleged prohibited practice complained of here could not have occurred later than September 23, 1991. The L-NEA cause of action accrued

on that date making March 23, 1992 the last date upon which the prohibited practice proceeding could be commenced. The Board argues that L-NEA's petition, having been filed with the Secretary on March 25, 1993, was time barred.

Neither the Professional Negotiations Act statute nor the adopted rules and regulations direct how the *"six months"* is to calculated. The Board apparently advocates that one is simply to determine the date of the alleged unlawful act and then proceed forward to the corresponding date six calendar months in the future. For example, if the alleged unlawful act occurred on January 15, 1993, the prohibited practice complaint would have to be filed on or before July 15, 1993 to be timely. The Board uses this method to support its argument that the L-NEA was two days late in filing its prohibited practice petition.

To agree with the Board's limitations argument one must accept this means of calculating the bar date. Arguably, there are at least two other methods which could be used in calculating the final date for filing the complaint.[2] It is a general policy of the law to protect rights and prevent forfeitures. 51

[2] First, one could establish a month to average 30 days in length thereby making the "six months" equal to 180 days. Counting forward 180 days from September 23, 1991, assuming that is the correct beginning date, would make March 21, 1992 the filing deadline. Since March 21, 1992 falls on a Saturday, the L-NEA would have until the following Monday, March 23, 1992, to file their petition. Alternatively, since there are 365 days in a year and "six months" equals one-half year, then one could count forward 183 days from the date of the alleged unlawful act. Using this method would make March 24, 1992 the last date.

Am.Jur.2d., §59, Limitations of Actions, p. 637. When the legislature requires a thing to be done within a certain time and deprives a party of a right for omitting to do it, the most liberal construction ought to be chosen and the furthest time given from which the reckoning is to be made. Edmundson v. Wragg, 104 Pa. 500 (1883).

However, K.S.A. 72-5430a(a) is similar to Section 10(b) of the National Labor Relations Act ("NLRA") which provides in pertinent part *"[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."* The federal courts, called upon to apply Section 10(b), have first determined the date of the alleged unlawful act and then proceeded forward to the corresponding date six calendar months in the future to determine the last day for filing:

> *"Since this suit was filed on June 6, 1983, appellants' cause of action must have accrued by January 8, 1983 six months before filing, unless some tolling principle otherwise precluded accrual of the cause of action."* Sevaco v. Anchor Motor Freight, 122 LRRM 3316, 3319 (CA 6, 1986); *see also* Armco, Inc. v. NLRB, 126 LRRM 2961, 2965 (CA 6, 1987).

[1 & 2] Because of its relative ease of application, for purposes of the Professional Negotiations Act, the six month period provided in K.S.A. 72-5430a(a) shall be calculated in the same manner employed under the NLRA. Here, if September 23, 1991 is the date upon which L-NEA's action accrued, the prohibited practice to be timely must have been filed on or before March 24, 1992. The

March 25, 1992 filing of the prohibited practice complaint would be time barred, having been filed one day beyond the 6 month statute of limitations.[3]

The issue then becomes the date on which the L-NEA complaint accrued and from which the six month statute of limitations should be computed. The Board asserts it is September 23, 1991 - the date the teachers received their first pay check; realized they received less than anticipated for their supplemental duties; and informed their L-NEA officers of the problem. As the Board argues:

> *"What more notice needs to be shown? Clearly L-NEA, through its members, the head of its negotiating team and its President, had notice on September 23, 1991 of the district's calculation and reduction of the extra class pay for the 1991-92 school year."* (Resp. Brief p. 17)

[3] In deciding whether the period for filing a prohibited practice complaint has expired under the National Labor Relations Act, the National Labor Relations Board has adopted the rule that the six month period begins to run from the date the injured party *"receives unequivocal notice of an adverse employment action rather than the time that action becomes effective."* Armco Inc. v. NLRB,

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[3] The Board interprets K.S.A. 72-5430a(a) to require the complaint to be served upon the party alleged to have committed the prohibited practice within six months of the date of the alleged practice, rather than filed with the Secretary within six months. This is too restrictive a reading of the statute. Once a complaint is filed with the Secretary the injured party no longer has control over the service process, and accordingly should not be penalized for any delays which may result in serving the *complaint upon the offending party.*

Labor relations acts are remedial enactments and as such are to be liberally construed in order to accomplish their objectives. K.S.A. 72-5430a(a) should be read to require filing of the prohibited practice complaint with the Secretary within six months of the alleged unlawful action. Upon receipt by the Secretary the limitations period is tolled pending service by the Secretary. Pursuant to K.S.A. 77-531 service by mail is complete upon mailing of the complaint to the offending party. Through this interpretation a party is not penalized for any delays in processing the complaint by the Secretary or in delivery of the complaint by the mail service.

126 LRRM 2961, 2964 (CA 6, 1987) citing with approval U.S. Postal Service, 116 LRRM 1417 (1984). As the National Labor Relations Board concluded in U.S. Postal:

> *"Where a final adverse employment decision is made and communicated to an employee . . . the employee is in a position to file an unfair labor practice charge and must do so within six months of that time rather than wait until the consequences of the act become most painful."* Id. at 1419-20.

The question then becomes *"Did the L-NEA have 'unequivocal notice of an adverse employment action' on September 23, 1991?"*

Black's Law Dictionary, 5th ed., defines *"unequivocal"* to mean *"Clear; plain; capable of being understood in only one way, or as clearly demonstrated. Free from uncertainty, or without doubt"*. The evidence clearly reveals L-NEA was aware on September 23, 1991 that *"there has been a diminution of the amounts paid for supplemental contracts for teaching extra classes at the Middle School schools in U.S.D. #480."* (Ex. K). While, on September 23, 1992, the L-NEA had information that some action had been taken by the Board concerning supplemental contracts wages, it cannot be said that such constituted *"unequivocal notice"* that the L-NEA understood the amount of the wage, the rationale for the reduction, or its finality. *See* Armco, Inc. v. NLRB, 126 LRRM 2961 (CA 6, 1987); United Technologies Corp., 128 LRRM 1242 (1988). As of that date the parties were still in negotiations on the 1991-92 contract including the Middle School Pilot Program; the teachers had not

received their Extra Duty Assignment Agreements setting forth the rate of pay for teaching an extra class at the Middle School; no supplemental salary schedule had been adopted by the Board or provided the teachers or the L-NEA; and there is no evidence the reason for the reductions, the method of calculating the supplemental wage in question, or the fact that the Board did not consider it necessary to negotiate the supplemental pay schedule had been understood by, or clearly communicated to, the teachers or the L-NEA.

On October 14, 1991 the teachers received their Extra Duty Assignment Agreements (Ex. 2), and the testimony indicates that after the October 16, 1991 impasse hearing, Superintendent Ludwick, L-NEA President Ewart, and Uniserv Director Kirby discussed the reduction of Middle School supplemental salaries. There can be no question, however, that with receipt of Superintendent Ludwick's November 13, 1991 letter to Uniserv Director Kirby the L-NEA had "*unequivocal notice of an adverse employment action.*" By November 16, 1993[4] the L-NEA had received all the information found absent above on September 23, 1991, and their cause of action must be considered to have accrued on that date. Therefore, any prohibited

[4] Since there is no evidence in the record indicating the date the November 13, 1991 letter was received, it appears appropriate to apply K.S.A. 77-531 to establish a date for receipt. K.S.A. 77-531 provides "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period." Such appears applicable in this situation where the document determinative of the issue of unequivocal notice has been sent by mail.

practice complaint must have been filed on or before May 16, 1992 to meet the requirements of K.S.A. 75-5430a(a). Consequently, the filing of the complaint by the L-NEA on March 25, 1992 would not be time barred.

Even if it were determined the date the L-NEA received "unequivocal notice" was September 23, 1991, the subsequent filing of the prohibited practice complaint on March 25, 1992 would still not be barred by the six month statute of limitations of K.S.A. 75-5430a(a). Relying on a doctrine formulated primarily in the context of Title VII and civil rights cases the National Labor Relations Board and the federal courts have adopted the principle of *"continuing violation"* to prohibited practice complaints. *See* WPIX Inc., 131 LRRM 1780 (1989); Sevaco v. Anchor Motor Freight, 122 LRRM 3316 (CA 6, 1986); Angulo v. Levy Co., 118 LRRM 3129 (CA 7, 1985); NLRB v. Actors Equity Association, 106 LRRM 2817 (CA 2, 1981).

[4] Where the conduct challenged by the employee organization involves a continuing prohibited practice that causes separate and recurring injuries to a unit employee or the employee organization, the action is deemed to be *"in the nature of a continuing trespass."* Sevaco v. Anchor Motor Freight, 122 LRRM at 3320. A separate cause of action accrues, therefore, each time the challenged conduct occurs.

The federal district court in Angulo v. Levy Co. recognized the continuing violation theory to hold timely employees' cause of action for alleged breaches occurring six months prior to the filing of the lawsuit. In Angulo the union had, for the last decade, allowed Hispanic workers to be paid a lower pay rate than mandated by the collective bargaining agreement. The court rejected the union's defense that the claims were time barred and agreed that the allegations of a continuing course of discriminatory treatment was sufficient to find that the limitations period runs from the occurrence of each violation, not from the first time the discrimination took place.

Likewise, in WPIX, Inc., the National Labor Relations Board concluded the National Labor Relations Act's six month limitations period did not bar allegations that the employer unlawfully refused to pay increases called for by the contract, since each individual failure to pay the wage increase was unlawful, and the last failure to pay occurred within six months of filing the unfair labor practice complaint.

Similarly in the instant case, the teachers who teach an extra class at the Middle School receive one-twelfth of their supplemental salary for that class each month. Under the continuing violation theory a new cause of action accrues each month from which a new prohibited practice complaint may be filed and from which a new six month statute of limitations period begins

to run. To find that the L-NEA's March 25, 1992 filing was not time barred, it is necessary that one of the allegations of diminution of supplemental wages included in the monthly pay check occurred after September 25, 1991. According to the testimony of Superintendent Ludwick, the Board used the same method to compute supplemental salaries in October, November, December and January that was used in computing the September salaries. All such dates fall within the six month limitations period of K.S.A. 75-5430a(a). Therefore, the L-NEA prohibited practice complaint would not be time barred under the continuing violation theory. Accordingly, the Board's Motion to Dismiss for untimeliness must be denied.

The second *"substantial procedural hurdle"* centers around the Board's motion to have the prohibited practice complaint dismissed as moot. The Board argues the L-NEA is complaining about actions which took place during the 1991-92 negotiations. A contract was ultimately reached as a result of those negotiations and ratified by the parties which, the Board maintains, *"specifically addresses the issue in controversy here, i.e., pay for teaching an extra class at the middle school."* Since the parties have reached agreement, the argument concludes, the matter is moot. As authority for its position the Board cites NEA-Topeka, Inc. v. U.S.D. No. 501, 227 Kan. 529 (1980).

In NEA-Topeka the appellate court found that the case was moot because by the time the case got to the court on appeal,

negotiations had ceased, contracts had been issued, and there no longer existed an actual controversy. As the court noted in finding the case moot, *"Those contracts were accepted and ratified by the teachers and nothing we can state in this opinion will alter the rights of the parties with respect to that contract."* Id. at 531. Additionally, the court stated that it was not statutorily empowered to render advisory opinions.

The parties here similarly negotiated ratified a contract for the 1991-92 school year. However, that contract does not address the issue in controversy, i.e. pay of teaching an extra class at the Middle School as alleged by the Board. The 1991-92 Memorandum of Agreement, Article XIV, Section A, states only, *"If a teacher is requested to give up one of their planning periods in order to teach a class, compensation will be given to that teacher based on the supplemental salary schedule."* (Ex. 3, p. 21). There is no supplemental salary schedule included in the Memorandum of Agreement; supplemental salaries were not a subject noticed by either party for negotiations for the 1991-92 contract; and there is nothing in the record to indicate that specific supplemental wage proposals for teaching the extra class were presented and discussed during negotiations. The Board maintains the L-NEA waived its right to negotiate the supplemental salary as a result of past practices between the parties, and therefore its unilaterally prepared Supplemental Salary Schedule should be used

to give effect to Article XIV, Section A of the Memorandum of Agreement.

The L-NEA counters that the supplemental salary schedule referred to in Section A is either the 1990-91 supplemental salary schedule under the Continuing Contract Law, or a salary schedule determined through professional negotiations between the parties. According to L-NEA, no past practice exists allowing unilateral action as argued by the Board.

Regardless of which party's argument is correct, the language of the negotiated agreement clearly does not resolve the issue in controversy, and an opinion in this complaint could alter the rights of the parties depending upon the argument accepted. Accordingly, the complaint is not moot.[5] The Boards motion to dismiss for mootness must be denied.

ISSUE 2

WHETHER THE U.S.D. 480 BOARD OF EDUCATION'S ACTION OF ADOPTING A SUPPLEMENTAL COMPENSATION SCHEDULE ESTABLISHING A LOWER WAGE RATE THAN THE PREVIOUS YEAR FOR MIDDLE-SCHOOL TEACHERS TEACHING EXTRA CLASSES UNDER A PILOT PROJECT, WITHOUT FIRST NEGOTIATING THE NEW WAGE RATE, CONSTITUTES A UNILATERAL CHANGE IN TERMS AND CONDITIONS OF EMPLOYMENT IN VIOLATION OF K.S.A. 72-5430(B)(5).

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[5] It should be noted the Secretary is not statutorily prohibited from issuing advisory opinions. The Secretary, in the past, has been called upon to render advisory opinions relative to the Professional Negotiations Act, and has provided such opinions where there are existing questions of public interest which should be answered to provide guidance for future interaction between professional employees and boards of education. Butler County Community College Education Association v. Butler County Community College, 72-CAE-13-1989 (September 27, 1990).

a. WHETHER ACQUIESCENCE BY THE PETITIONER DURING THE PROCEEDING FIVE (5) TO SEVEN (7) YEARS IN ALLOWING THE SUPERINTENDENT TO SET THE WAGES PAID UNDER SUPPLEMENTAL CONTRACTS WITHOUT NEGOTIATIONS ESTABLISHES A "PAST PRACTICE" MODIFYING THE BOARD OF EDUCATION'S OBLIGATION TO MEET AND CONFER DICTATED BY K.S.A. 72-5423(a).

The Liberal-National Education Association ("L-NEA") asserts that pay for duties under supplemental contracts is a mandatory topic for bargaining which must be submitted to professional negotiations before any changes can be made by the U.S.D. 480 Board of Education ("Board") in wages paid for teaching an extra class as part of the Middle School Pilot Project. Since the Board, through Superintendent Ludwick, unilaterally lowered the rate of compensation for teaching an extra class from that paid under the 1990-91 supplemental salary schedule, the L-NEA alleges the Board 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 Board admits the Superintendent unilaterally established the rate of pay for teaching the extra Middle School Pilot Project class, but argues the L-NEA waived its right to negotiate as a result of the past practices of the parties in developing the Supplemental Salary Schedule of which *"Extra Class"* wage is an element. The Board maintains it is relieved of any duty to

negotiate prior to setting the wage rate for teaching the extra class under the pilot project.

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) 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."*

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 basic 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).

[5] 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. As the NLRB and federal courts have held, good faith compliance with section 8(a)(1) and (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 the bargaining representative 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. Oakley

Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992); *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 necessarily a *per se* 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."*

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.[6]

Unilateral action is *prima facie* unlawful because of the high degree of probability that it may frustrate a bargaining opportunity. However if there has been a unilateral change in a term and condition of employment, the employer may successfully

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[6] 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 by any 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."

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."*

[6] The duty to bargain exists only when the matter concerns a term and condition of employment. It is not unlawful for an employer to make unilateral changes when the subject is not a mandatory bargaining item. *See* Allied Chem. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Also, since only unilateral changes are prohibited, an unfair labor practice will not lie if the change is consistent with the past practices of the parties. Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992); *see also* R. Gorman, Basic Text on Labor Law, p. 450-54 (1976).

Mandatorily Negotiable Subjects

Supplemental Contract Pay

There is no question pay for duties under supplemental contracts is a mandatory subject 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).

Past Practice of the Parties

The Board argues a *"past practice"* developed between the parties whereby the Superintendent has been allowed annually to unilaterally determine the rate of pay for duties performed under supplemental contracts without first negotiating with the L-NEA. As a result of that past practice, the argument continues, the L-NEA has waived its statutory right to bargain.

[6] 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 present relationship. R.I. Court

Reporters Alliance v. State, 591 A.2d 376, 378 (R.I. 1991).[7] 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.

The binding quality of a past practice 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). It is reasoned that 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. Essentially, by their silence, the parties have given assent to existing modes of procedure.

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[7] For a complete discussion of past practices see Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992). The reasoning, conclusions and citations included in that case are adopted here as though set forth in their entirety.

[8] *"Past practice"* and its uses is one of the most troublesome areas in the administration of the labor agreement. In Oakley Education Association v. U.S.D. 274, 72-CAE-6-1992 (December 11, 1992), the Secretary recognized four situations in which evidence of past practices may be used to ascertain the parties' intentions. These four situations are:

> *"(1) To clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement."* County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977).

It is situations #2 and #4 that appear applicable to the issues raised in this case as the Board is seeking to establish a right to unilaterally set the rate of pay for teaching the extra Middle School Pilot Project class under a supplemental contract. Since the language of the 1990-91 memorandum of agreement appears ambiguous and provides no clues regarding the parties intent, the use of past practices is appropriate in this case to determine the obligations of the parties relative to establishing the supplemental salary schedule.

[9] 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 and 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 for at least the last five to seven years it has been the practice of the Superintendent to unilaterally establish a supplemental salary schedule and thereby set the compensation to be paid under supplemental contracts for the coming school year. Given the length of time involved and number of supplemental contracts executed during that period, general knowledge of the existence of this practice must be inferred among the teachers and, consequently, the L-NEA. This inference finds support in the testimony of Kathy Peterson, one of the L-NEA negotiating team members:

> *"A. I've heard how it [the Supplemental Schedule for Extra Assignments] was established, but basically there was never anything in writing.*
> *Q. Could you explain to me what you had heard?*
> *A. Basically that whatever the Superintendent felt they should get, they got. If he felt they should get a raise, they got one; if not, they didn't get one.*
> *Q. They, you mean whoever took --*
> *A. The people that the Supplemental applied to.*
> *Q. And this has been -- this had been the practice or the procedure that had taken place at least during the ten years that you have been here?*
> *A. Yes sir." (Tr.p. 57-58).*

Presumably, during that time, it was also generally known among the teachers that those teaching an extra class at the middle

school received a lower rate of compensation than teachers at the high school who taught an extra class. This includes knowledge of the reason for the difference, i.e. the school day was divided into seven classes at the middle schools rather than six classes as at the high school, with correspondingly shorter class times. In attempting to rebut this presumption the L-NEA argues that it was unaware who prepared the Supplemental Salary Schedule; that neither it nor the teachers had ever actually received or viewed the prepared Supplemental Salary Schedules; and that it never received an explanation of how the wage rates were established. Such argument lacks credibility and is not persuasive.

It is hard to accept that in a school district the size of U.S.D. 480, over a period of five to seven years, none of the teachers discovered the middle school teachers were receiving less for teaching an extra class than received by the high school teachers[8]; or upon making the discovery never discussed it with other middle school teachers or their L-NEA representatives[9]; or that neither the teachers or L-NEA officers approached the Board or

[8] The evidence shows the teachers were immediately aware of a problem with paychecks received September 23, 1991. (Tr.p. 171).

[9] The testimony of Kathy Peterson reveals the teachers do discuss salaries received (Tr.p. 62).

its agents for an explanation as to the difference in rate of pay[10].

There is nothing in the record to show L-NEA actively sought to negotiate specific supplemental salaries during the five to seven years here in question except brief references during the testimonies of Steve Rice and Superintendent Ludwick. Mr. Rice is a member of the U.S.D. 480 Board of Education and has served on the Board's negotiation team each year beginning with the 1989-90 agreement. He testified that during the 1989-90 negotiations the L-NEA agreed not to negotiate supplemental salaries. According to Superintendent Ludwick this was in exchange for the Board not seeking to negotiate the subject of Merit Pay.

Additionally, the method of establishing the Supplemental Salary Schedule was mentioned during those negotiations. Mr. Rice testified that Mr. Cleland, another member of the Board's negotiating team for 1989-90, stated during those discussions, *"let's don't open those up, you know, let the Superintendent continue to compute the salaries."* No change in the procedure was negotiated for the 1989-90 memorandum of agreement or for any memorandum thereafter nor is there evidence that such procedure was altered during this period, and the L-NEA did not notice supplemental salaries as a subject for negotiations in their

[10] In this case the L-NEA UniServ Director was contacted and the same day entered into correspondence with the Board to begin a dialogue on the problem of decreased wages. (Ex. K).

February 1, 1991 notice letter. There is also nothing in the record to indicate during the 1991-92 negotiations the L-NEA repudiate its acquiescence in this procedure.

The record does show that when it came time to prepare the 1991-92 Supplemental Salary Schedule, the first for Superintendent Ludwick after being hired to the position of Superintendent of Schools, he was unfamiliar with the Supplemental Salary Schedule as the 1990-91 schedule had been prepared before he was hired as Superintendent. According to Superintendent Ludwick, his research revealed the preparation of the Supplemental Salary Schedule was the sole responsibility of the Superintendent. In determining how to proceed, Superintendent Ludwick sought the advise of Mary Meier. She is his secretary and had served as the secretary to past superintendents, and she was familiar with how the Supplemental Salary Schedule had been prepared in the past. In addition, he reviewed Supplemental Salary Schedules dating from the 1987-88 school year. From these sources he determined the method used in determining wages for teaching an extra class at the middle schools was a proration based upon class length with the high school six classes/55 minutes per class length as the standard.

In calculating the Middle School wage for past years under the seven period format, the following formula was used:

$$\frac{\text{Wage for extra class at high school}}{\text{Minutes per high school class}} \times \text{Minutes per middle school class} = \text{middle school wage.}$$

Upon inserting into the above formula the wage for teaching an extra class at the high school from the 1991-92 Supplemental Salary Schedule as it appeared September 23, 1993 and the 55 minute classes at the high school and 44 minute classes at the middle school under the Pilot Program, it quickly becomes apparent that Superintendent Ludwick used this same formula from past years to calculate the supplemental wage for teaching an extra class at the middle school for 1991-92:

$$\frac{\$1,558}{55} \times 44 = \$1,246$$

This $1,246 figure appears on the Supplemental Salary Schedule used to calculate wages to be paid beginning September 23, 1991 (Ex. J), and appears on the October 14, 1991 Extra Duty Assignment Agreement of Elaine Ewert (Ex. 2).

The evidence clearly shows Superintendent Ludwick followed the practice of his predecessor and prepared the Supplemental Salary Schedule for the 1991-92 school year without first submitting the wages to negotiations. Additionally, Superintendent Ludwick did not deviate from the procedure used to calculate the difference in wages paid between Middle School, High School and Vo Tech School teachers who teach an extra class.[11]

[11] Had Superintendent Ludwick deviated from the past practice as set forth above, such changes would have required their submission to negotiation prior to implementation.

The record as a whole sufficiently proves both parties knew of the practice used to determine supplemental salaries and acquiesced in it, and supports the Board's position that a past practice has been established whereby it had the right to unilaterally prepare the Supplemental Salary Schedule and thereby the wages to be paid for teaching an extra class at the middle school. The evidence further proves the Board, through Superintendent Ludwick, relied upon and followed that past practice in preparing the 1991-92 Supplemental Salary Schedule.

As a result of the past practice, the L-NEA will be deemed to have waived its right to negotiate any changes in the Supplemental Salary Schedule for 1991-92. Consequently, the Board did not commit a prohibited practice when it unilaterally prepared the Supplemental Salary Schedule and paid those teachers teaching an extra class under the eight class day Middle School Pilot Project a lower wage than received the previous year under the seven class day format. If the L-NEA wishes to repudiate the past practice and its waiver, such must be done as part of the professional negotiation process for the next memorandum of agreement.

Other Issues

The L-NEA raises two other arguments that require discussion. First, the L-NEA alleges the Board unilaterally instituted the

Middle School Pilot Project which increased the number of class periods and changed existing teaching and planning times for teachers at the middle school. Since these are mandatory subjects of bargaining, the argument continues, the unilateral implementation of the pilot project without negotiation constituted a prohibited practice.

The record is silent as to when exactly the Board made a final decision to implement the Middle School Pilot Project other than a reference to April, 1991. However, since the L-NEA had notice that the pilot project would be implemented for the 1991-92 school year and thereafter possessed sufficient information to formulate a written proposal for implementation of the pilot project for submission at the May 8, 1991 negotiating session, the L-NEA must be considered to have had *"unequivocal notice"* of this adverse employment action no later than May 8, 1991. To be timely, a complaint alleging such unlawful action needed to be filed on or before November 8, 1991. No such complaint having been filed by that date, the L-NEA cannot use the present timely prohibited practice complaint concerning supplemental salaries to bootstrap their untimely complaint concerning implementation of the pilot project. The complaint is time barred and will not be considered.

The L-NEA also argues that supplemental contracts are controlled by the continuing contract law, and accordingly the wages set forth in those contracts cannot be unilaterally changed

especially while professional negotiations are taking place. According to the L-NEA, the Board was required to continue into the 1991-92 school year the same rate of compensation paid under 1990-91 supplemental contracts, since professional negotiations for 1991-92 had not concluded. This argument is without merit for two reasons. First, K.S.A. 72-5412a specifically states:

> *"The provisions of article 54 of chapter 72 of Kansas Statutes Annotated which relate to the continuation of teacher contracts and to the due process procedure upon termination or nonrenewal of a teacher's contract do not apply to any supplemental contract of employment entered into under this section."*

K.S.A. 72-5412a removes supplemental contracts from all of Article 54, Chapter 72 of the Kansas Statutes. Swager v. Board of Education, U.S.D. No. 412, 9 Kan.App. 648, 652 (1984).

Second, the extra classes taught at the Middle School for the 1990-91 school year under a supplemental contract were 50 minutes in length. Only three such contracts were issued for that school year. The 1991-92 extra classes under the Middle School Pilot Project were reduced to 44 minutes in length, and there were 10 such contracts. Simply stated, under the Continuing Contract Law a contract which, at the election of the individual teacher, continues into the next school year under the same terms and conditions that existed previously. Even assuming the same three teachers who had supplemental contracts in 1990-91 accepted a supplemental contract for 1991-92, there is no contract to continue

because, by the reduction in class time, one of the major terms of the supplemental contracts is different. For the remaining seven teachers there were no supplemental contracts for the 1990-91 school year and so no contracts to continue into the 1991-92 school year.

With the end of the 1990-91 school year on June, 1991, the supplemental contracts terminated and did not carry forward into the next school year under the provisions of the Continuing Contract Law. New supplemental contracts must be issued each year. While tenured teachers cannot be forced to accept a supplemental contract as a condition of continued employment under a primary contract, Hachiya v. U.S.D. 307, 242 Kan. 572 (1988), they cannot, through application of the Continuing Contract Law, force a board of education to again employ them under a supplemental contract or pay them a specific wage because they held the supplemental contract for that service at that wage the previous year.

L-NEA next argues that if the Continuing Contract Law does not apply because these are supplemental contracts, then the extra duties should not be viewed as supplemental but rather as directly related to the primary contract, therefore making the Continuing Contract Law applicable. The L-NEA contends that while the teaching of the extra class is captioned a supplemental duty, it requires teaching a regular class in the same manner as required by

the teacher's primary contract covering the other six teaching periods. According to the L-NEA:

> *"Although the caption may have been different, there is no doubt that the extra duty hour is a primary duty and the contract for it must continue from year to year under the Continuing Contract Law, K.S.A. 72-5411 et seq.*

When the caption given a document is inconsistent with the contents thereof, the court must look through form to substance in determining the true nature of the document. A supplemental contract, to come within the provisions of K.S.A. 72-5412a, must be for additional duties over and above those required by the teacher's primary contract. NEA-Wichita v. U.S.D. No. 259, 225 Kan. 393, 402 (1979).

L-NEA cites NEA-Wichita v. U.S.D. No. 259, 225 Kan. 393, 402 (1979) and NEA-Goodland v. U.S.D. No. 352, 13 Kan.App. 558, syl. 3 (1989) as support for this position. The pertinent issue in NEA-Wichita involved teachers who had supplemental contracts because they were teaching special education. According to the court it was undisputed that the special education supplemental contracts involved no duties that were in addition to the teachers' primary contracts. The court concluded *"The issuance of supplemental contracts to special education teachers was purely a device to supplement their salaries and not for the assignment of additional duties."* Id. at 402, (Emphasis added). The salary supplementation was in accordance with the master contract and based on a need to

attract state certified special education teachers to school district.

In this case, under the Middle School Pilot Project the teacher's primary contract called for eight periods per day; six periods were designated for classroom teaching and the remaining two periods were set aside for planning. Through supplemental contracts those Middle School teachers willing to give up one of their two planning periods and accept an additional teaching period, received additional compensation. Of import here is that the supplemental contracts were not *"purely a device to supplement their salaries"* but constituted compensation for the assignment of additional duties, i.e. teaching an extra class period. These were additional duties over and above those apparently covered by the teacher's primary contract. The compensation received under the supplemental contract was directly related to the new duties assumed, and not to duties already required under the primary contract. The facts in NEA-Wichita are clearly distinguishable from those in the case for determination here, and the rule from that case should not be extended here.

NEA-Goodland v. U.S.D. No. 352, 13 Kan.App. 558 (1989) concerned the issue of whether supervision of recess was properly a supplemental duty or a duty covered by the teacher's primary contract. The court concluded:

> *"Any supervising of children participating in extracurricular activities must be governed by a supplemental contract. Any supervising which is entwined with the duty of educating should be considered a part of the teacher's primary teaching obligation. Noon recess duty is intricately related to the education process and as such is controlled by the teacher's primary contract."* Id. at 562.

The controlling factor, according to the court, is that the service must be an integral part of the teacher's duty to educate if it is to be considered a part of the teacher's primary contract. Id. at 560-61. There can be no question that the teaching of an extra class is an integral part of the teacher's duty to educate. The issue then is whether the Middle School teacher who taught the extra class under the pilot project was employed under a contract which, as the District contends, was in reality two contracts: a primary contract to teach six periods at the Middle School and a supplemental contract to teach an extra class; or whether, as MAPE argues, the teacher entered into two contracts to fill a single position, a position requiring the performance of multiple duties, i.e. teaching six classes and having two planning periods, and relinquishing one planning period and teaching one additional class. *See* Swager v. Board of Education, U.S.D. No. 412, 9 Kan.App. 648, 652 (1984).

When two instruments are executed by the same parties contemporaneously or in the course of the same transaction, and concern the same subject matter, they will be read and construed

together to determine the respective rights of the parties, even though the instruments do not in terms refer to each other. Bowen v. Hathaway, 202 Kan. 107 (1969); West v. Prairie State Bank, 200 Kan. 263 (1967). In this case, the Middle School teacher's primary contract covering six class periods and two planning periods and the supplemental contract covering one additional class period are read together forming a primary contract covering seven class periods and one planning period plus additional compensation. While labeled an *"Extra Duty Assignment Agreement,"* the contract for teaching the extra class is in reality an addendum to the teacher's primary contract and not a contract for supplemental duties.

Having determined that the contract for teaching the extra class is to be included as part of the teacher's primary contract, the Continuing Contract Law would apply. The problems presented in making such an application are the same as discussed above, p. 42-43, concerning application of the Continuing Contract Law to supplemental contracts. Only the individual teacher possessing a 1990-91 contract which included teaching an extra class could elect to continue that contract into the 1991-92 school year under the Continuing Contract Law. The record indicates only three Middle School teachers had such contracts for 1990-91. It is devoid of evidence that any of those three teachers accepted an extra class assignment for 1991-92. The ten Middle School teachers accepting

an extra class assignment for 1991-92 can not rely upon the 1990-91 contracts of other teachers, containing the extra class compensation, as a basis for applying the Continuing Contract Law to those assignments. Having rejected the Continuing Contract Law argument, the setting of the compensation would be subject to the past practices of the parties as discussed above.

Assuming, *arguendo*, that the Continuing Contract Law would apply to the ten Middle School teachers who accepted the extra class assignment, to require payment of the 1990-91 level of compensation during the time the teachers were working without a ratified 1991-92 contract, the teachers still have not suffered any harm for which relief can be granted. MAPE's prohibited practice petition seeks as relief *"The Board will restore the wages paid for teaching extra classes to the level as specified in the negotiated agreement."* The 1991-92 Memorandum of Agreement, Article XIV, Section A, Middle School Pilot Program, provides:

> *"If a teacher is requested to give up one of their planning periods in order to teach a class, compensation will be given to the teacher based on the supplemental salary schedule."*

The Memorandum of Agreement does not indicate which *"supplemental salary schedule"* is to be used, or how that supplemental salary schedule will be established. It is reasonable to infer from the past practices of the parties that by this reference was meant the supplemental salary schedule prepared

annually by the superintendent in the same manner as had occurred in previous years. A 1991-92 supplemental salary schedule was prepared according to that past practice, as discussed fully above. The Middle School teachers have received in compensation for teaching the extra class exactly that for which it bargained. There are no wages to be restored "*to the level as specified in the negotiated agreement*" because the District did, in fact, pay all wages at the levels provided by the negotiated agreement.

Additionally, it would appear that each of the teachers executed an Extra Duty Assignment Agreement following the ratification of the 1991-92 which sets forth the specific amount each teacher would receive for teaching the extra class that year. (See Ex. 4, Elaine Ewert contract). Even if the teachers should have been paid at the 1990-91 compensation level each month until the 1991-92 Memorandum of Agreement was ratified, upon ratification the <u>total</u> compensation due for 1991-92 extra classes was fixed. Subsequent monthly payments would have to have been reduced to compensate for the higher earlier payments. Again the rights of the parties have been fixed by the Memorandum of Agreement and the teacher's individual contracts, and the teachers were compensated in accordance with those agreements. Accordingly, they have suffered no harm as a result of the District's action.

ORDER

IT IS HEREBY ORDERED that the Respondent's motions to dismiss the prohibited practice complaint are denied for the reasons set forth above.

IT IS FURTHER ORDERED that the Petitioner's complaint be dismissed for the reasons set forth above, and the remedies sought are hereby denied.

Dated this 5th day of March, 1993

Monty P. 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 Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Human Resources, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on March 23rd, 1993 addressed to: Secretary of Human Resources, Employment Standards and Labor Relations, 512 West 6th Avenue, 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 5th day of March, 1993, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

David Schauner
Kansas National Education Association
715 W. 10th
Topeka, Kansas 66612

U.S.D. 480, Board of Education
P.O. Box 949
Liberal, Kansas 67905-0949

Richard R. Yoxall
YOXALL, ANTRIM & YOXALL
P.O. Box 1278
Liberal, Kansas 67901

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

Sharon Tunstall