BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

NEA-TOPEKA, Complainant,	*	
vs.	*	CASE NO.: 72-CAE-9-1985
U.S.D. 501, Topeka, KS, Respondent.	*	

ORDER

Comes now on this 4th day of January, 1985, the above captioned matter for consideration by the Secretary of the Department of Human Resources. The Secretary has appointed Jerry Powell to serve as hearing officer and to make the following Findings, Conclusions, and Order on his behalf.

The case comes before the hearing officer on petition of Les Kuhns, President of NEA-Topeka. The petition alleges that the Board of Education of U.S.D. 501 has engaged in prohibited practice within the meaning of K.S.A. 72-5430(b)(3), (5), (6), and (7). NEA-Topeka alleges that board action taken on the evening of December 5, 1984, to issue unilaterial board policies constitutes the above stated violations.

PROCEEDINGS BEFORE THE SECRETARY

1) Complaint filed by Les Kuhns on behalf of NEA-Topeka on December 6, 1984, case designated 72-CAE-9-1985.

2) Answer to complaint received December 14, 1984 under the signature of William G. Haynes, Attorney at Law, acting on behalf of the Board of Education U.S.D. 501.

3) Notice of Hearing sent to parties on December 12, 1984 scheduling a hearing for December 20, 1984. Parties agreed to waive 10 day notice of hearing as provided by K.A.R. 84-2-2(b).

4) Hearing conducted on December 20, 1984, December 21, 1984 and January 4, 1985.

APPEARANCES

Complainant, NEA-Topeka appears by and through its counsel, David M. Schauner, Kansas-National Education Association, 715 West 10th,

Topeka, Kansas. Also appearing on behalf of NEA-Topeka were Les Kuhns, President of Kansas-NEA, and Jim Marchello, Executive Director of Capital UniServ.

Respondent, U.S.D. 501, Topeka, Kansas, appears by and through its counsel, William G. Haynes, 1300 Merchants National Bank Building, Topeka, Kansas.

FINDINGS OF FACT

1) That NEA-Topeka is the recognize employee organization for the purposes of K.S.A. 72-5413 et seq. (See Joint Exhibit #1).

2) That the complaint is properly and timely before the Secretary.

3) That NEA-Topeka filed a "notice to negotiate" on U.S.D. 501, Board of Education on February 1, 1984. (See Joint Exhibit #5).

4) That the Board of Education of U.S.D. 501 filed a "notice to negotiate" on NEA-Topeka on January 31, 1984. (See Joint Exhibit #6).

5) That the Joint Exhibits referenced in Findings #3 and #4 clearly set out the items (subjects) that both parties desired to change during negotiations and the items which neither party desired to change.

6) That there was a written agreement between NEA-Topeka and Board of Education, U.S.D. 501 for the period of June 1, 1982 through June 1, 1984. (See Joint Exhibit #1).

7) That negotiations between U.S.D. 501 and NEA-Topeka commenced sometime in February 1984.

8) That U.S.D. 501 and NEA-Topeka had not reached an agreement in negotiations by June 1, 1984.

9) That U.S.D. 501 and NEA-Topeka participated in mediation and fact-finding as required by K.S.A. 72-5413 et seq.

10) That a post fact-finding meeting between U.S.D. 501 and NEA-Topeka was held in November, 1984.

11) That during the post fact-finding meeting a representative of U.S.D. 501 presented to NEA-Topeka the Board's final position on items under negotiations. (T-131)

12) That the NEA-Topeka representatives assumed that the last offer of U.S.D. 501 (Joint Exhibit #2) was supplemented by provisions

of the existing contract (Joint Exhibit #1), which were noticed or negotiated by the parties.

13) That no "agreement" was reached between the parties at the post fact-finding meeting.

14) That a ratification vote for the Board's last offer was conducted by NEA-Topeka on November 29, 1984. (T-154)

15) That the results of the ratification vote referenced in Finding #13 was 580 no votes, 191 yes votes and 1 unmarked ballot. (T-131)

16) That Mr. Frank Ybarra, Assistant Superintendent of Administrative Services, prepared and disseminated to the U.S.D. 501 Board members a "packet" or set of proposed Board policies (Complainant's Exhibit #2) on November 30, 1984. (T-44, T-75 and T-111)

17) That Mr. Frank Ybarra also prepared an alternative set of proposed Board policies which he gave to Mr. Haynes for presentation to the Board of Education. (T-78)

18) That the U.S.D. 501 Board of Education considered both packets or sets of Board policy referenced in Findings #16 and #17, during an executive session on the evening of December 5, 1984. (T-45)

19) That the U.S.D. 501 Board of Education adopted a set of special Board policies relating to terms and conditions of employment for professional employees of the district on the evening of December 5, 1984. (T-46)

20) That the special Board policies referenced in Finding #19 are entered into the hearing record as Joint Exhibit #2.

21) That the special Board policies (Exhibit #3) do not contain references to NEA-Topeka (See Joint Exhibit #3)

22) That the special Board policies do not contain seven articles and the preamble which were contained within the previously negotiated agreement between the parties. These 8 items were not noticed for negotiated change by either party in their "notice" documents referenced in Findings #3 and #4. Those items are:

1) Preamble
2) Article II — Recognition
3) Article III — School Board's Powers and Rights
4) Article IV — Unfair Practices

5)	Article VII	No Strike - No Lockout
6)	Article XXXII	Matters Contrary to Agreement
7)	Article XXXIII	Agreements Contrary to Law
8)	Article XLIX	Individual Teaching Contract

(T-141) (Joint Exhibit #3)

23) That the special Board policies (Joint Exhibit #2) contain language changes in at least five policies from the language of similar articles which were contained within the previous negotiated agreement. The five items were not "noticed" for negotiations by either party. Those items are:

1)	Article XIII	School Curriculum	Special policy SB12
2)	Article XVI	Multiple Building Assignments	Special policy SB15
3)	Article XXII	Evaluation Procedure	Special policy SB21
4)	Article XXVI	Jury Duty and Legal Leave	Special policy SB24
5)	Article XLIV	Absence Without Pay	Special policy SB42

24) That the special Board policies issued December 5, 1984 provided for an eleven percent (11%) increase in wages for professional employees.

25) That Connie Skinner, principal of Topeka West High School, directed a memorandum to teachers at the school in which he stated that in order for the teachers retroactive pay to be received by the Christmas break, the contracts must be received by Personnel by 4:00 PM on Friday, December 7, 1984. (See Joint Exhibit #8).

26) That on December 7, 1984, Mr. Skinner called a special faculty meeting during which he gave more information to teachers about the proposed policies and offered to allow any teacher who had signed their contract to "unsign". (T-17)

CONCLUSION OF LAW/DISCUSSION

This case comes before the Secretary on petition of NEA-Topeka alleging that U.S.D. 501 acted in bad faith in deleting references to NEA-Topeka in Board policy enacted when a negotiated agreement could not be reached. Further, NEA-Topeka alleges that certain items or subjects which were not noticed for negotiations were unilaterally changed by the issuance of Board policy. NEA-Topeka argues that the above cited action was taken for the express purposes of punishing NEA-Topeka for failure to agree to the Board's last offer and to coerce NEA-Topeka into making concessions in future negotiations. NEA-Topeka also argues that this action discourages membership in NEA-Topeka and that the Board action taken on December 5, 1984, constitutes a "continuing" refusal to bargain in good faith.

The Board argues that their action of implementing Board policies on December 5, 1984, results from a failure to reach a negotiated agreement coupled with the statutory mandate found at K.S.A. 72-5428(f). The Board cites a Supreme Court decision Riley County Education Association v. U.S.D. 378, 225 Kan. 385, 592 P. 2d 87 (1979), as governing the latitude given an employer in "taking such action as it deems in the public interest."

It appears to the examiner that he must first rule on the question concerning the intent of K.S.A. 72-5428(f) as that subsection might be tempered by K.S.A. 72-5430(b)(5), in order to clearly understand rights or obligations when the parties cannot reach a negotiated agreement. Once this question has been answered the examiner can view the factual occurrences in order to determine intent and/or violations of statute.

K.S.A. 72-5428(f) states:

> "(f) When the report of the fact-finding board is made public, if the board of education and the recognized professional employees' organization do not resolve the impasse and reach an agreement, the board of education shall take such action as it deems in the public interest, including the interest of the professional employees involved, and shall make such action public."

In order to properly construe the legislative intent of the above cited statute one must read in concert K.S.A. 72-5423(a), K.S.A. 72-5430(b)(5),

K.S.A. 72-5427(c) and K.S.A. 72-5413(g).

First, K.S.A. 72-5413(g) defines professional negotiations as; ". . . . 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." It is obvious from this verbiage that the legislature desired to establish a framework for the parties to expend good faith efforts in discussing and hopefully agreeing on terms and conditions of employment. This definition, then, obligates both parties to lay problem areas on the bargaining table and then engage in good faith dialogue to mutually resolve problems.

The legislature recognized however that each year not all terms and conditions of employment would create problems. Therefore, K.S.A. 72-5423(a) was enacted to clearly indicate to the parties that only those areas creating problems need be negotiated. That statute states in part; "Notice to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party..." There can be no doubt, then, that the legislature desired to relieve the parties of the obligation of annual negotiations over all terms and conditions of employment. Further clarity of rights and obligations under this statute was given by the Kansas Court of Appeals in Dodge City Nat'l Education Ass'n v. U.S.D. No. 443, 6 Kan. Ap. 2d 810. The facts in that case differ from the instant case inasmuch as a negotiated agreement was effected by the parties prior to the Board's action to make a change in a mandatorily negotiable subject. The court held that a Board could not make such a change when a negotiated agreement had been reach. The court reasoned; "If the Board's position were sustained, then every year NEA would be required to notice for negotiations all mandatorily negotiable items - even though no change in past procedure is anticipated or desired -- in order that the Board might not thereafter make unilateral changes. This would lengthen the negotiations process and undermine one principle purpose of the act -- to designate and negotiate those items which either parties desires to change." The examiner adopts this reasoning as the underlying legislative intent of K.S.A. 72-5423(a), the notice provision. That is, both parties are required to notice only those subjects or items which

they desire to change.

The court, in Dodge City, points our the difference in facts between the case before them and the Supreme Court decision in Riley County Education Association v. U.S.D. No. 278, 225 Kan. 285, 592 P. 2d 87 (1979). However, the court did not clearly indicate that Riley County was based upon the professional negotiations law prior to the time the Kansas Legislature amended the statute to include an impasse procedure. Justice McFarland in her opinion for the court in Riley County stated, "Before proceeding further, it should be noted that negotiations herein ceased prior to the time the School Impasse Legislation (K.S.A. 1978 Supp. 72-5426 et seq.) went into effect, and such legislation is not involved in this dispute..."

The examiner is confident that the legislature has clearly indicated its intent in instances such as are now presented, by the language within the provisions enacted to resolve impasse. While the legislature has not specifically defined "impasse" within the statutes, the examiner is guided by the definition of the procedures designed to resolve an impasse and the historical meaning of that term.

K.S.A. 72-5413(h) defines mediation as:

> "(h) 'Mediation' means the effort through interpretation and advice by an impartial third party to assist in reconciling a dispute concerning terms and conditions of professional service which arose in the course of professional negotiations between a board of education or its representatives and representatives of the recognized professional employees' organizations." (Emphasis added)

K.S.A. 72-5413(i) defines fact-finding as:

> "(i) 'Fact-finding' means the investigation by an individual or board of a dispute concerning terms and conditions of professional service which arose in the course of professional negotiation, and the submission of a report by such individual or board to the parties to such dispute which includes a determination of the issues involved, the findings of fact regarding such issues, and the recommendation of the fact-finding individual or board for resolution of the dispute." (Emphasis added)

It is quite obvious then, that an impasse can only exist over items which were negotiated or discussed between the parties during negotiations. The examiner notes that "tentative" agreement may be reached on many items during negotiations. Most parties, however,

will condition the inclusion of those tentatively agreed upon items on the achievement of a total "package" or contract. Therefore, it follows that in the event agreement cannot be reached on all items under negotiations, no agreement is reached and all items or subjects are "open" or at impasse.

Turning now to K.S.A. 72-5428(f), the examiner would emphasize the language which states; "if the board of education and the recognized professional employees organization do not resolve the impasse and reach an agreement, the board of education shall take such action as it deems in the public interest, including the interest of the professional employees..." This action in the public interest shall be taken to resolve the dispute between the parties. The statutes outline a series of steps which precede unilateral action by a board of education. Those steps include timely notice of intent to negotiate, negotiations, impasse declaration, mediation, and fact-finding. If items or subjects were unnoticed for negotiations and were never negotiated, they were never at impasse. Thus it follows that the Board of Education would be without authority to take action to change such issues. Further, it is illogical to assume that changing unnoticed items is in the public or the employees interest when neither party desired to change such items in the first place. Logic dictates that one reason for changing an unnoticed item at this point in negotiations would be to punish the employee organization for having failed to agree on all noticed items which had been negotiated. An emergency could also arise which could dictate a change and undoubtedly other situations could explain the necessity for change. Regardless of the rationale behind the change, allowing such an act works a disservice on the employee organization and must not be permitted. Except under the most extreme circumstances, even an emergency situation would not justify such an act.

Inherent in the concept of good faith negotiations in this or similar statutes is that both sides must give the other notice of desired change so that an opportunity is give for meaningful dialogue prior to unilateral action. The purpose, of course, is to insure "labor peace" and hopefully eliminate strife between employers and

employees. The examiner is persuaded that the legislature embraced this concept when the impasse procedures were enacted during the 1977 session. The Court of Appeals utilized this concept in Dodge City and reasoned that any other interpretation of rights would lengthen the process and undermine the principal purpose of the Act. The examiner submits that with the addition of the impasse procedure unilateral action by an employer to change mandatorily negotiable terms and conditions of employment not noticed for negotiations would undermine the principal purpose of the Act. This would hold true regardless of whether the parties had reached an agreement or not. Further, to allow an employer to take such action would only send a message to employee organizations to notice all items each year in an effort to have a fact-finder rule in the employees favor on all items. This would certainly lengthen the process but would, in the absence of arbitration, provide the employees with their only ammunition for swaying public interest to continue items or subjects in existence which neither party desired to change in the first place.

The examiner believes that K.S.A. 72-5428(f), clearly allows an employer to take any position desired on mandatorily negotiable items or subjects properly noticed and negotiated in good faith in the event agreement cannot be reached after mediation, fact-finding and the post fact-finding meeting required by K.S.A. 72-5428(e). However, the examiner believes that the statute is equally clear regarding mandatorily negotiable subjects which are not noticed for negotiations. That is, such subjects must remain in effect and any change from past practice would constitute a prohibited practice.

The examiner notes the use of the terms "unilateral contracts" in referring to the fulfillment of the requirements of K.S.A. 72-5428(f). This term is loosely used to mean "unilateral action" taken by a Board of Education when agreement is not reached. The Respondent in this matter has put forth as one defense for its action the argument that a Board cannot issue a unilateral contract which might appear to bind an employee organization to certain duties. Therefore, the Board argues, any documents or policies governing terms and conditions of employment which were unilaterally issued must contain no reference to an employee organization. NEA-Topeka argues that a Board may issue

"unilateral contracts" or Board policies containing references to an organization and in fact may not delete the organization from policies or contracts issued subsequent to negotiations. Further, the NEA-Topeka points to a past practice of U.S.D. 501 in which NEA-Topeka was referenced in the issuance of a "unilaterial contract".

Logic falls on the side of the employer since the Board cannot bind the employee organization to actions absent an agreement of the organization. The examiner finds nothing within the Professional Negotiations Act to define the type of document or even to require that a written document be issued in order to comply with the provisions of K.S.A. 72-5428(f). Quite the contrary exists by the statement that the Board of Education take such action as it deems in the public interest. The examiner concludes therefore, that the Board could take any number of actions based upon its interpretation of public and employee interest. The definition of "good faith negotiations" gives no guidance in this area with the exception of an employers inability to change past practice or previously contractual procedures relative to mandatorily negotiable subjects which neither party noticed for negotiations.

It appears to the examiner that an employer could issue "unilateral contracts" in which provisions are contained along with references to a union, or an employer could simply implement board policies. Certainly, the employer could not bind an organization to perform services but the examiner sees no harm in an employer simply handing out "contracts" containing language which appears to bind an organization.

A brief review of the examiners conclusions of law regarding issuance of unilateral contracts reveals the following:

1) If no agreement is reached at the post fact-finding meeting, an employer may take any desired position on the items or subjects which were noticed for and subsequently negotiated in good faith.

2) An employer need not issue "contracts" and may implement Board polices to govern terms and conditions of employment on any item which was noticed and negotiated in good faith.

3) An employer would commit an act of bad faith if such employer changed a mandatorily negotiable term and condition of employment without first noticing the subject and subsequently negotiating the subject in good faith. Such an action would constitute a violation of K.S.A. 72-5430(b)(5).

Turning now to the factual occurrences in the instant case, the examiner notes that the parties concur in the procedural occurrences leading up to and including Board action on December 5, 1984. The parties each served "notice to negotiate" on the other prior to or before February 1, 1984. NEA-Topeka's "notice to negotiate" was dated February 1, 1984, and is entered into the record as Joint Exhibit #5. This exhibit lists articles for continuation within a new contract without change and articles on which the association wished to make change. Further the notice included new articles which the association desired to have included within a new contract.

U.S.D. 501 Board of Education served notice to negotiate on NEA-Topeka dated January 31, 1984 and this notice is entered into the record as Joint Exhibit #6. This exhibit listed articles which the board was prepared to continue without change in a successor contract, articles which would be changed only by a negotiated dollar amount, and articles which the district desired to change.

On or about February 21, 1984, the parties commenced negotiations. These negotiations continued through June 1, 1984, the statutory impasse date. Thereafter the parties participated in mediation and fact-finding pursuant to statutory procedure. Subsequent to receipt of the fact-finders report the parties met as required by K.S.A. 72-5428(e). During this meeting both parties made movement toward an agreement but such agreement was not forthcoming.

At sometime during the post fact-finding meeting the Board representative made a final offer on behalf of the board to NEA-Topeka. The final offer was submitted to all teachers in the bargaining unit. The document submitted to the teachers was entered into the record as Joint Exhibit #2. The examiner notes that some question exists regarding the Board's last offer as it relates to "subjects" or "articles" not addressed within Exhibit #2. NEA-Topeka contends that it was their

understanding that all articles contained within the 1982-1984 agreement (Joint Exhibit #1) which were not spoken to in Joint Exhibit #2, would be continued in a successor agreement if in fact the teachers had ratified Joint Exhibit #2. The Board contends that on one knows for sure exactly what would have occurred since the ratification vote taken by the teachers on November 29, 1984 was negative.

The examiner turns to the language contained in Joint Exhibit #7 coupled with language found in Joint Exhibit #6. Exhibit #7, a memo to all teachers from Owen M. Henson states in part;

> "Attached is the position of the Board of Education on all matters which were discussed at the bargaining table at the final session held after fact-finding on November 21..." (Emphasis added)

Joint Exhibit #6, a letter to Mr. Barnhill from Mr. Haynes states in part;

> "This is to notify you that USD 501 is prepared to continue in effect without change the following articles included within the June 1, 1982 through June 1, 1984 Professional Agreement with NEA-Topeka..."

These two statements read in concert would lead a reasonable person to believe that a combination of the two documents (Joint Exhibit #7 and Joint Exhibit #6) would comprise the new agreement in the event the teachers had voted to ratify the document sumitted to teachers for consideration. The examiner is convinced that a ruling on the above stated question is unnecessary inasmuch as the teacher vote was negative and no contract was issued.

Subsequent to the ratification vote Mr. Frank Ybarra caused to be prepared a set of Board policies which were provided to Board members prior to the December 5, 1984, Board meeting. Complainant's Exhibit #2, the Board policies furnished to Board members November 30, 1984, contained references to NEA-Topeka. Joint Exhibit #3 is the document which the Board of Education adopted as special Board policy during the December 5, 1984, Board meeting. Joint Exhibit #3 contains no references to NEA-Topeka.

A comparison of documents reveals that the following articles were not noticed for negotiations or change but were included as

special board policy:

Article XI	Attendance At Conferences, Meetings or Seminars
Article XII	School Curriculum
Article XV	Credit For Past Experience
Article XVI	Multiple Building Assignments
Article XXI	Monitoring
Article XXII	Evaluation Procedure
Article XXIII	Teacher Protection
Article XXIV	Employee Files
Article XXVI	Jury Duty And Legal Leave
Article XXIX	Retirement
Article XXXI	Life Insurance
Article XXXIV	Elementary Planning Period
Article XLIV	Absence Without Pay

The following articles were not noticed for negotiations or change and were not included as special Board policy:

Article II	Recognition
Article III	School Board's Powers and Rights
Article IV	Unfair Practices
Article VII	No Strike - No Lockout
Article XXXII	Matters Contrary To Agreement
Article XXXIII	Agreements Contrary To Law
Article XLIX	Individual Teaching Contract
Article L	Duration

The examiner has previously found that an employer may, after exhausting the negotiations process, take any desired position on items properly noticed and subsequently negotiated in good faith. The foregoing holds true regardless of reaching "tentative" agreement on specific items. The examiner turns now to items which were neither noticed nor negotiated and were not included in Board policy as was enacted by the Board on December 5, 1984.

1) The preamble of the prior agreement was not issued as Board policy. This item is not a mandatorily negotiable item, does not reference a term and condition of employment, and specifically states that the parties "agree as follows".

It would seem that such a paragraph or statement would be misplaced in Board policy.

2) The article on recognition was not included in the Board policy. It appears that this article simply restates rights granted to employees by other sections of the law. These rights are not forfeited by the Board's failure to issue policy in this area. Additionally, the subject recognition is not a mandatorily negotiable subject.

3) The article on school Board's powers and rights appear to restate statutory rights and is not a mandatorily negotiable subject.

4) The article on unfair practices was not issued as a special Board policy. This article appears to be a statement of policy on the part of both the association and the school Board. Basically the policy restates civil rights of employees insofar as the school Board is concerned. The employer is bound by numerous statutes and regulations pertaining to nondiscrimation in employment. The association may or may not be bound by similar statutes but certainly the Board cannot issue Board policy to bind the association to a policy of nondiscrimation. Additionally, the item is not a mandatorily negotiable subject.

5) The article no strike - no lockout was not issued as Board policy. This article restates the prohibited practice section of the PNA and is not a mandatorily negotiable subject.

6) This article, matters contrary to agreement, was not issued as a special Board policy. This article simply incorporates the agreement into personnel policies of the Board. In the absence of an agreement the article is unnecessary.

7) The article on agreements contrary to law was not issued as special Board policy. This article is inappropriate as Board policy since no agreement was affected. Additionally, any Board policy (mandatorily negotiable term and conditions of employment) found to be contrary to law would of necessity be renegotiated by the parties.

8) The individual teaching contract article was not issued as Board policy. This article incorporates the agreement into the individual teaching contract and is inappropriate since no agreement was reached.

The above listed eight articles are all either inappropriate for issuance as special Board policy and/or other than mandatorily negotiable items. The Secretary has previously ruled that an employer must notice a nonmandatorily negotiable item prior to its deletion from a successor contract. However, the items above are of a nature which logic dictates would not be proper for inclusion in a Board policy manual. Further, a majority of the articles are rights granted by statute thus it is immaterial whether they are written in a contract or Board policy. Respondent's argument relative to "deletion" or failure to include these articles in Board policy is adopted by the examiner. It would be illogical and inappropriate for a Board to attempt to bind an organization to perform functions without the signed agreement of the organization to do so.

All items within the 1982 through 1984 contract fall within 3 general categories for purposes of the prohibited practice complaint; 1) there are those items which were not noticed for change which were issued as Board policy; 2) there were those items not noticed for change which were not issued as Board policy and 3) there were those items which were noticed for change and were subsequently issued as Board policy.

The examiner has found that the employer may take any action desired on those items falling within categories three listed above. Further, the facts in this case reveal that the items (articles) falling within category two above were of a nature which need not be included in Board policy. The examiner now must look at the treatment of those terms and conditions of employment falling within category one to determine whether they were changed.

A comparison of Joint Exhibit #1 and Joint Exhibit #3 reveals that changes were made in at least five articles, within category #1 by the Board in their issuance of Board policy. Those articles were:

Article XIII School Curriculum

Article XVI Multiple Building Assignments

Article XXII Evaluation Procedure

Article XXVI Jury Duty and Legal Leave

Article XLIV Absence Without Pay

These articles were not noticed for change by either party and the examiner must assume they were not negotiated. While the verbiage in Board policy differs from that of the previous contract, the examiner cannot judge whether a substantial change would be made in practical application. Nor can the examiner judge the extent of the change in the five articles from contract language to Board policy.

It would not, however, be the written change which would constitute a prohibited practice. Rather a change in the practice application of an unnoticed item would constitute a violation of K.S.A. 72-54(b)(5). The record is void of instances in which such change in practical application was carried out. Certainly a change in language strongly indicates an intent to change a practical application. However, guilt must be based upon actions, for intent may never come to fruition. Additionally, the Respondent may well have depended upon dicta within Riley County when language changes were made on December 5, 1984.

NEA-Topeka argued that the Board action taken December 5, 1984, was punitive in nature. The examiner submits that the mindset of an individual or Board in taking action is immaterial so long as the action taken is not illegal. It is only when an action is prohibited that mindset becomes important in order to determine "willful" intent. In light of previous Findings and Conclusions the examiner need not consider the mindset of the Board in taking action on December 5, 1984.

NEA-Topeka has also argued that the Board action of December 5, 1984 was a prohibited practice by a continuation to refuse to bargain in good faith. The examiner points to the language of K.S.A. 72-5428 which clearly sets out a procedure to follow when an impasse reaches the fact-finding stage. Clearly the Board participated in fact-finding meetings. NEA-Topeka failed to show the examiner that any action taken during these procedures violated K.S.A. 72-5430. The Board then is required by K.S.A. 72-5428(f) to "take such action as it deems necessary" and to "make such action public". The examiner concludes that the Board by its action on the evening of December 5, 1984, was fulfilling its statutory obligation and in so doing did not "continue to refuse to bargain in good faith."

NEA-Topeka also argues that the Board has "attempted to discriminate or discourage its employees who are members of the bargaining unit represented by NEA-Topeka from belonging to the association..." The examiner finds nothing in the record to show any act which might discourage membership in the association. While the unilaterial issuance of Board policy was legal, such action might well serve to unite the employees or to, in fact, encourage membership in NEA-Topeka. Certainly a curtailment of dues deduction might harm NEA-Topeka financially but again the subject was noticed and negotiated therefore the act was not a prohibited practice. Again one might wonder if such action might not serve to unite teachers and encourage membership in NEA-Topeka.

NEA-Topeka has pointed to the Board's direction to administrators regarding the return of contracts by a date certain in order for teachers to receive their retroactive pay before Christmas. NEA-Topeka argues that this action was intended to discriminate against NEA members and employees of the district with regard to their terms and conditions of employment. It appears that the cut-off date was directed to all teachers and not just members or nonmembers of NEA-Topeka. Further, it appears reasonable to ask that contracts be returned by a specific date in order to perform the necessary bookkeeping to issue checks by a date certain. NEA-Topeka has failed to show that the cut-off date was unreasonably early as it relates to providing paychecks before Christmas. Additionally, an employer must, at some specific date, know which employees will be working under new Board policies as opposed to those who might choose to work under the past contract. The examiner finds nothing to indicate bad faith bargaining or any discriminatory act by the Board when it requested the return of contracts on a date certain.

In summary the examiner has found; 1) that the issuance of Board policy does not in and of itself constitute a prohibited practice; 2) that an employer may after exhausting the impasse procedure change or implement any position desired on items (subjects) which

were "noticed" and negotiated in good faith; 3) an employer may not make practical application of items (subjects) which were not "noticed" and negotiated in good faith if such application is contrary to past practice or past contracted procedures and; 4) that Board of Education of U.S.D. 501 did not violate the provisions of K.S.A. 72-5430(b)(3), (5), (6) or (7).

In light of the above Findings and Conclusions the examiner hereby dismisses the Complaint (72-CAE-9-1985) in its entirety.

IT IS SO ORDERED THIS 21st DAY OF May, 1985.

Jerry Powell

Jerry Powell, Designee of the Secretary
Labor Relations & Employment Standards
Section - Department of Human Resources
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Topeka, KS 66603-3178