

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

NCKAVTS TEACHERS' ASSOCIATION)
AND DALYN DIERCKS,)

Petitioners)

Case No. 72-CAE-1-1996

vs.)

NORTH CENTRAL KANSAS AREA)
VOCATIONAL-TECHNICAL SCHOOL,)
BOARD OF CONTROL,)

Respondent)
_____)

INITIAL ORDER

On October 11, 1995, the above-entitled matter came on for a formal hearing in Topeka, Kansas, before presiding officer Gloria M. Vusich. Petitioners NCKAVTS Teachers' Association and Dalyn Diercks appeared by David M. Schauner and Jonathan M. Paretsky, their attorneys.

The Respondent appeared by its Chief Executive Officer and Director Bill Reeves and was represented by Arvid V. Jacobson of Jacobson & Jacobson, attorneys for respondent.

Called as witnesses for the Petitioners were Bill Reeves, Chief Executive Officer and Director of Respondent Board; Steve Dibbern,

President of NCKAVTS Teachers' Association; and Duane Krueger, Director of Education for North Central Kansas Area Vo-Tech School.

BACKGROUND

On July 26, 1995, the NCKAVTS Teachers' Association and Dalyn Diercks filed a complaint with the Secretary of Human Resources. The complaint alleged that the Board of Control of NCKAVTS had committed a prohibited practice by making unilateral changes in mandatorily negotiable terms and conditions of employment, specifically involving the transfer of petitioner Dalyn Diercks from the Beloit campus to the Hutchinson Correctional Facility. On July 27, 1995, the Secretary granted emergency treatment, but denied substantive relief pending a mediation conference. On August 8, 1995, the parties participated in a mediation conference. The conference failed to produce resolution of any of the issues raised in the prohibited practice complaint. The petitioners therefore moved for an emergency hearing, which was granted by the Secretary.

QUESTIONS PRESENTED

Based upon the petitioners' statement of issues as set forth in their pre-hearing questionnaire and adopted by respondent in its memorandum, the following issues were presented:

- I. Whether The Board Unilaterally Changed Mandatorily Negotiable Terms And Conditions Of Professional Service Of The Teachers Of NCKAVTS When It Entered Into A Contract With The Kansas Department Of Corrections.
- II. Whether The Board Committed A Prohibited Practice When It Entered Into The Contract With The Kansas Department Of Corrections.
- III. Whether The Complaint Herein Was Timely Filed.
- IV. Whether The Board Should Be Enjoined From Requiring A Member Of The Bargaining Unit To Work Under Terms And Conditions Of Employment Imposed In Alleged Violation Of K.S.A. 72-5413 *et seq.*

FINDINGS OF FACT

1. Since November 26, 1975, pursuant to K.S.A. 72-5413 *et seq.*, the respondent, North Central Kansas Area Vocational-Technical School, Board of Control (hereinafter referred to as the "Board") officially has recognized the petitioner, North Central Kansas Area Vocational-Technical School Teachers' Association (hereinafter referred to as the "Association") --

"... as the exclusive negotiating representative of the professional employees making up the appropriate negotiating unit, all certificated personnel covered by the general salary schedule, including all classroom teachers ..." (Tr. 129,130; Petitioners' Ex. No. 21) (emphasis added)

2. The Board's Director personally is aware that ever since the commencement of his employment, on July 1, 1991, the Association has

been so recognized by the Board (Tr. 88).

3. Since at least 1991, there have existed contracts between the Board and the Kansas Department of Corrections (hereinafter referred to as the "KDOC"), pursuant to which contracts the Board is to provide professional employees to render academic and vocational educational services at various correctional facilities throughout the State (Tr. 33,34).

4. In 1991, the Board operated KDOC campuses at Beloit, Norton and Hays (Tr. 33). It is uncertain whether prior to 1991, the Association had entered into contracts with the KDOC or had operated campuses other than in Beloit and Hays (Tr. 45). The Board now operates educational and vocational programs at El Dorado, Topeka, Hutchinson, Norton, Larned, Lansing, and Winfield (Tr. 65). After the initial contract between the KDOC and the Board was signed with regard to the Norton facility, six other facilities were added as the result of an agreement entered into between the KDOC and the Board for the 1994-1995 school year (Tr. 102).

5. In July of 1994 the Board and the Association ratified a negotiated agreement governing the terms and conditions of professional service of the Board's employees for the 1994-1995 school year, for a period commencing July 1, 1994, through June 30, 1995 (Tr. 41, 42;

Petitioner's Ex. No. 1).

6. Pursuant to the contract referred to in Finding No. 5 above, and during the school year 1994-1995, Dalyn Diercks (hereinafter referred to as "Diercks") was employed by the Board as a classroom teacher at the Beloit campus, in the field of diesel mechanics, for 195 contract days, commencing August 1, 1994, and ending May 26, 1995 (Petitioner's Ex. No. 6).

7. The matter of rehiring teachers for the succeeding school year was discussed at a Board meeting on March 30, 1995. At that time, in a "shot-gun" motion, the Board renewed contracts of all teachers, including Diercks.

8. At least as early in point of time as the negotiated contract between the Board and the Association was executed for the 1985-1986 school year, Article VIII of the contracts between the KDOC and the Board has provided that an instructor shall be notified in writing of a change in campus assignment; and if the instructor does not wish to accept such change, the instructor shall submit a written letter of resignation to the Director within fifteen days after receipt of the written notice (Tr. 25; Petitioner's Ex. No. 1, p.13).

9. Sometime in May, 1995, the matter of Diercks' transfer to

Hutchinson was discussed among Diercks, Bill Reeves, Director and Chief Executive Officer of the Board, and Mr. Abel, the Assistant Director of the Vo-Tech School. At that meeting, Diercks was advised that the position at Hutchinson was open and that he would be transferred there, where lesson plans were not required, due to the fact that in the past, Diercks was having problems developing lesson plans. Diercks made no objection to his transfer. Diercks was not told at that time when the transfer would be effective and the matter was left open at the time for Diercks to "get back" with the Director and his assistant (Tr. 49, 50).

10. Diercks' transfer to Hutchinson was approved by the Board on the third Monday in June (Tr. 50, 51). The transfer was formalized by letter to Diercks, dated June 27, 1995 (Petitioners' Ex. No. 4). Among other things, the letter recites that Diercks is aware of the Board's decision to transfer him in view of the fact that he had attended the meeting at which such decision was made. The letter asks that Diercks report for duty on July 31 (Tr. 52).

11. Diercks' proposed contract for 1995-1996 provides for employment during the school year for a period of 230 days; describes Diercks' assignment to be "educational duties as assigned"; and establishes a starting date of July 1 (Petitioners' Ex. No. 5). Diercks

never returned the 1995-96 contract presented to him. To this date, it has not been signed by him or the Board (Tr. 113-114).

12. On July 28, 1995, Diercks filed a grievance with the Board. In his Statement of the Grievance (Petitioner's Ex. No. 7, pp. 2,5) Diercks makes the following complaints:

(a) He received a letter on June 29, 1995, and an amended and revised individual continuing primary duty contract for employment which effectively set forth and changed the terms and condition of his employment, including salary and wages;

(b) His continuing contract for the past year 1994-1995 sets forth a salary of \$27,580 for 195 duty days of service; whereas the contract offered for the 1995-1996 school year sets forth a salary of \$28,408, for an increase of \$828 (or 3%) for 230 duty days of service, an increase of 35 duty days of 17.9%); and that no revised or amended salary schedule for 1995-1996 has been published or sent to him;

He further states that such matters constitute

(c) " ... a violation, misinterpretation, and misapplication of Article I, Salary and Wages, Section C Pro rata Salary, at page 1 of the negotiated agreement. Such provision states in pertinent part that 'any extension of the teaching contract beyond the normal 195 contract days... shall be salaried at the pro rata basis.'"

As a remedy, Diercks requested that

(a) The Board rescind its action with regard to unilaterally changing the terms and conditions of his individual continuing contract;

(b) That it provide him a copy of the negotiated and ratified salary schedule for 1995-1996;

(c) That any salary adjustment be discussed with him prior to any change; and

(d) That any mutually agreed to change(s) be in accordance with the negotiated and ratified agreement, including the provision for pro rata salary if any extended contract duty days are mutually agreed upon.

A review of the grievance form discloses that Diercks does not grieve his transfer (Tr. 93).

13. With the filing of the prohibited practice, the Board learned for the first time that Diercks was objecting to being transferred to Hutchinson (Tr. 104).

14. Diercks' request that he be removed from the 230-day contract was granted by the Board. His work days were changed from 230 to 195 (Tr. 63, 64, 92).

15. Under its contract with the Board, the KDOC has authority to remove vo-tech employees from KDOC facilities in the event of security problems (Tr. 69). This language has been in all KDOC-assigned employee contracts ever since 1991 when the Board first took over the corrections' programs (Tr. 112) Respondent's Exhibits "A", "B", and "C" are contracts between the Board and the KDOC for the respective years 1991-

1992, for the fiscal year 1993, and for 1994-1995. Such a contract likewise exists for the 1992-1993 school year. A copy was requested from the KDOC, which sent the wrong contract to the Board (Tr. 93-95).

16. Copies of contracts between the Board and the KDOC never have been sent to the president of the local Association. While the Association is not aware of the specific details of the working conditions or that an employee can be barred from the facility on a non-pay status, the Board has advised the Association of such agreements (Tr. 137).

17. The Association never has filed a grievance against the Board for having language referred to in Finding No. 16, above, in the KDOC-assigned employees' contracts (Tr. 112).

18. A request never has been made by the KDOC employees to negotiate, nor have they requested that they be recognized as a separate bargaining unit (Tr. 107).

19. The Association never expressed interest in seeking recognition as the exclusive bargaining representative for the KDOC-faculty. To the contrary, disinterest was exhibited (Tr. 137, 138) .

20. Diercks is the only Board employee at the KDOC facility at Hutchinson (Tr. 79). The Board had never before permanently transferred any employee to any correctional facility pursuant to the contract

between it and the KDOC (Tr. 56).

21. The first time that the Association would have been advised of specific language regarding barring an employee from a facility would have been when Diercks received his proposed contract for 1995-1996 (Ex. No. 5). This contract contained language providing that under the Board's contract with the KDOC, for security reasons, a KDOC-assigned teacher could be barred from entering a correction facility. However, they [the Association] did not seem to be interested. Moreover, they were "very, very silent" about the matter (Tr. 137, 138).

22. For the current year there have been no negotiations with the Association with regard to salaries, number of contract days, and other terms and conditions for KDOC-located employees in the Hutchinson-Beloit Area. Such matters have been determined by the Board of Control, without the formalized bargaining process, the same never having been brought up by either side in any of the negotiation sessions. (Tr. 79, 80).

23. The parties now have a tentative agreement as to the salary schedule, being an overall increase of about three per cent from last year (Tr. 113). The increase applies to KDOC-assigned employees as well as the Beloit-Hays employees for the 1995-1996 school year, assuming ratification by the members of the bargaining unit (Tr. 113).

24. Differences between the 1994-1995 and the 1995-1996 negotiated agreements between the Board and the KDOC concern only the amount of compensation to be paid. (Tr. 110).

25. Diercks currently is working under the 1994-1995 negotiated agreement between the KDOC and the Board (Tr. 100,101).

26. Other than Diercks, there have been no complaints from the KDOC-assigned employees anywhere regarding any of their hours of work, salary and compensation (Tr. 81).

27. Since Diercks declined to work 230 days, rather than to decrease his salary, the Board has continued to pay him at the 230-day rate with the same three per cent increase in the negotiated and tentative agreement referred to in Finding No. 23 above (Tr. 135).

28. No member of the bargaining unit represented by the Association has received an increase in salary for 1995-1996. They are working under their continuing contracts (Tr. 167).

29. All vo-tech employees at Beloit continue to receive all benefits bargained for the 1994-1995 school year, pending the successor agreement. There are no differences other than the fact that the school calendar is changed a bit (Tr. 81).

30. The procedure for discipline of employees at KDOC in Hutchinson

under the 1994-1995 contract is the same as that at Beloit, with the exception of the matter of security, which one would have in a correctional facility. Such difference was not negotiated with the faculty association (Tr. 75).

31. There are a number of differences in terms and conditions of employment between the KDOC-assigned teachers and those at Hays-Beloit. These have existed ever since the Board first had an agreement with the KDOC (Tr. 107).

32. Having been informed by Diercks and the KNEA that there should be negotiations that govern KDOC employees in the contract, this was added by the Board to the list of negotiable items and discussed at the bargaining table. The parties were in general agreement with the negotiated contract (Tr. 82, 83).

33. At the in-service day in 1995, the Association formally was told that the employees at the other facilities possibly could exist as a part of the Association's bargaining unit (Tr. 171).

34. At the first of this year, at a meeting at each of the seven institutions, the Board's Director, Mr. Reeves, notified the directors of correctional facilities that they should inform their employees that the official bargaining unit for the vo-tech was the NCKAVTS Teachers'

Association (Tr. 89).

35. On June 27, 1995, the Board and the KDOC entered into a contract of five years' duration (Petitioner's Ex. No. 8). It contains the same provision as the other years' contracts insofar as a teacher's being barred from a facility and placed on a non-pay status in the event the instructor becomes a security problem authority. This language is peculiar to the faculty assigned to a KDOC facility. It was not negotiated between the Association and the Board (Tr. 70).

36. The difference between insurance benefits paid to employees at Hutchinson and those at Beloit were not negotiated. The Board of Control made that decision after the contract was consummated with the KDOC (Tr. 71).

37. There is no current language in the agreement between the Association and the Board as to wearing apparel (Tr. 72).

38. The same evaluation procedure is in place at the Vo-Tech School in Beloit as is present at the facility in Hutchinson. This likewise was not negotiated and follows the language of the agreement between KDOC and the vo-tech (Tr. 72,73)

39. The same grievance procedure is available to the employees of the vo-tech school in Hutchinson as is available to the employees of

Beloit (73).

40. Petitioners' Exhibits numbered 9 through 20 reflect vacations and holidays for the school years commencing 1984-85 and ending with the 1995-96 school year. The exhibits reflect dates of beginning and ending of semesters. While some of the calendars refer to Beloit and Hays there is no reference to KDOC facilities because the Director of Education at each such campus develops his or her own holiday schedule based on state regulations (Tr. 86-88).

41. In Diercks' request for relief he asks that the Board negotiate the terms of professional services for contract facilities. This has been done, as reflected in the proposed 1995-1996 negotiated agreement between the Board and teachers. But for some language changes or having the language reviewed by the KNEA, the proposed contract is acceptable to the teachers (Tr. 107,108).

42. The contract between the KDOC and the Board for 1995-1996 is virtually the same as that for 1994-1995, taking into consideration a reduction in instructional hours due to deletion of some programs and reduction in hours of others. Such changes would not impact the teachers (Tr. 110, 111).

43. Sometime in August, during the term of the prior president of

the Association, before Mr. Dibbern assumed that office, the Board provided to the Association a written notice that it wished to discuss some non-monetary items. Salary was a separate item (Tr. 159,161).

44. The parties' first two bargaining sessions took place during the summer. During such times, discussions were had as to verbiage items. Thereafter, the parties met three other times. Salary also was an issue at the bargaining table (Tr. 161,162).

45. It is the Board's understanding that KDOC-located employees are not covered by the general salary schedule in effect between the Association and the Board, but that because the persons located at vo-tech facilities are the Board's employees, they are members of the bargaining unit represented by the Association (Tr. 88,130).

46. Sometime during September, 1995, prior to meeting with the Board, the Association's bargaining agents reviewed and discussed pre-drafted KDOC language brought to the table for consideration by Mr. Sander (the Board's bargaining spokesman). The parties jointly recognized that KDOC agenda items were added to the 1994-1995 agreement. This agreement then was used as the base line for language dealing with the KDOC for the 1995-1996 negotiated agreement (Tr. 172-174,186,187)

47. The Association did not consider KDOC employees as part of the

bargaining unit until the last meeting prior to the Board meeting in September, at which time language referring to KDOC employees was added to the negotiated contract. Negotiation meetings were held subsequent to that time (Tr. 230, 231).

48. Until the recent round of bargaining, there had been no attempt to justify or bring together working conditions and salaries as between the seven KDOC facilities and the Beloit facility because it would have resulted in a decrease in salaries for quite a few people (Tr. 127).

49. As of August 25, the Association did not adopt the position that it was considered as the bargaining unit KDOC employees. However, it recognized that possibility because it did not know the legal ramifications of accepting such employees (Tr. 235).

50. Steve Dibbern, as president of the Association and its chief spokesman for the entirety of the period of bargaining for the 1995-1996 school year (Tr. 157, 160) has not bargained or attempted to bargain salary for KDOC located employees (Tr. 215).

51. As the negotiation process proceeded, the Association did not consider KDOC employees as members of the bargaining unit or as part of the negotiation process because they were not members of the same constituent that the Association had bargained for the in the past; that is

they were not members of the Beloit and Hays campuses (Tr. 217, 218). As the Association negotiated through the process, the negotiating team for the Association felt like they were negotiating for the Beloit-Hays campus. It did not profess to include KDOC employees (Tr. 218).

52. The bargaining unit interpreted the position of the Association that as of the prior year (1994-1995) KDOC assigned employees were not recognized as a member of the bargaining unit represented by the Association (Tr. 215). However, this year, the Association is being referenced that it is becoming the bargaining head for KDOC members (Tr. 215,216).

53. Mr. Dibbern has asked the Association whether to notify the KDOC located employees that they are falling under a new bargaining unit. He has been directed by the Association not to solicit information until it knows where it stands (Tr. 212).

54. It is the Association's understanding that the parties had arrived at an agreement as to some verbiage items that the Board conceded. At the last meeting, there was only one such item that was in discussion (Tr. 162).

55. A meeting of the Association has been scheduled for a date prior to October 17, for the purpose of considering the proposed 1995-

1996 agreement (Tr. 172).

56. Mr Dibbern has not been in contact with KDOC assigned teachers since his meeting with the Board's chief negotiator, in late September of 1995 (Tr. 206). However, it is Mr. Dibbern's intention to give notice of the ratification meeting to KDOC-assigned teachers (Tr. 206).

57. In Mr. Dibbern's opinion, it appears that he is bargaining the matter of salary and other benefits for KDOC located employees, notwithstanding there have been no salary discussions for them (Tr. 176).

58. The Association's negotiating committee gave Mr. Dibbern authority to state that the salary schedule was correct and would be ratified; however, the committee does not yet know about the new KDOC language (Tr. 174,175).

59. At each in-service day, the first part of August, each teacher at the Hays and Beloit campus is given a copy of the faculty handbook (Respondent's Ex. No. D). The Association likewise is given a copy of the handbook at the beginning of the year. Diercks should have received a copy (Tr. 97). There was no testimony to the contrary.

60. In the faculty handbook for 1994-1995 (Petitioners' Ex. No. D) under the heading of the column entitled "Assistant Director" are listed the seven correctional education campuses (Tr. 97,98).

61. The 1994-1995 and the 1995-1996 agreements contain identical language with regard to salaries at the pro rata basis beyond the normal 195 contract days (Tr. 46). If the faculty at Beloit works more than 195 days, they are paid their daily rate times each day of additional work beyond 195 (Tr. 62).

62. Vacation days are different for all campuses (Tr. 58). A KDOC vacation schedule is flexible because the method of instruction is different. This is determined between the employees and the director of education (Tr. 58).

63. While it has been the practice up to the 1994-1995 school year of having two weeks for Christmas, it was announced at the in-service day at the beginning of the school year, that for the 1995-1996 school year there will be only one week; that is, from December 22 through January 2. While there were no negotiations on the issue, the faculty had input into the school calendar and agreed to the reduced number of days (Tr. 61,62).

64. Holidays have been changed for this school year at the Beloit campus but only to the extent that the spring break has been shifted, but not shortened; and the beginning and end of the academic year was moved up one day (Tr. 61, 62).

65. The Association's president recognizes the exclusive power of the Board to make changes in campus assignments and acknowledges that the Board had the authority under Article VIII of the negotiated contract to transfer Diercks to the Hutchinson facility (Tr. 202, 203).

66. While the Association acknowledges the exclusive right of the Board to transfer Diercks, it nonetheless wants an interpretation for future use because of "repositioning due to the reassignment by one person or a Board". The Association likewise admits that the prohibited practice complaint was filed because neither it nor Diercks likes the provision (Tr. 203-205).

CONCLUSIONS AND DISCUSSION

I. The Association Does Not Represent KDOC-Assigned Employees

The Association's president, Mr. Dibbern, testified that the Association does not adopt the position that for the contract year 1994-1995, it was the bargaining unit for professional employees of the Board who worked at the several correctional facilities operated pursuant to contract between the KDOC and the Board (Finding No. 50).

However, based upon other testimony of the Association's President, the position of the Association as to its representation of the employees at KDOC facilities for the school year 1995-1996 is not so clear. The

Association's president testified as follows:

(a) As of August 25, of this year, while the Association recognized the possibility that it was considered the bargaining unit for KDOC employees, it did not know the legal ramifications of accepting such employees as members of its bargaining unit (Finding No. 50).

(b) The Association did not profess to include KDOC employees in its negotiation process because such employees were not members of the same constituent for which the Association had bargained in the past (Finding No. 51).

(c) This year, the Association is being referenced that it is becoming the bargaining head for KDOC members (Finding No. 52).

(d) While the Association has not bargained or attempted to bargain salary for KDOC located employees (Finding No. 50), it appears to Mr. Dibbern that he is bargaining salary and other benefits for KDOC located employees (Finding No. 57).

(e) The Association did not consider KDOC employees as part of the bargaining unit until the last meeting prior to the Board meeting in September. At that time, language referring to KDOC employees was added to the negotiated contract and negotiation meetings were held subsequent to that time (Finding No. 46).

(f) While Mr. Dibbern has not been in contact with KDOC-assigned teachers since his meeting with the Board's chief negotiator in late September, it is his intention to give them notice of the ratification meeting to be held prior to October as it is Mr. Dibbern's understanding that the parties had arrived at an agreement as to some verbiage items conceded by the Board (Findings Nos. 56, 46).

(g) Sometime during September, 1995, prior to meeting with the Board, the Association's bargaining agents reviewed and discussed pre-drafted KDOC language brought by the Board to the table for consideration (Finding No. 46).

Fortunately, the brief of the petitioners and statements by their counsel at the hearing make clear the ambivalent testimony with regard to the Association's relationship with the KDOC-located faculty. By admissions in petitioners' brief and their counsel at the hearing, there is no doubt that the Association does not represent the KDOC-assigned faculty either for the prior year or for the current year. The specific admissions referred to are as follows:

"The employees at the KDOC facilities are not members of the bargaining unit as defined in Petitioners' Exhibit 21, and therefore are not, and clearly have not been, governed by the negotiated agreement between the Teachers Association and the Respondent." (P.16, Petitioners' Brief)

Mr. Schauner:

"... the document marked as Exhibit 21 (Recognition Certificate) speaks to the issue and is determinative of the issue. It says classroom teachers who are paid on the general salary schedule are members of the unit. Mr. Reeves has already testified that the people at KDOC are not paid on the general salary schedule, hence they are not members of the unit. ... It's our position as an association that the KDOC people are not members of the association. Our position is -- I'm representing this association, our legal position is they are not members of the bargaining unit". (Emphasis added)

(Tr. 137,138)

Never has any request been made by the KDOC employees to negotiate, nor have they requested that they be recognized as a separate bargaining unit (Finding No. 18). Moreover, no evidence was presented

that the Association ever expressed interest in seeking recognition as the exclusive bargaining representative for the KDOC-assigned teachers (Finding No. 19). Furthermore, despite the fact that there are a number of differences between the terms and conditions of employment between KDOC-assigned teachers and Beloit-Hays assigned teachers, which differences have existed ever since the Board first had an agreement with the KDOC, never has any request been made by the KDOC employees to negotiate or that they be recognized as a separate bargaining unit (Finding No. 31).

The fact that no interest was even shown in forming a relationship between the bargaining unit and the KDOC faculty, is demonstrated by the following questions by counsel for the Association and answers by the Board's Director:

Questions By Mr. Schauner:

"A. Have you ever sent to the president of the local association a copy of any of the agreements between the Department of Corrections and the vo-tech?

"A. No.

"Q Have you ever told the president of the local association that there were such agreements?

"A. Oh, absolutely.

"Q. So to the best of your knowledge, the first time anyone in the bargaining unit would have known about that restriction or that potential would have been when Mr. Diercks received this proposed contract for 1995-96 with that language on it?

"A Yes, that's probably right. **Although they didn't seem to be interested.**

"Q. I understand they were silent.

"A. **Very. Very.**" (Emphasis added) (Tr. 137,138)

The conclusion that the Association does not represent KDOC-assigned faculty is further supported by the statement of petitioners' counsel that "the Certificate of Recognition is definitive that the Association does not represent the KDOC-faculty members, because the Certificate recognizes the Association as the exclusive negotiating representative of ... all certificated personnel covered by the general salary schedule, including all classroom teachers... and, according to the Board's Director, KDOC-faculty are not covered by the general salary schedule in effect between the Association and the Board"(Finding No. 45).

II. The Board Did Not Commit a Prohibited Practice by Transferring
A Member of the Association's Bargaining Unit to a Facility
Which Has No Bargaining Unit

At the time of Diercks' transfer to the Hutchinson facility, there was in effect the following provision of the 1994-1995 negotiated

contract between the Association and the Board. (Petitioners' Exhibit No.3). It was pursuant to this provision that Diercks was transferred:

"The Director shall notify an instructor in writing of a change in campus assignment within ten (10) days after such change has been approved by the Board of Control. In the event that the instructor does not want to accept such change in campus assignment, the instructor shall submit a written letter of resignation to the director within fifteen (15) days after receipt of the written notice of change of campus assignment. The Board shall accept such resignation if received by the Director within such fifteen (15) day time period. After such fifteen (15) day time period to submit a resignation has expired, the acceptance or rejection of the resignation will be at the sole discretion of the Board of Control."

The negotiated contracts for every year since 1985-87 (Petitioners' Ex. No. 1) contained the identical provision, as does the tentative agreement for 1995-1996 (Petitioners' Ex. No. 3).

Neither the President of the Association nor the Association itself considers palatable, the Article VIII provision granting exclusive authority to the Board to transfer a teacher (Finding No. 66). Nonetheless, the Association's President acknowledges that the Board had the authority under Article VIII of the negotiated contract to transfer Diercks (Finding No. 65).

Whether a prohibited act has been committed by the Board in transferring Diercks to a facility which is not represented by a bargaining

unit, and whether the Board committed a prohibited act by entering into the contract with KDOC to provide it with teachers who would not be working under the general salary schedule, appear to be matters of first impression in Kansas. Hence, it is appropriate to look to the National Labor Relations Act, 29 U.S.C., Sec. 151, *et seq.* for guidance.

In this regard, the case of Boeing Company and Seattle Professional Engineering Employees, 1974 CCH NLRB para. 26,707 (a copy of which is attached to the Board's brief) is persuasive authority that the Board's actions did not violate any bargaining duty and does not constitute a prohibited practice.

The facts of *Boeing* are similar to those herein. There, the employer reclassified several employees who were performing non-professional work, from the professional to the technical payroll. This resulted in the removal of several employees from a professional unit represented by an association. Representative rights had never been accorded to the association for the reclassified employees either by certification or agreement. The Administrative Law Judge determined that there was no alteration in the scope of the professional unit because of the reclassification, notwithstanding the fact that there was no change in duties for the employees removed. Moreover, it was concluded that the

contract between the employer and the SPEEA specifically authorized the reclassification. The Board affirmed the Administrative Law Judge's dismissal of the complaint, stating as follows:

"...The SPEEA was originally certified in 1946 as the representative of a unit of professional engineers. ... The most recent contract describes the unit as limited to employees classified by the employer as engineers ...

"The complaint should be dismissed. Representative rights have never been accorded to the SPEEA for employees performing computer work for business applications either by certification or agreement of the parties. Some 200 other employees performing computer work for business applications are not included in the SPEEA unit. Since there is no dispute over the fact that 54 employees were and are now performing non-unit work, it is found that no alteration in the scope of the SPEEA unit has occurred by virtue of their reclassification. and that, in reclassifying the employees, the employer did not violate Section 8(a)(5) of the Act" (emphasis added)

There are factual similarities between the *Boeing* case and the case at bar. In *Boeing*, the most recent contract between the parties described the unit as being limited to employees classified as "engineers". In this matter, the "Recognition Certificate", likewise limits representation; i.e., to those employees who are covered by the general salary schedule. (Petitioners' Ex. No. 21).

Moreover, in *Boeing*, the Board found that no alteration in the scope of the SPEEA unit had occurred by virtue of the employees'

reclassification. The only testimony herein regarding the effect upon the Association by Diercks' transfer is Mr. Dibbern's testimony that the "current bargaining unit is smaller than the number of potential bargaining unit members standing out there as KDOC employees" (Tr. 240). Absent testimony as to specific numbers and based upon that testimony, it can only be concluded that the loss of Diercks to the bargaining unit by virtue of his transfer, likewise would not constitute any appreciable alteration of the Association's scope of representation.

The facts in the instant case are even more conclusive that no prohibited practice occurred, than are the facts in *Boeing*, because both under the law and pursuant to Articles VIII and XIII of the negotiated contract between the parties, the Board had the exclusive and unfettered authority to assign and transfer employees.

III. The Board Committed No Prohibited Act by Unilaterally
Entering Into a Contract with the KDOC

As far back as the contract for 1985-1987, in all negotiated contracts between the Association and the Board, the Association has recognized the right of the Board to determine school policy and to operate and manage the schools, without interference. That provision of the current contract, Article XIII, of Petitioners' Ex. No. 3 provides as

follows:

"... The NCKAVTS Teachers Association recognizes and agrees that the determination and administration of school policy, the operation and management of the schools, and the direction of employees are vested exclusively in the Board of Control of NCKAVTS, and the Board of Control of NCKAVTS is the legally constituted body for that purpose. ... "(Emphasis added)

At 48 Am. Jur 2d *Labor and Labor Relations*, Sec. 908, appears the following general rule of law:

"... if employees are excluded from the bargaining unit by agreement for other than statutorily proscribed reasons, the employer does not commit an unfair labor practice by refusing to extend to non-unit employees the benefits of the collective bargaining agreement covering unit employees." (Emphasis added)

K.S.A. 72-5423 provides that nothing in the Professional Negotiations Act shall be construed to change or affect any right or duty conferred or imposed by law upon any board, except that a board is required to recognize and negotiate with professional employee organizations.

As heretofore stated, it is undisputed that the KDOC faculty was not represented by the Association; consequently, the Board was not required to negotiate with the Association, the contracts which the Board entered into with the KDOC,

Moreover, in the negotiated contract between the Board and the Association for the 1994-1995 school year (Petitioner's Ex. No. 3) the Association clearly recognized and agreed that the determination and administration of school policy, the operation and management of the schools, and the direction of employees are vested exclusively in the Board of Control of NCKAVTS.

Under the circumstances, the Petitioners' contention that the Board somehow committed a prohibited act by entering into a contract with the KDOC-- a right which both the law and the petitioners' written contract gives to the Board -- is not convincing. This is particularly so because the Association in no way has limited , nor could it limit the extent or terms of any contract which the Board might enter into in connection with the operation of its schools. Furthermore, it is outside the realm of possibility and reasonableness even to postulate that under the law, a professional employees' organization could ever have any right of approval over such contracts or to prohibit the same entirely.

The Petitioners are fully aware that under both law and petitioners' contract with the Association, the Board has the exclusive right to assign and transfer its teachers and that teacher transfers are not mandatorily negotiable. In NEA Topeka, Inc. v. U.S., No. 501, 225 Kan.

445, 449, 692 P.2d 93 (1979) the Supreme Court stated that

"The legislature in enacting K.S.A. 1978 Supp. 72-5413(l) made statutory law out of the judicial determination in Shawnee Mission NEA v. Bd. of Educ. 212, Kan. 741, 512 P.2d 426 [1973]), except 'probationary periods, transfers, and teacher appraisal procedures' were deleted therefrom as mandatorily negotiable items." (emphasis added)

It is noteworthy that never has Diercks orally complained about his transfer to Hutchinson (Finding No. 9). A review of his grievance form discloses no reference to his transfer, nor does it request that he be transferred back to Beloit (Petitioners' Ex. No. 7)

No doubt petitioners recognize that the correctness of their position in regard to Diercks' transfer is tenuous, at best. Being aware that the Board had the right to offer Diercks a unilateral contract, the Association argues that the Board unilaterally changed the form of Diercks' individual contract by making changes in Diercks' salary, wearing apparel requirements, insurance benefits, disciplinary procedure, holiday and vacation schedule, and duty day; that the Board also required that Diercks undergo a background investigation; and also made his contract subject to a provision that Diercks could be placed on a non-pay status if he is denied access to the Hutchinson facility, due to security reasons.

It is apparent that the matters complained of by petitioners are not

persuasive under the facts in this matter, because the opinion states that "unilateral change ... is a violation of the statutory duty to bargain collectively..." . Under the facts of the instant case, the Board had no duty to bargain collectively because there existed no professional employees' association representing the KDOC-assigned faculty with which the Board was required to bargain.

In support of their position, at page 8 of their brief, the petitioners further quote from N.L.R.B. v. Katz, supra as follows:

"Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation ... "

Again, it must be emphasized that in the case in hearing, there was no professional "union" with which to bargain any matter about which the petitioners complain because the KDOC-assigned members (of which Diercks was one) are not members of any bargaining unit represented by the Association. That being the case, the Board did not refuse to negotiate in good faith with representatives of a recognized professional employees' organization as required in K.S.A. 72-5423 and amendments thereto

In enumerating the list of mandatorily negotiable items, the current

statute employs the nouns, "resignations" "termination" and "non renewal of contracts". Since at least 1985, Article VIII of the negotiated contracts between the Board and the Association provided that if an instructor chooses not to accept a change in campus assignment, the instructor shall submit a written letter of resignation. It is noted that while the article references "changes in campus assignment," "resignation", and "acceptance or rejection of resignation", it is entitled "Resignations," rather than "Transfers" or "Assignment". Such title, no doubt was utilized in order to comply with the statutory language. This is of no consequence, since the real character and legal effect of the provision is not determined by its title or characterization but, rather, by its terms (Rutland Sav. Bank of Rutland, Vt. v. Steele, 155 Kan. 667, 127 P.2d 471). Thus, the provisions of Article VIII, however entitled, clearly grant to the Board the power to make changes in campus assignments and the right of the teacher to accept or refuse the same.

In Chee-Craw Teachers' Assn. V. U.S.D. No. 247, 225 Kan. 561, 569, 593 P.2d 406 (1979) in enumerating a list of non-negotiable items, the Court states

"3. Assignment and Transfer- Non-negotiable. Transfer was an item held negotiable in *Shawnee Mission*, but it was deleted by the legislature in listing the statutory items.

Assignment is closely related thereto and a part of the same topic." (Emphasis added)

"In Tri-County Education Ass'n. v. Tri-County Special Ed., 225 Kan. 781, 784, 594 P. 2d 207 (1979) (which opinion was filed just two months after the decision in 'Chee-Craw') the Court reiterated its prior holding that 'transfer or reassignment of employees, both voluntary and involuntary' was not mandatorily negotiable. "

It is self-evident that if a transfer or assignment of any teacher is made, whether voluntarily or not, concomitant with that transfer will be modifications, changes, added responsibilities, the addition of new rights, or even the elimination or withdrawal of former privileges.

As stated many times before, in negotiating the language of Articles VIII and XIII of the contracts between the Board and the Association the contracts have acknowledged

"...that the determination and administration of school policy, the operation and management of the schools, and the direction of employees are vested exclusively in the Board of Control ...".

The language of Article VIII is clear and concise in that it states that the Director shall notify an instructor in writing of a change in campus assignment and that if the instructor does not want to accept the change, he or she shall submit a written letter of resignation.

Based upon the clear language of Article VIII, logically it cannot be argued that the Association did not contemplate a change of

circumstances due to a change in assignment, as occurred Diercks' case.

Furthermore, transfers and assignments of teachers not being a topic of mandatory negotiation, and the current negotiated contract between the Board and the Association permitting assignments and transfers of teachers, the Board did not unilaterally change the conditions and terms of Diercks' contract. Under the contract, he had the option of transfer or resignation. While Diercks never signed his contract for the year, he acquiesced in the transfer. Thus, he cannot now be heard to complain that he was transferred, nor can his transfer constitute a prohibited practice, because transfers and assignments are not mandatorily negotiable topics under the law .

At page 13 of their brief, the petitioners advance the proposition that when the transfer language was negotiated, only two campuses were contemplated, Beloit and Hays, and that inclusion of other campuses across the state violates the "intent" of the parties to provide for transfers.

This argument lacks merit in that there is testimony from the Board's Director that at least as of the date of his employment by the Board in 1992, the Board operated not only the campuses at Beloit and Hays, but also operated the Norton campus (Finding Nos. 3). Thus, it is

clear that the Board's intent was not to limit the contract only to the Beloit and Hays campuses.

In this regard, it is noted that at the very latest, the petitioners were placed on notice of the existence of all the campuses during the contract year 1994-1995 because the faculty handbook given to the Association and to each of the teachers at that time, specifically lists at page 1 thereof, the seven campuses and the chain of authority over the Correctional Education program (Findings Nos. 59, 60). In addition, the Association's President, Mr. Dibbern, testified that he was aware there were vo-tech employees assigned to KDOC facilities as of the 1994-1995 school year (Tr. 192).

It is black-letter law that a contract does not require construction by the court (even if drafted by only one of the parties) when the language is clear and unambiguous (Daniel v. Bd. of Trustees of Herington Mun. Hosp. 841 F. Supp. 363). If the court as a matter of law, determines that the language of a written instrument is clear and can be carried out as written, there is no room for rules of construction (Simon v. National Farmers Organization, Inc., 250 Kan. 676, 829 P.2d 884 (1992)). In addition, in the absence of fraud or mutual mistake, a clear and unambiguous contract must be enforced according to its terms (East v.

Kahan, 206 Kan. 682, 481 P. 2d 958 (1971). To be ambiguous, contracts must contain provisions or language of doubtful or conflicting meaning as gleaned from a natural and reasonable interpretation of its language (Catholic Diocese of Dodge City v. Baymer, 251 Kan. 689, 840 P. 2d 456 (1992)). Moreover, if a contract is clear and unambiguous, its terms must be construed in such manner as to give effect to the intentions of the parties at the time they entered into the contract, and such intent must be derived from the four corners of the contract itself. (Wiles v. Wiles, 202 Kan. 613, 452 P.2d 271 (1969)).

Petitioners make no allegation of ambiguity, fraud, or mutual mistake of the parties in entering into the contract provision in question. At page 13 of their brief they state that at the time the transfer language was negotiated, only two campuses were contemplated, Beloit and Hays; and that therefore the inclusion of campuses across the state violates the intent of the parties to provide for transfers. As heretofore noted, that could not have been the intent because the Norton facility had been operated by the Board since 1991 (Finding No. 4). Thus, there could be no mutual mistake of the parties in negotiating the contract.

A reading of Article VIII fails to disclose any doubtful or conflicting meaning. The clear intent of the parties easily is gleaned

from the contract itself; that is, there is no limitation to the Board's exclusive right to transfer.

Under the facts and the law, petitioners' challenge as to the meaning of Article VIII, based only upon their "intent" has no merit because the terms as written are concise and clear and need no construction.

IV. The Complaint Herein Was Timely Filed.

In Chrysler Workers' Ass'n. v. Chrysler Corp., 843 F. 2d 573 (6th Cir. 987) the federal court had before it the question of timeliness of filing unfair labor complaints under Sec.10(b) of the NLRA. This Act contains the same six-month time limitation for filing unfair labor practice complaints as does the Kansas Act. There, the court held that a claim accrues for Sec.10 purposes when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.

The Board contends that it first contracted with the KDOC five years prior to the filing of Petitioners' complaint; that the filing of petitioners' complaint was outside the time constraints of K.S.A. 72-5430; and therefore the same is barred.

Arguably, the existence of the transfer provision for at least five

years would constitute some notice to the petitioners, as set forth by the Board. However, petitioners apparently make no claim that the transfer language itself was a prohibited practice. It predicates its cause of action upon the results, or effects, of that transfer, which it alleges, unilaterally changed the terms of Diercks' contract

Under the law cited above, a claim accrues for Sec.10 purposes when the claimant discovers, or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation. Thus, until such time as Diercks actually received written notice of the transfer, which allegedly resulted in changes in the terms of his employment, he had suffered no alleged harm.

On June 27, 1995, the Board sent Diercks a letter notifying him of his transfer (Petitioners' Ex. 4). These proceedings have been filed within one month of receipt of that letter of notice. Even if it could be argued that Diercks received verbal notice while attending the May meeting at which time his transfer was discussed, the complaint still was timely filed under the six-month limitation provided in K.S.A. 72-5430a.

RECOMMENDED ORDER

Based upon the facts and the law herein set forth, as well as the

documentary evidence, the admissions of the petitioners and its counsel, and a preponderance of the testamentary evidence, it is the recommended **ORDER**

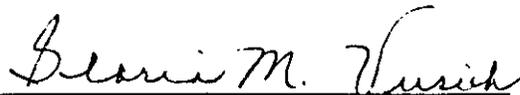
I. That petitioners' complaint has been timely filed within the applicable six-month period of limitation set forth in K.S.A. 72-5430a.

II. The complaint of the petitioner Association should be dismissed because the Association did not at any of the times in question represent KDOC-assigned employees;

III. The complaint of the petitioner Diercks should be dismissed because at the time of filing the complaint herein, he was not a member of the bargaining unit represented by the Association; and

IV. By virtue of such facts, the Board had no obligation to bargain any of the matters encompassed within petitioners' complaint. Consequently, the Board could not have, and did not willfully refuse to negotiate in good faith with the Association over mandatorily negotiable terms and conditions of professional service for the KDOC-assigned teachers .

Dated November 7,1995.



Gloria M. Vusich
Presiding Officer

RIGHT TO SEEK AGENCY HEAD 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 (18) days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, a petition for review must be received no later than 5 PM on December 11, 1995, at 1430 SW Topeka Blvd., Topeka, Kansas 66612-1853.

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, hereby certify that on the 22nd day of November, 1995, a true and correct copy of the above and foregoing Initial Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

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