

**BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS**

Lawrence Education Association,)
)
 Petitioner)
)
 v.)
)
 Unified School District 497 - Lawrence,)
 Kansas,)
)
 Respondent)
 _____)

Case No.: 72-CAE-2-2003

INITIAL ORDER

NOW on this 14th day of May, 2004, the above-captioned Prohibited Practice Charge comes on for decision pursuant to K.S.A. 72-5430 and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner, Lawrence Education Association, appeared through counsel, Marjorie A. Blaufuss, Attorney at Law, Kansas National Education Association. Respondent, Unified School District 497, Lawrence, Kansas, appeared through counsel, Peter K. Curran and Bradley Finkeldei, Attorney at Law, Stevens & Brand, L.L.P.

72-CAE-2-2003

PROCEEDINGS

On November 12, 2002, the Lawrence Education Association, (hereinafter "Petitioner"), filed a complaint with this agency against the Unified School District No. 497, Lawrence, Kansas, (hereinafter "Respondent"). See Complaint Against Employer, 72-CAE-2-2003, November 12, 2002. The complaint alleges commission of a prohibited practice in violation of K.S.A. 72-5430(b)(5). As the basis for its complaint, Petitioner alleges that Respondent unilaterally changed a portion of the parties' negotiated agreement regarding hours and amounts of work. The Board changed the parties' agreement concerning the school's duty day by implementing, on the first day of the 2002-2003 school year, its unilateral decision to increase the number of teaching periods by one each day during one semester of the school year for senior high school English instructors. *Id.*

Respondent's December 23, 2002 Answer to Complaint generally denied that it committed a prohibited practice. Respondent's Answer to Complaint, 72-CAE-2-2003, December 23, 2002. Respondent further asserted that the Secretary lacks jurisdiction over the subject matter of the complaint for Petitioner's failure to timely file same, that Petitioner should be estopped from raising the complaint due to Respondent's reliance on Petitioner's apparent acquiescence to the changes and that Petitioner waived negotiation of the subject matter of its complaint.

This matter came on for hearing on July 16, 2003. Following receipt of the hearing transcript, the parties submitted post-hearing legal arguments. The presiding officer considers this matter to be fully submitted and issues this Initial Order.

ISSUES OF LAW

Pursuant to the prehearing conference order, prior to hearing the parties each submitted their respective characterizations of the issues of law in dispute in this matter. *See* The Lawrence Education Association's Issues of Law, 72-CAE-2-2003, July 14, 2003; Respondent's Issues of Law, 72-CAE-2-2003, July 14, 2003. The parties are in general agreement and the presiding officer finds that the issues of law raised in this matter can be stated as follows:

1. Was Petitioner's complaint timely filed, pursuant to K.S.A. 72-5430a(a)?
2. Did Respondent make a unilateral change to the parties' written agreement, or to a past practice, concerning hours and amounts of work when it changed the school year 2002-2003 teaching load of some of its high school English teachers?
3. Is Petitioner, by its conduct and statements relied upon by Respondent, estopped from filing this complaint?
4. Did Petitioner waive its right to bargain over the purported change such that Respondent's failure to negotiate any changes with regard to the 2002-2003 duty day does not constitute a prohibited practice?

Concluding that this tribunal has jurisdiction over the complaint, the presiding officer determines that the latter of these is dispositive of this matter, as will be further discussed after setting forth relevant findings of fact.

FINDINGS OF FACT

The parties have reached a stipulation as to certain underlying facts pertaining to this matter and they are adopted as if fully set forth herein. The Parties' Stipulations of Fact, 72-CAE-2-2003, July 14, 2003, *attached*. The presiding officer finds additional facts as follows:

1. The parties' negotiated agreement for the 2002-2003 school year provided that secondary school teachers would teach a maximum of five classes in a six-period day. Respondent's Exhibit A. The parties' agreement provided specifically in Article 13—Duty Day that:

“Secondary schools daily teaching load will be five (5) teaching periods in a six (6) period day. . .”

Respondent's Exhibit A, Article 13, ¶2.

“The teacher may establish, with mutual agreement between teacher and supervisor, a plan for long-term flexibility in complying with the specific duty day time requirements so long as all the educational needs of the classroom are met.”

Respondent's Exhibit A, Article 13, ¶5.

2. These provisions had been in effect since the 1995-1996 school year. Respondent's Exhibit B.

3. It was understood by the parties that provision 2 above of the agreement's duty day article was to be a maximum and that provision 5 above would allow flexibility to alter a teacher's duty day to meet the educational needs of the students. Transcript, (hereinafter “Tr.”), pp. 180-182.

4. When the above provisions were negotiated for 1995-1996, the parties were cognizant that a number of secondary high school teachers, including some English teachers, had been and were then teaching a lesser number of periods than five classes in a six period day. Tr., pp. 183-184.

5. During negotiations for the 1995-1996 school year, Brad Tate, principal of Lawrence High School and member of Employer's negotiating team, discussed the duty day issue with the English teachers. Tr., pp. 22-24, 184-185.

6. As part of these discussions, it was decided that English teachers would teach four of six periods one semester and five of six periods the opposite semester because of budgetary constraints. Tr., p. 23. Although there was an attempt to change this practice in the spring of 1997 to require that English teachers teach five classes both semesters, the Board withdrew this proposed change and English teachers continued to teach five classes one semester and four the other semester up until the fall semester of 2002. Tr., p. 29.

7. The flexibility provision, Article 13, ¶5, which allows a teacher to teach less than five classes a day as long as teacher and supervisor agreed to it, was originally adopted in the 1987-1988 Master Agreement, and the specific purpose of this language was to allow flexibility in the duty day. Tr., pp. 189-190.

8. As negotiations began for the 2002-2003 school year, Respondent faced significant funding problems that had to be addressed if it hoped to provide teachers any increase in compensation that year. Tr., p. 245. According to Mary Rodriguez, chief negotiator for Respondent, "we were looking at a crisis in the state legislature with inadequate funding, and I

think they were approaching close to a \$500 million deficit, and there was talk of no funding or a cut in funding to . . . public education, so we had that crisis to deal with.” *Id.*

9. Due to this budget crisis, Respondent created a budget and program review committee to look at ways to be more efficient and save money. *Tr.*, p. 246.

10. One of the suggestions from its budget committee was that all teachers, including English teachers, be required to teach five of six periods both semesters. *Tr.*, pp. 227, 246-247. Implementation of this proposal would save an estimated \$97,870. *Tr.*, p. 250.

11. At the time this proposal was considered, Respondent believed that it did not have to be negotiated because the parties’ existing master agreement allowed Respondent to require all teachers to teach five classes in a six period duty day. *Tr.*, pp. 250-252.

12. Although Respondent believed in good faith that this issue did not have to be negotiated, the District was nonetheless concerned about the controversy this change in teaching loads might cause. *Tr.*, pp. 252-253. In an attempt to address such concerns, Mary Rodriguez discussed the budget crisis with Wayne Kruse, Petitioner’s President, and the proposal that English teachers, and others, teach five of six periods each semester. *Tr.*, pp. 253-254.

13. During this fall, 2001 conversation, Mary Rodriguez showed Kruse the negotiated agreement to be sure he did not agree with Respondent’s interpretation that Respondent had the authority to require teachers to teach five of six periods each semester. *Tr.*, pp. 256, 254-255. Kruse agreed, saying, “I don’t see any problem with it. It’s pretty clear.” *Id.*, p. 255.

14. Respondent’s chief negotiator, Mary Rodriguez, had similar conversations with Petitioner’s Chief Negotiator, Al Gyles, in the fall of 2001. *Tr.*, pp. 257. Gyles did not see any

problem either and agreed that the master agreement allowed Respondent to require all teachers to teach five of six periods both semesters. *Id.*

15. On January 15, 2002, the Lawrence Journal World reported the budget committee's recommendations for budgeting would include requiring "all high school faculty to teach five sections of courses each semester (some teach four)". Petitioner's Exhibit 16.

16. On January 15, 2002, the budget committee recommendation to require all secondary teachers to teach five classes in a six period day was presented to the budget committee, of which Wayne Kruse, Petitioner's President, was a member. Tr., p. 260.

17. The budget committee accepted this proposal. Tr., p. 261.

18. Wayne Kruse understood that this proposal would require all high school teachers to teach five classes in a six period day and would result in a cost savings of approximately \$97,000. Tr., pp. 165-166.

19. This proposal was presented to the Board of Education at a study session on February 19, 2002, which Wayne Kruse attended. Tr., p. 261.

20. At that meeting, the Board prioritized budget proposals into phase 1 proposals and phase 2 proposals. Tr., p. 264. Phase 1 proposals were changes the Board intended to make regardless of funding provided by the Kansas Legislature. Tr, p. 265. The money saved by implementing phase 1 proposals was to be used to provide increased funding for staff compensation. Tr., p. 265. Phase 2 proposals were prioritized and their implementation would depend on the amount of funding allocated by the Legislature. Tr., pp. 265-266.

21. The budget proposal that all high school teachers be required to teach five of six periods each semester was included in phase 1, and was to be implemented regardless of the level of funding provided by the Kansas Legislature. Tr., pp. 264-266.

22. The Board discussed and adopted this budget proposal on February 25, 2002. Tr., p. 267. Although Petitioner's President, Wayne Kruse, and its Chief Negotiator, Al Gyles, were present for this meeting, neither objected nor requested that Respondent negotiate the issue relating to Petitioner member teachers' duty days. Tr., p. 268.

23. On March 11-12, 2002, Respondent Board had a public hearing in which this budget proposal was discussed and approved. Wayne Kruse and Al Gyles attended, and neither voiced any objection nor request negotiation of the issue. Tr., pp. 270-271.

24. The Board took these actions because the District believed that the educational needs of students could not be met with some teachers teaching less than a full five of six class period schedule. Tr., pp. 226-227. The Board believed that provisions of the existing negotiated agreement allowed it to require that all teachers teach five of six class periods both semesters. Tr., p. 252.

25. During the time period of the budget meetings discussed in findings of fact numbers 8-11 and 15-23, above, these parties were also in negotiations of the 2002-2003 Master Agreement. Petitioner did not request that the staffing proposal, that all teachers be required to teach five of six class periods each semester, be negotiated. Tr., p. 271.

26. Sam Rabiola, an English teacher who opposed the staffing change, wrote a letter dated May 10, 2002, to Respondent's chief negotiator, Mary Rodriguez, alleging that the District's

staffing change was a unilateral change to a past practice regarding terms and conditions of employment. Tr., p. 272; Respondent's Exhibit Q. Rodriguez was "absolutely shocked" by this revelation, Tr., p. 272, because she had previously discussed the issue with Kruse and Gyles, both of whom had agreed that the Master Agreement allowed Respondent to implement the staffing change without negotiating it first. See Findings of Fact Numbers 13, 14. However, in spite of his belief that the District's unilateral change to a past practice had to be negotiated, Rabiola did not request negotiation of the issue, indicating that he believed it was Respondent's duty to request bargaining over the issue. Tr., pp. 76-78. Rabiola also indicated that he believed, based upon his knowledge of events described in finding of fact number 6, that the proposed staffing change would be reversed prior to implementation and the parties would return to the *status quo*. Tr., p. 77.

CONCLUSIONS OF LAW/DISCUSSION

As noted above, several issues are raised in this matter and this order will address only those necessary to its resolution, as follows:

ISSUE 1

Was Petitioner's complaint timely filed, pursuant to K.S.A. 72-5430a(a)?

Under Kansas law, a prohibited practice complaint under the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, "shall be commenced within six months of the date of

the alleged practice” by service of written notice upon the accused party. K.S.A. 72-5430a(a). Respondent urges that the statutory six-month limitations period begins to run from the date the injured party receives unequivocal notice of an adverse employment action rather than the time the action becomes effective. USD #497 Proposed Findings of Fact and Conclusions of Law, Case Number 72-CAE-2-2003, October 14, 2003, pp. 21-22. Respondent argues that because it put Petitioner members Kruse and Gyles on unequivocal notice of its proposal to have all teachers teach five of six class periods not later than March 11-12, 2002, *see* Finding of Fact Number 23, Petitioner’s complaint was untimely when filed on November 12, 2002. *Id.*, p. 32.

Petitioner counters that although aware of Respondent’s proposal, its leadership viewed it to be just that, a proposal. Brief of the Lawrence Education Association, Case Number 72-CAE-2-2003, September 19, 2003, p. 16. Consequently, and in view that the parties history indicated that an item recommended for elimination could be restored and in view that the parties continued for months to informally discuss the issue outside of the formal meet and confer process, Petitioner was not put on unequivocal notice until the 2002-2003 school year began and the change was actually implemented. *Id.*, p. 17.

Based upon the record in this matter, it is the conclusion of the Secretary’s Designee that Petitioner cannot be said to have had unequivocal notice of Respondent’s adverse employment action until at least the beginning of the 2002-2003 school year, at which time Respondent began the implementation of its earlier proposal to require all teachers to teach five of six class periods each semester. As such, Petitioner’s November 12, 2002 complaint is well within the statutory limitations period of six months and this tribunal is not without jurisdiction to decide the issues

raised herein. The Secretary's Designee will now turn to the question whether Petitioner waived its right to pursue its claim that the District committed a prohibited practice when it unilaterally implemented the staffing change at issue.

ISSUE 4

Did Petitioner waive its right to bargain over the purported change such that Respondent's failure to negotiate any changes with regard to the 2002-2003 duty day does not constitute a prohibited practice?

Respondent urges that even were it is determined that it unilaterally changed a mandatorily negotiable term or condition of service, it may successfully defend against a prohibited practice charge by demonstrating that it did not engage in a bad faith refusal to bargain about the issue. USD #497 Proposed Findings of Fact and Conclusions of Law, Case Number 72-CAE-2-2003, October 14, 2003, p. 28. According to Respondent, it provided notice to Petitioner of its proposed change, but the Petitioner did not request to negotiate it. *Id.*, p. 29. Moreover, Petitioner member Rabiola intentionally chose not to request negotiations even though he believed that Respondent must negotiate the issue or leave the *status quo* scheduling in place. *Id.*, pp. 29-30. As a result, Respondent urges, Petitioner has waived its right to complain that Respondent failed to negotiate this issue. *Id.*

Petitioner responds that the parties' practice of allowing some teachers to teach four classes one semester and five the other created a separate and enforceable condition of employment apart from the contract provision. Brief of the Lawrence Education Association,

Case Number 72-CAE-2-2003, September 19, 2003, pp. 14-15. As a consequence, Petitioner urges, Respondent could not make any unilateral change in this past practice unless the matter was fully discussed and the union clearly and unmistakably waived its interest in the matter. *Id.*, p.15 (citing from the PERB's decision at syllabus ¶6, *Oakley Education Association v. U.S.D. 274*, KDHR Case No. 72-CAE-6-1992). Such a waiver, Petitioner asserts, did not occur. *Id.*, p. 16.

The Kansas Professional Negotiations Act (hereinafter "PNA", or "the Act"), found at K.S.A. 72-5413 *et seq.*, is the statutory framework governing the right of professional employees to collective bargaining with employer school boards in Kansas. *Liberal-NEA v. Board of Education*, 211 Kan. 219, 225 (1973). The Labor Management Relations Act of 1947 had specifically excluded from its application the employees of states and their political subdivisions. *Id.*, p. 224. The Kansas legislature enacted the PNA in 1970 to extend to professional employees of school districts collective bargaining rights which had been denied them by the Kansas Supreme Court's 1964 decision in *Wichita Public Schools Employees Union v. Smith*, 194 Kan. 2 (1964). *Id.*, pp. 224-225.

The PNA gives professional employees of school boards the right to form, join or assist professional employee organizations and to participate in professional negotiations with boards of education through representatives of their own choice for the purpose of establishing, maintaining, protecting and improving terms and conditions of professional services. K.S.A. 72-5414. Professional employees were also given the right to refrain from any or all of the foregoing activities. *Id.*

The Act also provides mechanisms for enforcing the rights it confers. Similar to the prohibition of "unfair labor practices" under the National Labor Relations Act, the PNA bans certain enumerated "prohibited practices" in an effort to promote greater equality of bargaining power between professional employees and school boards so that the parties may find improved ways of organizing their joint efforts to their maximum mutual benefit. By attempting to equalize the bargaining power between school boards and their professional employees, the Act advances its statutory objectives of improved professional employee-school board relations, giving employees a greater voice in decisions affecting their working conditions.

One of the "prohibited practices" enumerated by the Act is implicated in this matter. K.S.A. 72-5430(b)(5) provides that it is unlawful for a board of education willfully to "refuse to negotiate in good faith with representatives of a professional employees' organizations".

It is well-established principle of labor law that an employer's unilateral change in terms and conditions of employment is a *prima facie* violation of its duty to negotiate in good faith. *Brewster-NEA v. U.S.D. #314, Brewster, Kansas*, Case No. 72-CAE-2-1991, p. 23 (Sept. 30, 1991); *Oakley Education Association v. Unified School District #274, Oakley, KS*, Case No. 72-CAE-6-1992, p. 21 (Dec. 11, 1992). It is equally well-settled, however, that a unilateral change in terms and conditions of employment is not *per se* a prohibited practice. *Id.*

The board of education may successfully defend its unilateral 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 or that the union waived its right to bargain, courts will not find bad faith."

An employer may not be charged with an unfair labor practice in absence of a demand for negotiation following the employee organization's receipt of notice of a planned change in a term or condition of employment. See *Ogilvie v. Ind. Sch. Dist. No. 341*, 329 N.W.2d 555 (Minn. 1983). It must be noted as a corollary, however, that an employee organization will not be said to have waived its right to bargain an issue unless it is given both adequate and timely notice of a proposed change, that is notice sufficient under the circumstances to inform the employee organization that a change is being made, or that one is imminent, prior to its implementation. *Foley*, 353 N.W.2d at 922; *Minnesota Teamsters Public v. Anoka County*, 365 N.W.2d 372, 375, (Minn.App. 1985); *Brewster-NEA*, p. 14.

Based upon the record of this matter, it is the presiding officer's conclusion that Petitioner had adequate and timely notice of the proposed staffing change in question, see Findings of Fact Numbers 12-26, and that such notice gave rise to an obligation that Petitioner request bargaining about the issue if it objected. However, Petitioner failed to do so. Finding of Fact Number 26. Without addressing Respondent's dual contentions that the bargained agreement between the parties authorized the staffing changes in question and that its failure to previously require all teachers to teach five of six class periods each semester did not constitute a past practice, the presiding officer finds and concludes that the record of this matter establishes

that Petitioner waived its right to complain of Respondent's unilateral staffing change by its failure to request negotiation after receiving adequate timely notice of Respondent's proposal. Under this set of facts, the presiding officer is compelled to conclude that Respondent's unilateral staffing change did not constitute a prohibited practice. Respondent's action did not deprive Petitioner of its right to negotiate the issue because Petitioner failed to request negotiation after receiving adequate, timely notice of Respondent's proposed change.

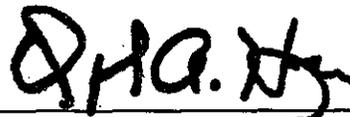
Petitioner contends that it should not be found to have waived the right to bargain, essentially suggesting that it lacked adequate notice that the change might actually be implemented, because in prior years a similar proposal was defeated informally without actual bargaining. This contention is not persuasive. The record as a whole demonstrates that Respondent proposed the staffing change in question over a period of numerous months while negotiations were ongoing. Petitioner officers and bargaining team members were well aware of the proposed change and the fiscal crisis that prompted the Board to consider it and similar cost-saving measures. Further, there is no indication in the record that Respondent affirmatively induced Petitioner to believe that its proposals were not to be taken seriously. Respondent should not be penalized for Petitioner's failure to seek bargaining about its proposed changes. Likewise, Petitioner should not be allowed to withhold its objection in negotiations, maximize its negotiated outcomes on other issues and then seek redress through this mechanism for its unspoken, or initially unrecognized, discontent with Respondent's proposed change.

THEREFORE, IT IS HEREBY ORDERED ADJUDGED AND DECREED that based upon the evidence of record, the Respondent Unified School District #497, Lawrence, Kansas, for the reasons set forth above, has not committed a prohibited practice pursuant to K.S.A. 72-5430(b)(5) relative to Respondent's unilateral staffing change described herein.

THEREFORE, IT IS FURTHER ORDERED that Petitioner's complaint be, and is hereby, dismissed with prejudice.

IT IS SO ORDERED.

DATED, this 14 day of May, 2004



Douglas A. Hager, Presiding Officer
Office of Labor Relations
1430 SW Topeka Blvd., 3rd Floor
Topeka, KS 66612-1853

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final order fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-527(2)(b) is filed within that time with the Secretary of the Department of Human Resources, Office of Labor Relations, 1430 SW Topeka Blvd., Topeka, Kansas 66612.

CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Office Manager for Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 14th day of May, 2004, 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:

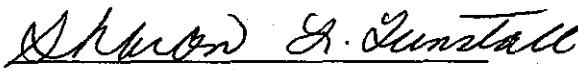
Marjorie Blaufuss, Attorney at Law
Kansas National Education Association
715 SW 10th Street
Topeka, KS 66612-1853

Peter K. Curran, Attorney at Law
Stevens & Brand, L.L.P.
P.O. Box 189
Lawrence, KS 66044-0189

Bradley R. Finkeldei, Attorney at Law
Stevens & Brand, L.L.P.
P.O. Box 189
Lawrence, KS 66044-0189

And, on this 14th day of May, 2004, a true and correct copy of the above and foregoing Initial Order was deposited in the building mail, addressed to:

Secretary Jim Garner
Kansas Department of Human Resources
401 SW Topeka Blvd.
Topeka, Kansas 66603


Sharon L. Tunstall