

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

JEWELL-RANDALL EDUCATION)
ASSOCIATION,)
Complainant,)
vs.) CASE NO. 72-CAE-5-1986
U.S.D. 279 - JEWELL COUNTY,)
KANSAS,)
Respondent.)

Comes now on this 3rd day of April, 1987, the
aboved captioned matter for consideration by the Secretary of
Human Resources. Mr. Jerry Powell has been appointed as the
Secretary's designee to make a record and enter an order in this
matter.

APPEARANCES

For the Complainant, Mr. David M. Schauner, General Counsel
for Kansas National Education Association, 715 West Tenth Street,
Topeka, Kansas 66612.

For the Respondent, Mr. Fred W. Rausch, Jr., Attorney at Law,
Suite 102, 220 Southwest 33rd Street, Topeka, Kansas 66611.

PROCEEDINGS

1) Complaint filed December 30, 1985 under signature of
David M. Schauner, General Counsel for Jewell-Randall Education
Association.

2) Complaint served on Donovan Williams, Superintendent for
U.S.D. 279 on December 30, 1985.

3) Answer to complaint filed on January 17, 1986 under the
signature of Fred W. Rausch, Jr., acting in behalf of U.S.D. 279.
The answer contained a Motion To Dismiss which urged dismissal on
the grounds that:

- 1) The Association has no standing to file the
charge since negotiations have been completed.
- 2) The Secretary has no authority to grant the
relief sought by Complainant.

4) Answer to complaint filed on David M. Schauner on January 21, 1986.

5) Amendment to answer to complaint filed by Mr. Fred Rausch, Jr. on January 22, 1986.

6) Pre-hearing conference scheduled for February 18, 1986.

7) Letter received from David M. Schauner on February 20, 1986 stating that counsel for Complainant had marked March 18, 1986 for the pre-hearing and had thus inadvertently missed the scheduled pre-hearing conference. Further counsel for Complainant requested until February 28, 1986 to file his answer to the Motion To Dismiss.

8) First amendment to complaint filed under the signature of David M. Schauner on February 27, 1986. The amendment listed Pat Jones and Miola Griffiths as parties filing the complaint.

9) Complainant's Memorandum Response To Respondent's Motion To Dismiss filed by David M. Schauner on February 26, 1986.

10) Letter under signature of Fred Rausch, Jr., received March 6, 1986. The letter requests until March 20, 1986 to respond to the amended complaint.

11) Received Respondent's brief in support of Motion To Dismiss on March 11, 1986.

12) Received on March 11, 1986 Respondent's answer to amended complaint and Motion To Dismiss.

13) Second amendment to complaint filed March 26, 1986 by David M. Schauner. This amendment removes the names of the two individuals listed as parties by the first amendment.

14) Motion To Dismiss Pat Jones and Miola Griffiths as parties Complainant filed by Mr. Fred Rausch, Jr., on March 31, 1986.

15) Ruling on Motion To Dismiss issued April 1, 1986 by Jerry Powell on behalf of the Secretary of Human Resources.

16) Journal Entry dated June 10, 1986 and signed by the Honorable Richard W. Wahl, District Court Judge dismissing an appeal of the Secretary's Denial of the Motion To Dismiss.

- 17) Hearing scheduled for August 27, 1986 before Jerry Powell, designee of the Secretary of Human Resources.
- 18) Hearing rescheduled for October 14, 1986 in Jewell, Kansas.
- 19) Hearing conducted October 14, 1986.
- 20) Letter received under signature of David M. Schauner requesting to admit a duplication from the Jewell County Republican newspaper as evidence to be considered in the pending matter.
- 21) Complainant's brief received January 15, 1987.
- 22) Respondent's brief received February 19, 1987.

FINDINGS OF FACT

- 1) That the matter is properly and timely before the Secretary for consideration.
- 2) That at the outset of the hearing, representatives for the parties entered into the following stipulations of fact:
 - A) On or about January 29, 1985, the Jewell-Randall Education Association submitted its notice of items which it proposed to negotiate for inclusion in the 1985-86 Master Collective Bargaining Agreement, in accordance with K.S.A. 72-5413 et seq.
 - B) On or about January 30, 1985, the Board of Education of U.S.D. 279 likewise submitted its notice of proposed items for negotiation.
 - C) During the course of professional negotiations, tentative agreement between the parties was reached on all items noticed except base salary and fringe benefits.
 - D) On or about May 2, 1985, an impasse was declared.
 - E) Following unsuccessful attempts at mediation, the parties went to fact-finding in accordance with the Professional Negotiations Act. On or about October 24, 1985, the Board representatives rejected the fact-finder's recommendations.
 - F) Pursuant to K.S.A. 72-5428a, a unilateral contract was voted on by the Board on November 4, 1985.
 - G) The following articles or terms and conditions of employment were not noticed by either party for negotiations and were not negotiated prior to June 1:

1. Article II, Section B; Contract Non-Teaching Duty Day;
2. Article IV, Section F: Personal or Emergency Leave;
3. Omission of Article IV, Section C of the 1984-85 Master Collective Bargaining Agreement: Sick Leave Bank;
4. Article IX: Teacher Resignation;
5. Article X, Section A: Reduction in Force;
6. Article XIII, Section E: Salary Schedule Probationary Non-Advancement;
7. Article XV, Section A: Access to Bargaining Unit Members at the workplace.

H) The following articles or items were noticed, were negotiated prior to June 1, but, in fact, were not in the same form when they were issued in the unilateral contract as they were negotiated at the table:

1. Article I, Section B, 4: Salary Schedule Placement of Teachers New to the District;
2. Article I, Section E: Supplemental Salary Schedule;
3. Article I, Section B: Salary Schedule.

3) That up to and including June 1, salary proposals were costed on the basis of what it would cost the District for a full year's implementation. (T-17)

4) That retroactivity or non-retroactivity of economic issues was never discussed between the parties at the bargaining table. (T-19)

5) That Gregg Tanzer is a member of the Jewell-Randall Education Association and is a fifth grade teacher in his sixth year of employment with U.S.D. 279. Mr. Tanzer is the president of the Jewell-Randall Education Association. (T-20)

6) That during the bargaining process between the District and the Association for the 1985-86 contract, Mr. Tanzer was the vice-president of the Association and was a member of the bargaining team. Mr. Tanzer attended all of the bargaining sessions. (T-21)

7) That Mr. Tanzer attended a bargaining session on October 24, 1985 at which time he recalls that the Jewell-Randall Education Association took an official position with respect to the fact-finder's recommendations. The position of the Association was that they were willing to accept what the fact-finder had given as his general finding in the case. (T-22)

8) That Mr. Tanzer recalls meeting with the Board team subsequent to the fact-finder's report. At that meeting, Mr. Tanzer recalls that Mr. Vic Jacobson was chief spokesman for the Board's team. Present on behalf of the Association were Mr. Bob White, Ms. Laura Blevins, Ms. Bertha Johnson and Mr. Tanzer. (T-23)

9) That Mr. Tanzer recalls that at the meeting referenced in the previous finding, the Board representative brought out another proposal that was different from the fact-finder's report and then went through the reasons why the Board could not accept the fact-finder's report. (T-23)

10) That subsequent to the Board's presentation referenced in the previous finding, the Association team caucused to consider the proposal. At the conclusion of the caucus, the Association team informed the Board team that they could not accept the proposal that the Board had put forth and that it was their decision to continue with the process. (T-24)

11) That the Jewell-Randall Education Association had a practice of using school buildings for their meetings. Prior to the issuance of unilateral contract, the local Association had not been required to pay for the use of those buildings. However, after the unilateral contract had been issued, the Association was required to pay for the use of the building for their meetings. (T-31)

12) That Mr. Tanzer believes that approximately eighteen (18) out of the twenty (20) teachers in the district signed the unilateral contract as proffered by the Board of Education for contract years 1985-86. (T-35)

13) That the Board of Education and the Association met in negotiations over a 1986-87 contract and an agreement was reached.

(T-36)

14) That the Association noticed for negotiations in the 1986-87 contract many of the things that were changed in the 1985-86 issuance of unilateral contracts. (T-36)

15) That Article II, Section B: "Contract Non-Teaching Duty Days" was not noticed by the teacher's Association for negotiations in the 1986-87 school year. (T-37)

16) That Article IV, Section F: "Personnel or Emergency Leave" was an item that was noticed by the Association for negotiations within the 1986-87 contract. Although that item was negotiated, it was not placed back into the contract in its original form as contained within the 1984-85 agreement. (T-38)

17) That Article IV, Section C of the 1984-85 Master Agreement Relating to Sick Leave Bank was noticed and negotiated back into the contract during the 1986-87 contract negotiations. (T-39)

18) That Article IX: "Teacher Resignation" was negotiated by the parties for the 1986-87 contract. Mr. Tanzer believed that the language contained within the 1986-87 contract on this subject is better than that which was contained within the 1984-85 contract. (T-39)

19) That Mr. Tanzer believed that the seven items that were not noticed and were not negotiated prior to June 1 for the 1985-86 contract and which were subsequently changed by the Board with the issuance of the unilateral contract were noticed and negotiated during the negotiations for 1986-87. Further, Mr. Tanzer believes that the change on these seven items that occurred within the 1986-87 contract were changes that the Association was pleased with or that they at least could live with. (T-43)

20) That Mr. Bob White is the UniServ Director for that portion of the state wherein U.S.D. 279 is located. (T-44)

21) That Mr. White attended the October 24, 1985 meeting as a member of the Jewell-Randall Education Association bargaining team. Mr. White was therefore present for Mr. Jacobson's presentation of the Board offer. (T-45)

22) That Mr. Bob White cannot recall the Board suggesting during any of the mediation sessions that salaries for teachers would not be given retroactively. (T-49)

23) That Mr. White recalls that the Association members had an opportunity to ask questions subsequent to the explanation put forth on the Board proposal by the Board's representative. Mr. White further feels that the brief caucus of the teacher's team was adequate to consider the proposals put forth by the Board. (T-55, 56)

24) That Mr. White cannot recall at any time when the question of retroactivity of pay raises was discussed during mediation or fact-finding. (T-58)

25) That Mr. White recalls that the Association made no counter offers to the Board's proposal at the October 24, 1985 negotiation session. (T-58)

26) That Mr. White perceived that the Board's offer made at the October 24, 1985 negotiation session to be a "here it is, take it or leave it" offer. However, Mr. White does not believe that the Board's representative ever couched his offer during that meeting in those words; "take it or leave it".

27) That Dr. Ronald R. Willis is a psychologist employed at the Youth Center at Beloit by the State of Kansas. Further, Dr. Willis is a member of the Board of Education of U.S.D. 279. (T-67)

28) That Dr. Willis served as chief negotiator for the Board of Education for the past two years. (T-68)

29) That Dr. Willis was present for all of the negotiations sessions conducted in an attempt to reach an agreement for the 1985-86 school year. (T-68)

30) That Dr. Willis was present at the October 24, 1985 negotiating session. Dr. Willis recalls that the Board representative, Mr. Jacobson, went through the entire Board proposal and entertained questions on each item. (T-69)

31) That Dr. Willis recalls that during the October 24, 1985 meeting, the teacher team caucused evidently to consider the Board's offer. At the conclusion of the caucus, the teacher team came back and explained to the Board's team that they could not accept the Board's proposal. The teacher team did not at that time indicate that they desired to further discuss the Board's proposal or the fact-finder report. (T-71)

32) That during Dr. Willis' involvement with the negotiations, all economic issues were computed for costing purposes for the entire 1985-86 school year. (T-62)

33) That Dr. Willis cannot recall the specific date upon which the Board determined that the salary increase would not be retroactive for the 1985-86 school year. However, he is confident that that decision was made some time after June 1, 1985 and before October 24, 1985. (T-72)

34) That Dr. Willis does not believe that the decision to make the pay raise non-retroactive was caused by a lack of funding or a change in state funding of the district's budget. (T-73)

35) That Dr. Willis believes that the fact that the district incurred expenses in fact-finding was a consideration in the determination that the pay increase would not be retroactive to the first of the school year. (T-74)

36) That Dr. Willis believes that the district spent approximately Eight Thousand and 00/100 Dollars (\$8,000.00) in attorney's fees for the services of Mr. Vic Jacobson. Further, Dr. Willis believes that most of Mr. Jacobson's work took place after June 1, 1985. (T-75)

37) That Mr. Arvid V. Jacobson is an attorney practicing law in Junction City, Kansas. Mr. Jacobson was retained to represent U.S.D. 279 during the calendar year 1985 for the purpose of resolving impasse activities. Mr. Jacobson continued to represent the Board in post-impasse proceedings. (T-87, 88)

38) That Mr. Jacobson was present at the October 24, 1985 negotiation session between the Board and the teacher's Association. Mr. Jacobson recalls that this meeting commenced at approximately seven (7:00) or seven-thirty (7:30) in the evening. Mr. Jacobson recalls giving to Mr. White and each of the teacher team members a copy of a document entitled "Collective Bargaining Agreement between the Board of Education U.S.D. 279 and JREA for the 1985-86 School Year". After having presented the documents to the teacher team, Mr. Jacobson recalls that he went through the proposal article by article, specifically emphasizing those articles which had been changed. Mr. Jacobson further recalls that he pointed out to the teachers that the salary schedule proffered was not retroactive, rather that it was going to be effective December 1. (T-89, 90, 91)

39) That Mr. Jacobson recalls that the salary schedule proffered during the October 24, 1985 meeting was different than the salary schedule that had been previously discussed in order to conform to a "conventional" salary schedule. (T-96)

40) That Mr. Jacobson did not assist the Board bargaining team at the bargaining table at any time prior to June 1, 1985. However, Mr. Jacobson recalls talking to Mr. Schultz on various occasions during the time that negotiations were in process. (T-98)

41) That Mr. Jacobson believes that one of the factors the Board took into consideration prior to issuing unilateral contracts was the fact that approximately Eight Thousand and 00/100 Dollars (\$8,000.00) in expenses had been incurred during mediation and fact-finding. (T-111)

42) That Complainant's Exhibit #1, an article prepared by Board representatives states in part;

"To date the Association's refusal to accept the Board's 10.03 percent offer has cost the school district over \$7,700, not including the cost of the man hours required by the administration and board members to deal with the negotiations deadlock. The School Board does not feel that this cost should be borne by the taxpayers of USD 279. For this reason the Board has deducted the \$8,536 to cover the current and future costs of completing this

year's negotiations. The Board does not feel that it is fair for the Association to now expect the Board to offer the same amount of money proposed in good faith by the Board over half a year ago. For the Board to do so would destroy any incentive the Association has to both believe the Board when it makes its best offer and avoid the lengthy and costly impasse procedures."

CONCLUSION OF LAW

The Association has alleged that certain actions of the USD 279 Board of Education constitute violations of K.S.A. 72-5430 (b) (1), (5), (6) and (7). In its complaint the Jewell-Randall Education Association states basically two actions which may be viewed as issues before the Secretary.

First, the complaint alleges that certain terms and conditions of employment, which were not noticed and properly negotiated by the parties, were changed by unilateral action of the Board when agreement could not be reached at the post fact-finding meeting on October 24, 1985.

Second, the complaint alleges that the Board's refusal to make the compensation package retroactive to the beginning of the 85-86 school year constitutes a violation of statute.

In his post hearing brief Mr. Schauner, counsel for the Jewell-Randall Education Association, states the issue before the Secretary to be;

- 1) Whether the Board's issuance of a unilateral contract without a retroactive compensation package constituted a prohibited practice and evidence of bad faith within the meaning of K.S.A. 72-5430 (b) (1), (5), (6) and (7).

Mr. Rausch, counsel for the district, lists six issues to be considered by the Secretary. Those issues are;

- 1) Whether the board's adoption of unilateral contract offers without a retroactive compensation package constituted a prohibited practice and evidence of bad faith bargaining.
- 2) Whether the Jewell-Randall Education Association has the authority to file a prohibited practice complaint after all of the provisions of the negotiations process, including mediation, fact-finding and the issuance of unilateral contract offers have been exhausted?
- 3) What subject matter may be included in a board's unilateral offer made to the teachers pursuant to K.S.A. 72-5428 (f), i.e., are the items included in such a unilateral offer limited to those which the parties have previously noticed for negotiation and those items which were actually negotiated?
- 4) Can a prohibited practice complaint be maintained only by the two teachers who refused to accept the unilateral offer and chose instead to be re-employed under the provisions of the Continuing Contract Law, K.S.A. 72-5411 et seq?

- 5) Are the two teacher now out of time to file a prohibited practice complaint for the reason that a complaint must be filed within six months following the occurrence of the act which gave rise to the alleged prohibited practice?
- 6) Are all issues in the complaint now moot for the reason that the complaint involves a fully executed contract which in turn has been succeeded by a new negotiated agreement brought about by successful negotiations between complainant and respondent?

The Secretary's designee shall address each of the six issues as listed by Mr. Rausch.

Issue #2 as stated by Mr. Rausch has been addressed, in large part, by the Secretary's designee in his ruling on the Motion To Dismiss which was issued on April 1, 1986 under the signature of Jerry Powell.

In that Ruling the Secretary's designee wrote:

"The second question concerns the authority of an exclusive representative to file a prohibited practice once a unilateral contract has been issued. The school district seems to argue that since the association's authority to negotiate contracts terminates with the issuance of unilaterals, their right to file a prohibited practice charge must also terminate. The district apparently derives this theory from Burton Education Association v. U.S.D. No. 369 wherein the court states:

'The authority of the designated professional employee' representative for negotiation of teachers' contracts (K.S.A. 1978 Supp. 72-5413 et seq.) terminates when the representative and the school board have exhausted impasse resolution procedures without reaching an agreement and the school board proceeds to issue unilateral contracts for the teachers.'

The examiner must point out that the above cited interpretation relates only to negotiations and further that the interpretation presumes good faith negotiations throughout the process.

Certainly the examiner recognizes that once the negotiations process has, in good faith, run its course and a unilateral contract has, in good faith, been issued, the authority or right of the exclusive representative to negotiate further for that contract year, terminates. However, the entire process up to and including the issuance of unilateral contracts must have been in good faith. The statute mandates that the Secretary shall serve as "watchdog" over the process and that either party may allege that any step in the process was in bad faith. Any other interpretation would allow an

unscrupulous employer to engage in bad faith negotiations, rush thru impasse resolution proceedings, and issue a unilateral contract in bad faith. This action then, under the school district's theory would remove or render moot any question of bad faith negotiations by the exclusive representative. Certainly the Legislature and the courts did not intend such a potential to exist. Further the examiner questions why the Legislature, at K.S.A. 72-5430a (a), would have provided a six month statute of limitations for filing charges if their intent was to limit the filing of a (b) (5) violation to a period prior to the issuance of a unilateral contract. The examiner cannot accept the school district's argument as valid inasmuch as the exclusive representative retains the right to file prohibited practice charges at anytime they believe the employer might be violating K.S.A. 72-5430 (b).

The hearing examiner must, therefore, rule that the Jewell-Randall Education Association does have standing to file the pending prohibited practice charge, notwithstanding the school district's action in issuing the unilateral contract."

The entire Ruling on the Motion To Dismiss is incorporated and herein made a part of this order.

In addition to the above argument counsel for the Respondent argues that the language at K.S.A. 72-5430 (a) somehow limits the commission of a prohibited practice to that period of time between the time negotiations formally commence and either (A) agreement is reached or (B) unilateral contract offers are made. The Secretary's designee points to the provisions of K.S.A. 72-5430a wherein that statute states in part;

"Any controversy concerning prohibited practices may be submitted to the Secretary. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six months of the date of the alleged practice"

This language makes clear the legislative intent of allowing prohibited practice charges to be brought at anytime so long as such charge is brought within six months of the alleged prohibited act. Additionally the Secretary's designee points to the very nature of some acts that are prohibited by K.S.A. 72-5430. The Secretary's designee cites the following acts as stated at K.S.A. 72-5430 (b) (1):

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414."

This subsection makes illegal the act of interfering with rights granted by K.S.A. 72-5414. That statute states:

"Professional employees shall have the right to form, join or assist professional employees' organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service."

Surely one would not argue with the fact that the formation of an employee organization usually occurs prior to the commencement of negotiations. Of equal importance is the process of maintaining and protecting terms and conditions of employment which usually is accomplished by the utilization of a contracted grievance procedure after negotiations are completed.

K.S.A. 72-5430 (b) (2) states:

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

dominate, interfere or assist in the formation, existence, or administration of any professional employees' organization."

This subsection again references the formation of an employee organization, an act which takes place prior to formal negotiations.

K.S.A. 72-5430 (b) (3) states:

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

discriminate in regard to hiring or any term or condition of employment to encourage or discourage membership in any professional employees' organization."

Surely one could not interpret this section so as to prevent discrimination during negotiations yet allow that same discrimination at other times.

K.S.A. 72-5430 (b) (4) states:

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

discharge or discriminate against any professional employee because such professional employee has filed any affidavit, petition or complaint or given any information or testimony under this act, or because such professional employee has formed, joined or chosen to be represented by any professional employees' organization."

Surely it is a prohibited act for an employer to discharge or discriminate against a professional employee because the professional employee has given testimony or filed a charge at anytime during the course of the employment relationship.

K.S.A. 72-5430 (b) (5) and (6) then are subsections which pertain to prohibited acts that occur during the course of professional negotiations including that portion relating to the act of offering unilateral contracts.

K.S.A. 72-5430 (b) (7) states:

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

refuse to participate in good faith in the mediation as provided in K.S.A. 72-5427 or fact-finding efforts as provided in K.S.A. 72-5428 or arbitration pursuant to an agreement entered into pursuant to K.S.A. 72-5424."

This subsection makes it a prohibited practice to fail to participate in good faith in arbitration efforts pursuant to an agreement between the parties calling for the utilization of arbitration to resolve disputes. Logic dictates that one could not expect to invoke this subsection during negotiations in which the parties are seeking to arrive at an agreement to arbitrate. Rather any act of failing to participate in arbitration endeavors must occur at sometime after the negotiations process is completed and an agreement is reached which provides for that arbitration.

The prohibited acts as defined at K.S.A. 72-5430 are called "protected activities" and may occur at anytime during the employment relationship. Thus organizational efforts, negotiations efforts and contract administration efforts are protected for all parties. These "efforts" are protected for the employees by the exclusive representative (employee organization)

selected by the employees under the provisions of K.S.A. 72-5416 or K.S.A. 72-5417.

There can be no doubt that a professional employee organization has the right to file a prohibited practice in behalf of those employees they represent. K.A.R. 49-28-1 a rule promulgated by the Secretary pursuant to K.S.A. 72-5432 and K.S.A. 77-415 et seq., clearly lists those parties who have standing to file a prohibited practice charge. K.A.R. 49-28-1 states:

"Who may file. An allegation of a violation of K.S.A. 72-5430 may be filed with the secretary by a board of education, professional employee organization, or a professional employee."

The record reflects that the alleged prohibited acts occurred on or about November 4, 1985 and that the original complaint was filed with the Secretary on December 30, 1985. Subsequent to the original filing the association twice amended their complaint the last of which occurred on March 26, 1986.

One might argue that the choice of the teachers to sign unilaterally offered contracts renders moot the issues within this complaint. That is, acceptance by the teachers of the salary increase effective in December might at first blush appear to settle the issue. However, when one explores the alternative to such acceptance the issues involved take on renewed importance and one very real question comes to mind. Must teachers forego any proffered salary increase by working under the previous contract in order to preserve their statutory right to submit alleged violations for ruling by the Secretary and district court?

It appears to the Secretary that the teachers should not be penalized for choosing to exercise their statutory rights. In the instant case there was no dispute concerning the amount offered by the Board or accepted by the teachers. Thus the acceptance of this nondisputed amount of salary increase should not serve to cause the loss of the right to question the good faith of the actions of the Board in lowering its offer after fact-finding. There was no harm caused to either party by the teachers acceptance of the amount not in dispute. Therefore it is only logical to assume that questions of law which need to be addressed

by the Secretary or Kansas courts should not be dismissed simply because one party agrees to accept that portion of an increase not at issue in the first place. To rule otherwise would only serve to cause a hardship on the teachers if they desired to pursue a question of law.

The Secretary's designee must therefore conclude that the Jewell-Randall Education Association does have the authority or standing to file a timely complaint even after a board has tendered a unilateral contract offer to teachers.

The fourth and fifth issues outlined by counsel for the district relate to the question concerning two teachers and their time for filing complaints. These issues appear to be moot inasmuch as the Association moved to amend their complaint to remove the individual teachers as parties to the complaint. With the granting of that amendment the charging party became solely the professional employee organization selected to represent the employees. The right and authority of the organization has been addressed by the Secretary's designee under issue #2 listed above.

Issue #3 and part of issue #6 as stated by counsel for the district are interrelated by the passage of time and events subsequent to the alleged prohibited acts. The Secretary's designee will address these two issues as one. The Secretary's designee need not restate his interpretation of K.S.A. 72-5428 (f) as that statute is impacted by various court decisions since testimony in the record indicates that the act of changing unnoticed subjects by the employer has been remedied by subsequent negotiations. Mr. Gregg Tanzer, president of the Jewell-Randall Education Association testified that during subsequent negotiations with the USD 279 Board, the professional employee organization had noticed and negotiated all items which were unilaterally changed for the 1985-1986 school year. Further, Mr. Tanzer testified that the Association was pleased or could live with the items as negotiated within the 1986-1987 agreement (See pages 42 and 43 of the transcript). It is therefore the belief of the Secretary's designee that he could not in retrospect order any relief which might better resolve any harm caused by a prohibited

act than that resolution arrived at between the parties in negotiations for a 1986-1987 agreement. The Secretary's designee finds no prevailing reason to further opine concerning this issue.

Issue #6 further comes into question as the question of mootness relates to Issue #1 of counsel and the primary issue of Complainant. That is, "does the Board's failure to make the compensation package retroactive constitute a violation of K.S.A. 72-5430?"

It has been argued that the retroactivity of a wage increase is a mandatorily negotiable subject. The Secretary's designee cannot argue this fact. The subject falls under the topical heading of salaries and wages and as such was properly noticed under that topical heading. Therefore, the act of making or not making the salary or benefit package retroactive was within the districts right so long as the district properly followed the dictates of K.S.A. 72-5428 (f). K.S.A. 72-5428 (f) requires the board to take such action as it deems in the public interest including the interests of the professional employees involved if no agreement can be reached after fact-finding. There is not, thereafter, unbridled authority vested in a board to take any action they might desire if agreement cannot be reached. This authority is tempered by the condition that the board weight its action based upon the interests of both the public and the employees.

The Secretary's designee believes that the legislature gave a great deal of discretion to boards in determining the interest of the public and the employees. However the Secretary's designee must conclude that the Legislature would not have enacted a statute which specifically requires that fees for fact-finders services be borne equally by the parties and then within the same statute allow a board to determine that the public interest requires the deduction of such fees from previously proposed salary increases. Certainly an action contrary to specific statutory direction cannot be said to be in the public interest.

There can be no doubt that at least Seven Thousand Seven Hundred Dollars (\$7,700) of the Eight Thousand Five Hundred Thirty-Six Dollars (\$8,536) difference between the Board's best salary offer and the amount finally given the teachers was to cover the costs incurred by the Board in mediation and fact-finding. This fact is substantiated by the testimony of Dr. Willis and Complainant's Exhibit #1. There is no specific dollar amount attributed to payment for the fact-finder's service but Complainant's Exhibit #1 at least suggests that a portion of the Seven Thousand Seven Hundred Dollars (\$7,700) was utilized to pay for fact-finding services or that some of the balance was reserved for that purpose under the heading of future costs. There can be no question that this action constitutes a violation of K.S.A. 72-5430 (b) (5) inasmuch as the action could not have considered the interest of the public or the employees.

At first blush it would appear that a board, under the guidelines of Riley County and Burrton, could recoup its expenses such as attorney fees for mediation and fact-finding by deducting such costs from tentative salary offers. Upon further reflection, however, one must consider and weigh the purpose of the statute against the public's interest in taking such an action. One might argue, for example, that if sufficient money was not available to pay such fees, the public's interest in raising taxes or the issuance of no fund warrants might out weigh the action of recoupment from salary increases. The Secretary's designee does not, in the record, find an argument on ability to pay. Rather the argument by the Board for the action appears to be three fold. 1) the best proffered salary increase plus the mediation and fact-finding fees was more than the Board wanted to pay; 2) there was a need to adjust the salary schedule; and 3) if the Board gave the same amount of increase to teachers upon the issuance of unilaterals as the Board offered over half a year ago it would destroy any incentive the Association has to believe the Board when it makes its best offer and avoid the lengthy and costly impasse procedure.

The above cited argument leaves a strong impression that the Board was motivated in their action by a desire to "punish" or "teach" the teachers a lesson so that in future negotiations the teachers would not elect to utilize the lengthy or costly impasse procedures. At very least the action placed the teachers on notice that they could at best expect to gain nothing and in fact lose if they chose to utilize impasse procedures.

In order to best understand the purposes for placing impasse procedures in the Professional Negotiations Act one needs to consider the purpose for the enactment of the entire law. No one would argue that the main purpose of the law is to insure employees input into their terms and conditions of employment. Of equal importance with this goal is the goal of providing a harmonious relationship between teachers and boards. To that end and recognizing strikes by teachers to be repugnant, the Kansas Legislature devised impasse resolution mechanisms to resolve disputes. These mechanisms replace strikes and lockouts with a peaceful procedure for either party to utilize in resolving impasse. Thus the right to use the mechanisms is a right granted by statute not to be usurped by the other party.

In the instant case the employee's right to utilize these procedures has, for all practical purposes, been effectively usurped by the employer and has placed the teachers on notice that fact-finding will do them no good and will only cost them money. Complainant's Exhibit #1, an article prepared by Board representatives, leaves no doubt that once the Board states "this is our best offer", utilization of lawful impasse procedures is useless. Thus the Board has removed the lawful and peaceful mechanism for resolving impasse and placed the employees on notice that some other means must be found if the employees desire to proceed further. The means which immediately comes to mind as a

substitute for fact-finding is a "means" which the Kansas Legislature designed the law to prevent. The only alternative to this "means" is to give up their right to fact-finding and accept whatever is offered by the Board once those faithful words (our best offer) are uttered. In either event the legislative intent of the law is lost and the interests of the employees and the public is overlooked.

The Secretary's designee must conclude that the underlying motive for deducting the Eight Thousand Five Hundred Thirty-Six Dollars (\$8,536) from the "best salary offer" of the Board is clearly set out in the last paragraph of Complainant's Exhibit #1. Further the Secretary's designee must find that this action violates K.S.A. 72-5430 (b) (1) and (b) (5).

K.S.A. 72-5430 (b) (1) states:

"It shall be a prohibited practice for a board of education or its designated representative willfully to:

Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414."

K.S.A. 72-5414 states:

"Professional employees shall have the right to form, join or assist professional employees' organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service. Professional employees shall also have the right to refrain from any or all the foregoing activities. In professional negotiations under this act the board of education may be represented by an agent or committee designated by it."

K.S.A. 72-5414 grants teachers the right to expect good faith efforts by a board in establishing terms and conditions of employment through representatives. In this case the Board's action was not in good faith and removed from the employees the right to have their best interests as well as the public interest considered when the Board took unilateral action.

K.S.A. 72-5430 (b) (5) was violated when the Board failed to follow the directions as set out at K.S.A. 72-5428 (f) for taking unilateral action. This action is in fact the final step in the impasse resolution procedure and thus a very important part of the negotiations process.

The Secretary's designee must dismiss the allegation of a K.S.A. 72-5430 (b) (6) violation since there are no facts to support a finding that the Board attempted to negotiate with anyone or any organization other than the exclusive representative.

The Secretary's designee must dismiss the allegation of a violation of K.S.A. 72-5430 (b) (7) inasmuch as the record is void of facts to show that the Board did not engage, in good faith, in mediation, fact-finding or arbitration.

In sum the examiner finds that;

- 1) the allegation that the Board changed mandatorily negotiable terms and conditions of employment without proper notice and negotiations has been rendered moot by subsequent negotiations.
- 2) the Association has standing to file the complaint and has done so in a proper and timely manner.
- 3) there is a willful lack of good faith in the Board's action to recoup mediation and fact-finding costs from offered salary increases for the purpose of giving the association an incentive to believe the Board when they make their best offer and avoid the lengthy and costly impasse procedures thus violating K.S.A. 72-5430 (b) (1) and (5).

The remaining issue for the Secretary's designee to resolve relates to the most appropriate relief necessary to remedy the harm caused to the teachers by the Board's action.

In its complaint the Association asks the Secretary to:

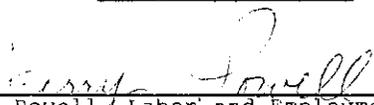
- 1) Order the Board to give retroactive effect to its unilateral contract to the beginning of the 1985-86 school year;
- 2) Order the Board to issue a memorandum to the district's teachers acknowledging that it has committed the prohibited practices alleged in this complaint and assuring the teachers that it will refrain in the future from interfering with the rights of the Association and its members;
- 3) Order the Board to post conspicuous notice in all attendance centers and administrative offices acknowledging that it has committed the prohibited practices alleged in this complaint; and
- 4) Assess a fine of \$500 against the Board, payable to the Association.

The Secretary's designee believes that the Kansas Legislature designed the relief section of K.S.A. 72-5430a (b) in order to grant to the Secretary the authority to award relief appropriate to remedy any harm caused by the commission of a prohibited act. In this case the teachers employed within the district suffered economic harm as a result of the Board's action. It appears therefore that any relief granted must be directed to those teachers.

The posting of notice does little to remedy the loss of salary experienced by the teachers caused by the Board's willfull disregard of the teachers and publics interest when issuing unilateral contracts. Rather it seems that the teachers should be paid an amount equal to their loss which the Board withheld for mediation and fact-finding services. The record is not totally clear relative to the exact amount expended for such services. However there is little doubt that at least Seven Thousand Seven Hundred Dollars (\$7,700) was withheld for the services. Therefore it is the order of the Secretary designee that the sum of Seven Thousand Seven Hundred Dollars (\$7,700) immediately be paid by the Board to the Jewell-Randall Education Association for reimbursement of teachers within the district employed during the 1985-86 school year. The Jewell-Randall Education Association is hereby instructed to place the Seven Thousand Seven Hundred Dollars (\$7,700) on deposit with a local financial institution pending approval by the Secretary's designee of a proposed payment to individual teachers. The Association is granted thirty (30) day to prepare a plan for payment of these funds to teachers who were employed within the district during the 1985-86 school year. The association is further instructed to submit the plan of payment to the Secretary for his approval within the same thirty (30) days period.

This order shall be effective this _____ day of _____, 1987, except for that portion relating to the plan of payment and payout of funds to teachers over which the Secretary designee shall retain jurisdiction until final payment is made to the teachers.

IT IS SO ORDERED THIS 3rd DAY OF April, 1987.



Jerry Powell, Labor and Employment
Standards Administrator
512 West Sixth
Topeka, KS 66603-3150