

**BEFORE THE SECRETARY OF LABOR
OF THE STATE OF KANSAS**

Wallace County Teachers Association,)
 Petitioner,)
)
v.)
)
Unified School District 241,)
Sharon Springs, KS,)
 Respondent.)
_____)

Case No.: 72-CAE-6-2004

INITIAL ORDER

NOW on this 12th day of October, 2005, 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 Wallace County Teachers Association, (hereinafter "Petitioner" or "Association"), appears by and through counsel, Gene F. Anderson, Attorney at Law, Anderson & Wichman, Hays, Kansas. Respondent Unified School District 241, Sharon Springs, Kansas, (hereinafter "Respondent" or "Employer"), appears by and through counsel, David C. Cunningham, Attorney at Law, Kansas Association of School Boards, Topeka, Kansas.

72-CAE-6-2004

ISSUES OF LAW

In Case Number 72-CAE-6-2004, a prohibited practice complaint filed by Employee Organization Wallace County Teachers Association against Employer Board of Education, Unified School District 241, Sharon Springs, Wallace County, Kansas, the Petitioner alleged a total of six violations of the Professional Negotiation Act, K.S.A. 72-5413 *et seq.*

Having reviewed and studied the parties' pleadings and responses, all evidence of record, including the lengthy transcript of the hearing held in this matter and exhibits, and written post-hearing legal memoranda, the presiding officer determines that the issues of law to be decided herein are as follows:

1. Whether the complained-of actions of Employer Unified School District 241 Board of Education, telling Petitioner's negotiating team that the Board would not negotiate any further until the Board's salary offer was taken to the unit's rank and file, constituted a violation of K.S.A. 72-5430(b)(1)?
2. Whether the complained-of actions of Employer Unified School District 241 Board of Education, unilaterally changing the compensation paid for a supplemental contract for Student Council sponsor, constituted a *per se* violation of K.S.A. 72-5430(b)(5)?
3. Whether the complained-of actions of Employer Unified School District 241 Board member Larry Keller, advising at least one teacher that the teachers' negotiating team was not keeping rank and file members informed and advising that teachers should attend negotiating sessions, constituted a violation of K.S.A. 72-5430(b)(1)?
4. Whether the totality of actions of Employer Unified School District 241 Board, e.g., telling Petitioner's negotiating team that the Board would not negotiate any further until the Board's salary offer was taken to the unit's rank and file, and, terminating negotiations and filing a unilateral impasse notice even though they had promised to meet with teachers one more time, were evidence of a refusal to negotiate in good faith, and constituted a violation of K.S.A. 72-5430(b)(5)?
5. Whether the complained-of actions of Employer Unified School District 241 Board in the charges detailed above at *ISSUE 1* constitute a violation of K.S.A. 72-5430(b)(5)?

6. Whether the complained-of actions of Employer Unified School District 241 Board, by Superintendent Scherling asking negotiators to sign a joint notice of impasse, constituted a violation of K.S.A. 72-5430(b)(1)?

Before addressing these issues, however, the designee will set forth the facts as found herein.

FINDINGS OF FACT¹

1. Respondent Unified School District 241 is organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.
2. Respondent is operated by a Board of Education as defined by K.S.A. 72-5413(b).
3. Pursuant to the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, Petitioner is the duly recognized exclusive representative for the existing professional employees' bargaining unit at Unified School District 241.
4. The Secretary of the Kansas Department of Labor has jurisdiction over the parties and the subject matter of the case, i.e., a prohibited practice complaint. K.S.A. 72-5430a.
5. Pursuant to K.S.A. 72-5430a, hearings on prohibited practices shall be conducted in accordance with provisions of the Kansas Administrative Procedures Act, K.S.A. 77-501 *et seq.*

¹ "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." *Stanley Oil Company, Inc.*, 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in *NLRB v. Pittsburg Steamship Company*, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

6. Pursuant to K.S.A. 77-514(a), the Secretary of the Kansas Department of Labor has designated the presiding officer to serve in this matter.

7. Contract negotiations between these parties for the 2003-2004 school year began in May, 2003 and extended over 13 sessions, ending in late May, 2004. Respondent's Exhibit 7. Negotiations were unsuccessful, ending in a single party declaration of impasse by Respondent. Tr., pp. 22, 28, 174. Petitioner did not join in the impasse request. Tr., pp. 22, 28, 176.

8. Petitioner was represented in contract negotiations by its negotiating team, consisting of Dean Baum, Virgil Fischer, Carol Johnson, Linda Shilts-Baum and Linda O'Connor. Tr., pp. 47, 50.

9. Respondent's Board of Education members participated as a group in contract negotiations with Petitioner's team, that is, all seven Board members attended and spoke during negotiations and comprised the Board's bargaining team. Tr., pp. 49, 54, 220, 279.

10. Pursuant to K.S.A. 72-5423(a), the parties noticed up issues for negotiations prior to their first negotiation session for school year 2003-2004, held on May 22, 2003. See Respondent's Exhibit 4.

11. Respondent noticed Petitioner of only one item for negotiation for school year 2003-2004. *Id.* That notice stated as follows: "The Board proposes a two year continuation of the current agreement." *Id.* In effect, the Board's initial offer with regard to teacher salaries was "no increase". Tr., p. 112. See also, Tr., pp. 171-172 (Superintendent Scherling noting that the Board's initial position on salaries was not to offer an increase).

12. Petitioner noticed eight items for negotiations under four separate headings: "Work Day, Salary Schedule, Leave Buy-Back and Fringe Benefit". *Id.* For its Salary Schedule item, Petitioner noticed Respondent of its proposal as follows: "We would like an increase in the base salary of 8.5%".

13. Negotiations for school year 2003-2004 between Petitioner and Respondent formally began at their first negotiations meeting on May 22, 2003. Respondent's Exhibit 7. Minutes of this meeting suggest that it was limited to a presentation of proposals for negotiations. Respondent's Exhibit 2, May 22, 2003 Special Board of Education Meeting Minutes. The meeting lasted approximately 45 minutes. *Id.*

14. The parties met for negotiations again on June 18, 2003 and July 15, 2003. Respondent's Exhibit 7. Together, these two meetings lasted about two and one-half hours. Respondent's Exhibit 2, June 18, 2003 and July 15, 2003 Special Board of Education Meeting Minutes.

15. The parties met twice in August, 2003. At their first August, 2003 contract negotiation meeting, held on August 19, 2003, Petitioner modified its "noticed" proposal of an 8.5% salary increase by reducing their proposal to an increase of 8%. Respondent's Exhibit 7. The first August, 2003 negotiation session lasted just under three hours. Respondent's Exhibit 2, August 19, 2003 Special Board of Education Meeting Minutes.

16. At the second August, 2003 contract negotiation session, held on August 28, 2003, the Board modified its "no increase" in salary stance, proposing a salary increase of 3%. *See* Respondent's Exhibit 2, August 28, 2003 Special Board of Education Meeting Minutes. The Board's minutes

characterized this offer as “our final proposal”. *Id.* One of Petitioner’s negotiating team members testified that the Board represented this proposal as its final offer, as well. Tr., p. 25.

17. During the August 28, 2003 negotiation session, noted above at Finding of Fact No. 16, Board of Education members Mr. Larry Keller and Mr. Ken Kuhlman told Petitioner’s negotiating team “very strongly” that it was important for the Board to know that all the rank and file unit member teachers knew about the Board’s “final” salary offer and asked that the offer be taken back to the teachers to get an answer or decision from them. Tr., pp. 24-25, 42-46. On cross-examination, Board member Kuhlman admitted that he and Mr. Keller “asked” that Petitioner’s team take the salary proposal to the rank and file. Tr., pp. 287-288. Minutes of the August 28, 2003 negotiation session indicated that “[t]he board would like to poll the teachers to see what or where they are with negotiations”. Respondent’s Exhibit 2.

18. In response to the Board’s request that the salary proposal be taken to the rank and file, Petitioner’s negotiator Virgil Fischer asked, “Are you mandating this or telling us that we have to do this?”. Tr., pp. 25, 55. The Board sat silent, giving no response until BOE member Kuhlman stated “What’s the sense of negotiating any further if you aren’t going to take this to the teachers?” Tr., p. 25. *See also*, Petitioner’s Exhibit 9. Petitioner negotiator Dean Baum viewed this remark as an indication that the Board would not negotiate further unless the Board’s offer was taken to the teachers for a decision. Tr., p. 25.

19. In a lengthy discussion that followed the Board’s request that their salary offer be taken to the unit for a decision, Petitioner’s negotiators explained to the Board that they had been elected and

chosen by the unit's members to represent the unit and do the bargaining for them. Tr., p. 55. Kuhlman expressed that they really wanted all the teachers to be at the negotiations and in response to Fischer's "are you mandating this" query, the Board gave a restatement of its position, "We want you to take this to all the teachers." Tr., pp. 55-56. Board member Kuhlman acknowledged that he reiterated this statement. Tr., p. 280. Petitioner negotiating team member Carol Johnson, a teacher with 23 years experience in Wallace County schools and multiple years experience negotiating for Petitioner, viewed the statement as an ultimatum. Tr., pp. 51-53, 56. Johnson's notes from the meeting indicated that school board member Keller conditioned the next negotiating session on the association polling its members regarding the board's salary offer. Petitioner's Exhibit 9; Tr., pp. 299, 304. Board member Keller denied making such a statement. Tr., p. 305.

20. Board members Kuhlman and Keller both understood that the teachers' negotiating team had authority to reach tentative agreements as to all issues in negotiation. Tr., pp. 265, 287-288.

21. The presiding officer finds the consistent testimony of Petitioner's witnesses, backed up by notes taken contemporaneously with the time of the events in question, to be persuasive in establishing the facts found above. Petitioner's Exhibit 9; Tr., pp. 299-303. Although Respondent witnesses generally denied insisting that the teachers be "polled" about the salary issue, Tr., pp. 256, 258, 288, based upon his review of all the testimony and other evidence, and based upon his observation of the demeanor and conduct of the witnesses, the presiding officer finds as noted above.

22. Supplemental salaries for school activities are a term and condition of professional service, K.S.A. 72-5413(1)(1), negotiated by the Petitioner and Respondent and included in the parties'

Memorandum of Agreement. Tr., pp. 32-33, 62. The negotiated supplemental salary for the high school student council sponsor was \$357.50 for the time period in dispute. Respondent's Exhibit 1, Schedule A; Respondent's Exhibit 9; Tr., p. 67.

23. The high school principal for Unified School District 241, Mr. Bruce Bolen, testified that in the spring of 2002, he requested to the school board and the teachers' association that the supplemental salary for the student council sponsor be increased to provide additional pay for additional duties associated with a new summer camp. Tr., pp. 241-242. Mr. Bolen recognized that supplemental salaries are mandatorily negotiable and wanted the school board to negotiate the supplemental salary for student council sponsor with the teachers' association so the new higher amount would be memorialized in the salary schedule. Tr., pp. 247-250. The school board had failed to notice this issue for negotiations. Finding of Fact No. 11; Tr., pp. 241-242. Bolen asked whether the teachers' association would mutually agree to negotiate the issue, but that option was declined. Tr., pp. 242.

24. Principal Bolen again asked that the supplemental for student council sponsor be negotiated in 2003, but the Board of Education again failed to notice it as an issue for negotiations. Tr., pp. 30, 242. Again, Bolen asked Petitioner to mutually agree to negotiate the topic, but his offer was declined. Tr., pp. 242. The teachers' association declined to negotiate the issue because the school board did not notice it up for negotiations, Tr., p. 34, and because the teachers' association wished to discuss an increase in pay for all supplemental contracts, not just that of student council sponsor.

Tr., pp. 72-79. The school board did not want to negotiate concerning any supplemental except that for student council sponsor. *Id.*

25. At the July 14, 2003 Regular Board of Education Meeting, the Board voted 7-0 to pay the student council sponsor a \$500 stipend in addition to the negotiated supplemental pay. *See, e.g.*, Tr., p. 211 (testimony by Superintendent Scherling, noting that the Board of Education had concluded, ten months prior to the close of contract negotiations, that it had the legal authority to pay the student council sponsor an amount of money different from that specified in the collective bargaining agreement). The Board was advised by the teachers' association that the association considered the student council sponsor supplemental pay to be a mandatorily negotiable term and condition of professional service. Tr., p.p. 62-63. The Board took the position that they did not have to negotiate this issue, Tr., pp. 63, 77, and that they had the authority to unilaterally change this supplemental pay. Tr., pp. 75, 211. Minutes of the meetings of negotiation sessions between these parties, *see* Respondent's Exhibit 2, suggest that the board of education believed that the supplemental salary schedule was mandatorily negotiable only when the position was filled by bargaining unit members. *See, e.g.*, Respondent's Exhibit 2, April 5 2004 minutes (noting that board offer #4 states board agrees supplemental salaries mandatorily negotiable when positions filled by USD 241 certified staff members, board will not negotiate changes in supplemental salaries when filled by non-certified employees).

26. Even though Respondent did not notice up the issue of student council sponsor supplemental salary and subsequently unilaterally increased said pay, Petitioner sought at a negotiation session a

few days later to discuss the issue with Respondent. *See*, Tr., pp. 60-61. Respondent refused at that time to negotiate the issue. Tr., pp. 30, 62-63. Later, the parties did exchange proposals seeking clarification whether supplemental salaries were a mandatorily negotiable issue, Tr., p. 30-31; Respondent's Exhibit 2, March 31, 2004 minutes; Respondent's Exhibit 2, April 5 2004 minutes, and Respondent proposed an increase in the student council sponsor supplemental corresponding to the amount of its unilateral increase. Tr., p. 72. Respondent never reached an agreement with Petitioner with regard to a modification of the negotiated \$357.50 supplemental pay for student council sponsor. Tr., pp. 79-80.

27. It appears from the record that the school board also paid a \$500 stipend to the student council sponsor for a camp that took place in the summer of 2002. Tr., p. 209. However, it is far from clear that this action was made known to members of the teachers' association. *See, e.g.*, Tr., pp. 209-210 (principal Bolen, in response to question from hearing officer, stating that he did not recall if teachers' association was given information about \$500 stipend payment as a negotiation item); Tr., p. 70 (teacher negotiator Carol Johnson stating she had no recollection that a \$500 stipend was paid to student council sponsor for '02-'03 school year); Tr., pp. 34-35 (teacher negotiator Dean Baum stating he would not know amount paid to student council sponsor for school year '02-'03 and stating his understanding that \$500 compensation increase for student council sponsor occurred in school year '03-'04, not school year '02-'03).

28. The student council sponsor supplemental is open to any member of the teachers' bargaining unit. Tr., p. 32. During the time period here at issue, the person performing the supplemental

contract duties as student council sponsor was not a certified staff member. Tr., p. 208. Although certified staff were made aware of the availability of the supplemental student council sponsor contract, no member of the certified staff offered to enter into the contract for those duties. Tr., pp. 68, 183-184, 208-210. The record does not establish conclusively that certified staff were not interested in the student council supplemental because it paid only \$357.50, but that is a reasonable inference that could be drawn from the record.

29. At some point in the range of the years 2000 through 2002, the school board hired a non-certified staff member as its basketball coach but deviated from the negotiated supplemental salary. Tr., pp. 36-37. Petitioner's negotiations committee chair provided Respondent notice that its action constituted a prohibited practice and Respondent subsequently negotiated regarding the supplemental pay schedule. Tr., p. 37. Respondent's Board member Keller could not recall a prohibited practice or any kind of complaint lodged with the Board in response to its supplemental salary action for basketball coach. Tr., p. 263.

30. A member of Respondent's Board stated to a teacher and professional employees' bargaining unit member that Petitioner's bargaining team was not keeping the rank-and-file unit members well-informed on the status of contract discussions. Tr., pp. 25-27, 54-55. This matter became the topic of a "fairly lengthy" discussion between the parties' negotiating teams during at least one of their negotiating sessions. Tr., pp. 54-55. The member of the Board to whom this statement was attributed acknowledged commenting to a unit member to the effect that "it was good to see her attend the [Board] meeting" and that he "hoped that more teachers would come to the meeting and be

informed”, but generally denied that the comment was motivated by any unlawful purpose. *See, e.g.*, Tr., pp. 256, 258 (Board member Keller stating that his comment was not intended to coerce or to circumvent the Petitioner’s negotiating team); Tr., p. 268 (Board member Keller stating that Petitioner’s bargaining team “made an issue out of” a “misinterpret[ation]” of his comment to the unit member).

31. As noted above in Finding of Fact No. 20, Board member Keller understood that the teachers’ negotiating team had authority to reach tentative agreements as to all issues in negotiations. In response to a question on cross-examination whether he believed it necessary for unit members to be present for negotiations, Keller offered that his reason for wanting other teachers present at meetings was that “over the years I’ve been on the [Board’s] negotiating team, I’ve had at least one teacher a year approach me wanting to know what was going on with negotiations.” Tr., p. 266. Keller subsequently stated that he had had a teacher or teachers tell him they thought the Petitioner’s negotiating team was not keeping them well informed of the contract talks in question. *Id.* When asked what teacher told him that, Keller retracted the testimony, indicating that no teacher had told him they were not being kept informed for the contract year at issue, but rather that it had happened in prior years. Tr., pp. 266-267.

32. Following the August 2003 negotiation sessions during which Petitioner reduced its opening proposal on teacher salaries from an 8.5% increase to an increase of 8% and the Board modified its position from “no increase” to a “final” offer of a 3% salary increase, as described above at Findings

of Fact Nos. 15 and 16, the parties continued to meet and negotiate until their final negotiation session, held on May 25, 2004. *See* Respondent's Exhibit 7.

33. The parties met and negotiated three times in October, 2003. *Id.* At their first October, 2003 negotiation session, held on October 1, 2003, Petitioner reduced its salary increase proposal from 8% to 7.5%, and "invited" Respondent to seek a ruling from the Kansas Department of Labor whether supplemental pay to the student council sponsor was mandatorily negotiable. Respondent's Exhibit 7; Tr., p. 176. There was no change in either parties' positions at the next negotiation, held on October 8, 2003. Respondent's Exhibit 7.

34. At their October 15, 2003 negotiation session, Petitioner reiterated its offer to seek a ruling from the Kansas Department of Labor regarding the student council sponsor supplemental, noting that if the parties failed to do so, Petitioner would have no alternative but to file a prohibited practice charge. *Id.*; Tr., pp. 190-191. The Board chose not to join Petitioner to seek such a ruling after consultation with its legal counsel. Tr., pp. 176-177. In addition, Petitioner modified its salary increase stance, reducing its position from 7.5% to 7% while the Board's teacher salary proposal remained constant at 3%. Respondent's Exhibit 7.

35. At the close of their October 15, 2003 negotiating session, the parties discussed and scheduled a date and time for their next negotiation session. Tr., p. 65. Respondent indicated that the parties would meet again. *Id.* Subsequently, the Board attempted to get Petitioner to join in its impasse declaration, as set out in findings of fact below. After making four unsuccessful attempts to

get Petitioner to join in its impasse filing, *see* Findings of Fact Nos. 38, 41-43, Respondent filed a single-party declaration of impasse. Tr., p. 65; Finding of Fact No. 44.

36. During the October 15, 2003 negotiation session, Superintendent Scherling was aware that the teachers' association had concerns about the Board having possibly committed prohibited practices about which the association was going to file charges. Tr., p. 189. Scherling was also aware from discussions at the Board meeting that had Petitioner joined in the declaration of impasse that it would have ruled out the possibility of Petitioner filing a prohibited practice charge of failure to negotiate in good faith. Tr., p. 193.

37. On the day immediately following their October 15, 2003 negotiation session, Respondent's Superintendent Scherling began preparing a declaration of impasse to file with the Kansas Department of Labor. Tr., p. 173, 191. Pursuant to discussion with the Board of Education, Superintendent Scherling began asking various teacher association representatives if the association wanted to make the impasse declaration a joint request. Tr., pp. 66, 175, 192. *See also*, Tr., pp. 214-215 (Scherling testifying that in discussion with Board members in caucus it was an option that Respondent suggest a joint declaration of impasse to Petitioner).

38. "[P]robably the next day after [Respondent] had decided [to file impasse]", Petitioner negotiating team member Carol Johnson was having her lunch alone in the high school teachers workroom when Superintendent Scherling came into the room and approached her. Tr., p. 58. Scherling stood to Johnson's right and asked if she would sign the impasse document, to which

Johnson replied that she would not. *Id.* During Johnson's direct examination by Petitioner's counsel, the following exchange took place regarding Scherling's request:

Q. Okay, what did she say?

A. I don't recall exactly what she said. After that the conversation was very short. I said no, I would not sign that. I may have explained to her why. I don't remember if I did or not. I was totally surprised by this confrontation.

Q. Okay. What was her demeanor or tone when she asked you to sign?

A. Her tone was very businesslike, as if she were asking me to do any other duty as an employee. And I had to tell her no.

Tr., pp. 58-59.

39. Superintendent Scherling acknowledged during direct examination by Respondent's counsel that she had inquired whether the association wanted to be a party to the impasse declaration by asking Ms. Johnson. Tr., p. 175. Scherling's recollection of the conversation with Johnson was that she "indicated to Ms. Johnson that the Board had made the decision to go ahead and file the impasse and wanted to know, was asking her on behalf of the teachers association, if they wanted to consider that." Tr., p. 176. Scherling testified that she could not remember making a similar request to Dean Baum, that he join in the impasse declaration. Tr., pp. 188, 189. Scherling testified that she could not remember going to any other members of the teachers' bargaining team with similar requests.

Tr., p. 188.

40. Scherling asked members of the association's negotiating team to join in the impasse declaration in spite of her knowledge of Petitioner's intent to file prohibited practice charges. *See, e.g., Tr., pp. 192-193* (Scherling noting that although aware of association's intent to file charges, she asked for joint filing of impasse "as a courtesy" and "so that they knew what our actions or what our intent was up front" even though Scherling knew that Respondent's intent could have been conveyed to Petitioner by simply stating that they were filing an impasse). Scherling asked association negotiating team members to join in Respondent's impasse filing in spite of her knowledge that such action would nullify Petitioner's prohibited practice charges. *Id.*

41. Superintendent Scherling, soon after the Wednesday, October 15, 2003 negotiation session, asked Petitioner negotiating team member Dean Baum to sign Respondent's declaration of impasse document. *Tr., p. 28.* As noted above, Scherling had no recollection of that. *Tr., p. 188.* Baum testified that Scherling's demeanor when asking him to sign the impasse declaration was "much the same as if she were asking me to do something that was required of me by my job." *Tr., pp. 28-29.* Scherling did not explain to Baum that he had the discretion to either join with Respondent or not. *Tr., p. 29.* Baum was aware that the Association was not required to join in the Respondent's impasse request and told Ms. Scherling that he didn't believe he could do that. *Tr., pp. 28-29.* Scherling responded, "Why not?", and Baum replied, "Because I think that will void our prohibited practice." *Tr., p. 28.* "And then she just walked away from me." *Id.*

42. During the time frame described above at Findings of Fact No. 38 and 41, Superintendent Scherling asked Petitioner's negotiating team member Virgil Fischer if he would sign Respondent's impasse declaration. Tr., p. 293. Fischer also declined. *Id.*

43. On Monday, October 20, 2003, Superintendent Scherling asked for a second time that Petitioner's negotiating team member Ms. Johnson join in Respondent's impasse declaration. Tr., p. 192. Johnson declined again. Tr., p. 189.

44. On the 20th of October, 2003, the Board filed a single-party impasse declaration with this Department. Tr., pp. 22, 28, 177, 191; Respondent's Exhibit 7.

45. In December, Petitioner filed the instant prohibited practice charges. *See Complaint Against Employer*, Docket No. 72-CAE-6-2004.

46. Events that followed the instant filing will not be considered in reaching conclusions in this matter. However, in order that the reader gain a more complete understanding of the ultimate course of these negotiations, a brief summary of post prohibited practice charge events will be set out. By February 1, 2004, in preparation to begin negotiations for the following contract year, that is, for academic year 2004-2005, Petitioner appointed a negotiations team and the parties gave each other notice of their respective topics for negotiations. Tr., pp. 212-213. Included in Respondent's topics was a proposal to increase the teachers' contracts by five days beginning with school year 2004-2005. *Id.*

47. Following the impasse declaration and charges filed, the parties continued, as is not uncommon, *see* K.S.A. 72-5426(e), to discuss negotiation issues to see if they could be resolved

without resort to more formal procedures. At the parties' March 31, 2004 negotiations, the Board proposed that it would negotiate supplemental salaries only where the person filling the position is certified. Respondent's Exhibit 7. Petitioner proposed language that any change in supplemental salaries be negotiated whether the position was filled by a certified or a non-certified staff. *Id.* During that same meeting, both parties modified their stance on teacher salaries twice. *Id.* Petitioner reduced its teacher salary increase proposal first from 7% to 6%, and then to 5.5%. *Id.* Respondent increased its previous offer from a 3% increase to 3.2%, and then to 3.4%.

48. Less than a week later, the parties met again. Initially during this April 5, 2004 negotiation session, Petitioner reduced its proposal on salary from a 5.5% increase to 5.25% and proposed that the student council sponsor supplemental be changed to \$480, with a gross pay rate of \$100 per day for any supplemental position taking students to summer activities. Respondent's Exhibit 7. Respondent responded by making the same student council supplemental offer it had previously advanced, that is, that the board would not negotiate supplementals when the person filling that position was not certified. *Id.* In addition, Respondent raised its teacher salary offer from 3.4% to 3.5%. *Id.* Following additional discussions, Petitioner reduced its teacher salary increase position three more times. *Id.* The first was from 5.25% to 5%, then to 4.5% and finally, to 4%. *Id.* The Board remained firm in its offer of 3.5%. *Id.* At the conclusion of this April 5, 2004 negotiation session, the Petitioner and Respondent were one-half of one percentage point apart in their respective teacher salary increase proposals, with Petitioner seeking an increase of 4% while Respondent was willing to offer an increase of 3.5%. *Id.*; Tr., pp. 200-201.

49. The parties' next negotiation session took place on April 26, 2004. Respondent's Exhibit 7; Tr., p. 194. During this session, Respondent altered its position regarding teacher salaries, offering an increase of 4%. However, with only about a month remaining in academic year 2003-2004 and for the first time in the parties' ten months of academic year 2003-2004 contract talks, and despite the fact that contract days had not been noticed as a topic for 2003-2004 discussions but had been noticed for negotiation for the soon-to-begin 2004-2005 contract talks, Respondent coupled its 4% salary increase offer with the requirement of an additional five contract days. Respondent's Exhibit 7; Tr., pp. 194, 202, 212-213. This proposal would have the effect of decreasing unit members' daily rate of pay. Tr., p. 132. Respondent continued to propose that Petitioner concede that Respondent could unilaterally change supplementals if the individual holding said supplemental contract was not certified. Moreover, Respondent conditioned its "4% and five days" offer on an immediate dismissal of Petitioner's prohibited practice charges. Respondent's Exhibit 7; Tr., p. 204.

50. Following Respondent's newest proposal, described above at Finding of Fact No. 49, which such proposal introduced for the first time a topic not previously discussed nor even noticed up for that years contract talks, that is, an increase of five teacher contract days, Petitioner proposed a "change in salary schedule structure". Respondent's Exhibit 7; Tr., pp. 202-203. This change in salary schedule structure concept was proposed to address a perceived inequity in the Board's salary proposal. Tr., pp. 96-99. Kansas National Education Association UniServe Director Asher Bob White, who has served as an area or district representative for K-NEA for 32 years, Tr., pp. 80-81, testified at length, describing the basis for Petitioner's view of inequity in the Board's proposal. Tr.,

pp. 86-87, 94-102, 106-107. In short, Petitioner viewed the Board's proposal as inequitable because 13 of 22 returning bargaining unit members were "frozen" on the current salary schedule, that is, they had reached the highest step for their placement on the salary schedule, denying those 13 unit members any "step movement" increase in salary, absent educational advancement to a higher column placement. *Id.*; Tr., pp. 108-109. This situation disproportionately affected those unit members with the most teaching experience and longevity at Respondent school district and meant that Respondent's base-salary increase proposal resulted in a lower percentage increase in salary for teachers with greater experience than for those with less seniority. *See, e.g.*, Tr., p. 96 (White testifying that under Board's proposal a career teacher at top of salary schedule having a Master's degree plus 32 additional credit hours of education would receive the smallest percentage increase of any teacher in the bargaining unit.)

51. Under the Petitioner's conceptual proposal to change the salary schedule structure, only one teacher would have been "frozen" with regard to step increases, absent educational advancement to a higher column placement. Tr., p. 99.

52. The Board "wouldn't talk about" any change to the salary schedule structure, effectively ending further discussions with Petitioner. Tr., pp. 101-102, 114, 128-130. The issue of allocation among teaching staff of any salary increase amount, and the issues of the negotiability of student council sponsor's, and others', supplemental contract amount and the proposal of five additional contract days were described by White as the issues precluding successful settlement of these contract talks. Tr., p. 131.

53. The parties met to negotiate in one final session on May 25, 2004. Respondent's Exhibit 7. Respondent reduced its additional contract days proposal from five to four. *Id.*; Tr., pp. 132. UniServe Director White testified that Petitioner "really believed that this was going to settle", Tr., p. 133, and attempted to avoid a statement to the contract talks by proposing that the parties could consider some percentage salary increase of less than four percent but with no additional contract days. Tr., pp. 133-134. According to White, however, the Board, "seemed to be married at this point to this final offer and made no evidence of any consideration" of any alternative and "was so adamant about it that it foreclosed any possibility of getting future agreement." Tr., p. 134.

CONCLUSIONS OF LAW/DISCUSSION

The underlying purpose of the Professional Negotiations Act is "to encourage good relationships between a board of education and its professional employee." *Liberal-NEA v. Board of Education*, 211 Kan. 219, 232 (1973). The Professional Negotiations Act was designed to accomplish the salutary purpose of promoting harmony between boards of education and their professional employees. A basis theme underlying labor relations legislation is "that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.J. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103 (1969); *City of New Haven v. Conn. St. Bd. of Labor*, 410 A.2d 140, 143 (Conn. 1979); *West Hartford Education Ass'n., Inc. v. Decourcy*, 295 A.2d 526 (Conn. 1972). Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives. *Oakley Ed. Ass'n v. U.S.D. 274*, Case No. 72-CAE-6-1992 (December 11, 1992). See also *Connecticut*

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State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979).

In view that this complaint centers around charges of failure to bargain in good faith, and other prohibited practices flowing from essentially the same background facts and set of circumstances, it appears advisable at the outset to summarize the basic principles that govern in reviewing a charge of refusal to bargain in good faith. The duty to negotiate in good faith generally has been defined as an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement. *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). Not only must each party have an open mind and a sincere desire to reach agreement but a sincere effort must be made to reach common ground. *Id.* After the parties have met in good faith and negotiated over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty under the Professional Negotiations Act. See *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). If after meeting and negotiating with one another in good faith the parties are unable to agree on the terms of a mandatory subject of bargaining they are said to have reached "impasse." *West Hartford Education Ass'n v. DeCourcy*, 295 A.2d 526, 541-423 (Conn. 1972). Under PNA when good faith negotiating has reached impasse and the impasse procedures set forth in K.S.A. 72-5427 have been completed, the employer may take unilateral action on the subjects upon which agreement could not be reached. *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, Case No. 75-CAE-12/13-1991, p. 29 (Feb. 10, 1992).

The duty to bargain does not require an employer to agree to a proposal, or require the making of a concession, or yield a position fairly maintained. *N.L.R.B. v. General Electric*, 418 F.2d 736, 756 (2nd Cir. 1969). The public employer, if it negotiates in good faith, retains the ultimate power to say "No," and "take such action as it deems in the public interest, including the interest of the professional employees involved." K.S.A. 72-5428(f). On the other hand, the parties are obligated to do more than merely go through the formalities of negotiation. There must be a serious intent to adjust differences and to reach an acceptable common ground. See *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801 (1983). To conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would violate K.S.A. 72-5423(a). Sophisticated pretense in the form of apparent bargaining, sometimes referred to as surface bargaining, will not satisfy a party's duty under PNA. "[Bad faith bargaining] is prohibited though done with sophistication and finesse. . . . [T]o sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

As the Court stated in *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), in a case where the parties "got nowhere" through negotiations, the question is:

"whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith, but was unable to arrive at an acceptable agreement with the union."

Determination of that question is inevitably difficult, since it generally requires the drawing of inferences concerning a state of mind from many facts, no one of which would have great significance

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if it stood alone.² The problem, therefore, in resolving a charge of lack of good faith in bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit that he intentionally failed to act in good faith, his motive must of necessity be ascertained from circumstantial evidence. *N.L.R.B. v. Patent Trader*, 415 F.2d 190, 197 (2nd Cir. 1969).

Certain specific conduct may constitute "*per se*" violations of the duty to bargain in good faith since they in effect constitute a "*refusal to negotiate in fact.*" Absent such evidence the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual acts. *General Electric*, supra at p. 756. While specific conduct alone may not amount to a "*per se*" failure to bargain in good faith, it may, when considered with all of the other evidence, support an inference of bad faith. *Continental Insurance Co. v. N.L.R.B.*, 86 LRRM 2003, 2006 (2nd Cir. 1974).

With this overview in mind, let us proceed to an examination of each of the charges contained in the instant matter.

ISSUE 1

Whether the complained-of actions of Employer Unified School District 241 Board of Education, telling Petitioner's negotiating team that the Board would not negotiate any further until the Board's salary offer was taken to the unit's rank and file, constituted a violation of K.S.A. 72-5430(b)(1)?

² In addition, there is a tension between the statutory obligation to "enter into professional negotiations", K.S.A. 72-5423(a), which such negotiations are defined by the Act to require "meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service", K.S.A. 72-5413(g), and the proviso that such obligation does not compel either party to agree to a proposal or require the making of a concession. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV.L.REV., 1401, 1415-16 (1958).

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Petitioner Wallace County Teachers Association first urges that acts of the Employer, e.g., telling Petitioner's negotiating team that it would not negotiate further until the Board's salary proposal was taken to the unit's rank and file for a vote constituted an attempt to coerce the teacher negotiating team, violating K.S.A. 72-5430(b)(1). "The Board is guilty of 'interfering' or 'coercing' the teachers if one attributes to these words their normal meaning . . . [b]oard members Kuhlman and Keller interfered with . . . an internal issue . . . [and] made a demand they had no right to make." Petitioner's Proposed Findings of Fact and Conclusions of Law, Case No. 72-CAE-6-2004, p. 14.

Respondent disagrees:

"[Petitioner] presented testimony . . . that the Board 'asked them 'very strongly' to take the Board's salary offer to the rank and file.' What exactly does 'very strongly' mean? [Petitioner] presented Carol Johnson who testified she 'took' the Board request as an 'ultimatum'. There was testimony that Virgil Fischer inquired of the Board if they were 'mandating' that the salary offer be taken to the rank and file. All of this testimony is suppositional at best. The record is manifestly clear that the Board did not mandate or require anything of the Teachers; the Board merely requested that the salary information be shared with all teachers. Making a request is not interference and the record establishes that the Board continued to negotiate with the Teacher team in an attempt to reach an agreement."

USD 241 Proposed Findings of Fact Proposed Conclusions of Law and Memorandum Brief in Support, Case No. 72-CAE-6-2004, pp. 15-16.

As noted in a previous order of the Secretary, the United States Supreme Court's decision in *NLRB v. Insurance Agents International Union*, 361 US 477 (1960), affirmed the principle that economic power goes hand-in-hand with reasoned discussion in determining the outcome of private-sector collective bargaining negotiations. In that case the Court held the National Labor Relations Board ("NLRB") could not find a lack of good-faith bargaining by a party solely because tactics

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designed to exert economic pressure were employed during bargaining. The *Insurance Agents* case involved charges against a union for violation of its duty to bargain in good faith based upon the union's use of harassing tactics while collective bargaining was in progress. The employees did not engage in conventional strike activities. Instead, they refused to solicit new business, refused to comply with reporting procedures, reported to work late, engaged in sit-in-mornings, distributed union leaflets, solicited policyholders' signatures directed to the company, and engaged in other harassing tactics. The District of Columbia Circuit Court reversed the NLRB finding of an unfair labor practice, and found such action did not constitute a *per se* violation of Section 8(b)(3). The Supreme Court affirmed, recognizing that the use of such pressure is not in and of itself inconsistent with the duty to bargain in good faith.

The Supreme Court articulated a definition that went on to become a classic description of the American collective bargaining process:

“[C]ollective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth. . . . The parties -- even granting the modification of views that may come from a realization of economic interdependence -- still proceed from contrary, and to a certain extent antagonistic viewpoints and concepts of self interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system . . . [T]he truth of the matter is . . . the two factors - necessity of good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms - exist side by side.” *Id.* at 488-89. (Emphasis added).

NLRB v. Insurance Agents International Union, 361 US 477, 488-489 (1960).

Economic considerations are the primary constraints on the scope of collective bargaining in the private sector.

“Every decision of the private sector employer has economic consequences. While the private sector employer undoubtedly offers some product or service, the continued offering of the product or service is contingent upon a favorable economic position. Like every other private sector decision when reduced to its common denominator, collective bargaining is merely a method to determine the employee's share of the economic pie. All employee demands have an economic impact on the employer. The employer is aware of this economic impact and is motivated by economic constraints at the bargaining table. It is the actual, perceived, or desired economic position of the private sector employer which draws the line during bargaining.”

Collapse of the bargaining process sets the stage for the use of employee economic weapons. The most common form of economic pressure is the strike. In the private sector, where commercial gain is the goal on both sides, the motive for agreement in a labor-management dispute is the fear on both sides of a strike. One side fears loss of production, and other side fears the loss of wages.

Probably the most significant distinction between the public and private sectors is the long-standing and universally followed prohibition against public employee strikes. K.S.A. 72-5423(c) specifically provides:

“Nothing in this Act, or the act of which this section is amendatory, shall be construed to authorize a strike by professional employees.”

Pursuant to K.S.A. 72-5430(c)(5) it is a prohibited practice for professional employees or employee organizations to:

“[A]uthorize, instigate, aid or engage in a strike or in picketing of any facility under the jurisdiction and control of the board of education.”

Thus while the strike in the private sector performs the necessary function of bringing pressure to bear on both sides to resolve their disputes, the PNA's statutory ban on strikes denies professional employees a powerful economic weapon available to private sector employees. Thus, where professional employees are denied the right to strike, another form of incentive for agreement becomes critical.

In contrast to the private sector model, the goal of the employer in the public sector is not commercial gain. As the Pennsylvania court stated, in *Pa. Labor Rel. Bd. v. State College Area School Dist.*, 337 A.2d 262, 264 (1975):

“Employers in the private sector are motivated by the profit to be returned from the enterprise whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible.”

The crucial difference is that in the public sector the Memorandum of Agreement is not a private decision, but a governmental decision; it is not so much a contract as a legislative act. From the employer's viewpoint, the collective agreement is not an economic decision but a political decision requiring that public policy choices for the allocation of scarce resources be shaped through political processes. The public employer must listen, consider and respond to conflicting viewpoints from all groups in the community, including professional employees. The determination of public policy is a multilateral process in which many public interests participate. Consequently, collective bargaining in the public sector is properly and inevitably political. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 TOLEDO L.REV. 265, 266 (1987). In the public sector the operative constraint is politics, not economics.

While economic pressure goes hand-in-hand with the collective bargaining process in private sector negotiations, with the ban on strikes by public employees, political pressure becomes the most effective means to motivate public sector parties to reach agreement. Here it appears to the presiding officer that the Board's action both vocalizing its desire to force attendance of teachers at Board of Education meetings and its requested mandate that the teacher negotiators take its "final" offer to its members for a vote were designed to bring pressure on teacher negotiators to work out a negotiated agreement with the Board. It may have appeared to the Board that rank and file were not adequately apprised of the status of negotiations and the Board may have believed that if the rank and file were adequately apprised, an agreement could be reached. As with economic pressure in the private sector, the use of political pressure during public sector professional negotiations is not in and of itself inconsistent with the duty to bargain in good faith. This statement of the law is consistent with the Secretary's holding in *U.S.D. No. 259 v. NEA Wichita*, 72-CAEO-1-1990 (Dec. 1990), wherein informational picketing by the employee organization during negotiations was found not to constitute a prohibited practice under the Professional Negotiations Act.

In the instant matter, however, Respondent threatened that it would negotiate no further unless the Petitioner's bargaining team would take a proposal back to the members for their vote. Far from the mere exertion of political pressure, the Board's acts were suggestive of a mindset consistent with an intent willfully to interfere, restrain or coerce professional employees in the exercise of rights granted by the Professional Negotiations Act, that is, the right "to participate in

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professional negotiations with boards of education *through representatives of their own choosing*". By trying to circumvent the teachers' chosen bargaining representatives, the Board of Education evidenced a state of mind consistent with an intent to do that which is prohibited by the Act.

Each party to collective negotiations has both the right to select its representatives for bargaining and the duty to deal only with the chosen representative of the other party. See *Junction City Police Officers Association v. City of Junction City*, 75-CAE-4-1992 (July 31, 1992); *Mine Workers Local 1854*, 238 NLRB 1583 (1980); *Frito-lay, Inc. v. Teamsters Local 137*, 623 F.2d 1354 (9 CA 1980). K.S.A. 72-5430(b) makes it a prohibited practice for a public employer willfully to:

“(5) refuse to negotiate in good faith with representatives of recognized employees’ organizations as required in K.S.A. 72-5423 and amendments thereto;”

The statute precludes an employer from interfering with an employee organization's choice of representative for the purposes of professional negotiations. Interference includes circumventing the other party's designated negotiations representative and dealing directly with the professional employees in the bargaining unit or the members of the governing body.

In *Unified School District 501, Topeka, Kansas v. NEA-Topeka*, 72-CAEO-1-1982 & 72-CAEO-3-1981 (July 19, 1983), the issue of bypassing the public employer representative was addressed. The Secretary determined in that case that the bypassing of the board of education's chosen negotiations representative through the employee association directly contacting board members to discuss subjects of negotiation constituted a violation of K.S.A. 72-5430(c)(2) by interfering “with respect to selecting a representative for the purposes of professional negotiations or the adjustment of grievances.” As the Secretary concluded:

“In summary, it is clear that both parties have the right to designate a representative for negotiations purposes. Furthermore, it is a prohibited practice for either party to interfere with the other party's selection of their representative.

It is a well-established principle that the designation of a representative by the parties is accompanied by rights of exclusivity for negotiations purposes. The examiner is of the opinion that the legislature intended to give both parties the right to exclusive representations. . . .

In the instant case, NEA-Topeka claims that the association retains the right to communicate directly with the board, regarding negotiation matters, thereby circumventing the designated representative of the board. . . . The examiner is of the opinion that the legislature fully intended to embody the general principles of labor relations when they enacted the Professional Negotiations Act. The legislation protects the rights of teachers to organize and negotiate, through representatives of their own choosing. The school board also has the right to designate a representative. . . . Most importantly, once a school board has designated a representative, that representative is the exclusive representative of the board for negotiations purposes, unless the board indicates to the contrary.

. . . [T]he examiner believes that the association cannot be negotiating in good faith with the representative of the board if it is simultaneously negotiating directly with the Board. This would also deny the Board of the right to designate a representative for negotiation purposes; a right expressly granted by the statute.”

In similar fashion, the presiding officer finds in the instant matter that the Board's stated and reiterated directive that teacher negotiators take its final offer to the members was indicative of a state of mind consistent with an intent to interfere with the teachers' statutorily granted right to designate the bargaining unit's own representatives for the purpose of negotiations. Respondent's actions are contrary to, and prohibited by, K.S.A. 72-5430(b)(1) and constitute interference with exercise of rights granted by the Professional Negotiations Act.

ISSUE 2

Whether the complained-of actions of Employer Unified School District 241 Board of Education, unilaterally changing the compensation paid for a supplemental contract for Student Council sponsor, constituted a *per se* violation of K.S.A. 72-5430(b)(5)?

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Petitioner Wallace County Teachers Association next asserts that by unilaterally changing the compensation set for the supplemental contract for student council sponsor, Employer violated K.S.A. 72-5430(b)(5).

In administering the state's labor relations laws, this agency has long recognized that the history of employer-employee relations in the public sector reveals an overriding concern that collective bargaining as it exists in the private sector is irreconcilable with the nature of government. See *Brewster NEA v. Unified School District 314, Brewster, Kansas, 72-CAE-2-1991* (January 29, 1991). The right to associate and bargain collectively about wages and working conditions did not exist at common law or in equity. *Public Employee Labor Law*, Section 11.2 at p. 58. Early thought on the subject concluded that the transplantation of traditional collective bargaining into the governmental process would impair the decision-making power of elected officials seeking to represent the public interest. This position is exemplified in the language of the New York court in *Railway Mail Association v. Murphy*, 44 N.Y.Supp.2d at 607 (1943):

"To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen."

It is clear the state court shared the prevailing federal attitude that labor organizations were an anathema to the sound functioning of the governmental process. In 1937 President Roosevelt said:

"A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is

unthinkable and intolerable." Vogel, *What About the Rights of the Public Employee?*, 1 Lab.L.J. 604, 612 (1950).

The Kansas Supreme Court shared this view as late as 1964. In *Wichita Public Schools Employees Union v. Smith*, 194 Kan. 2 (1964), the Court stated:

"The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining or contract.

"The objects of a political subdivision are governmental - not commercial. It is created - for public purposes and has none of the peculiar characteristics of enterprises maintained for private gain. It has no authority to enter into negotiations with labor unions concerning wages and make such negotiations the basis for final appropriations. Strikes against a political subdivision to enforce collective bargaining would in effect amount to strikes against the government.

"The statutes pertaining to employer and employee relations must be construed to apply only to private industry, at least until such time as the legislature shows a definite intent to include political subdivisions. . . "

"It appears to be a uniform rule that wages, hours and working conditions of governmental employees are to be fixed by statutes ordinances or regulations and that state laws which in general terms secure the rights to employees to enter into collective bargaining agreements with respect to such matters are not intended to apply to public employees." *Id.*, p. 5.

Public employees have the constitutional right to promote, associate with and be represented by a union. The First Amendment to the U.S. Constitution has been held to protect these rights. However, it does not afford public employees the right to bargain or impose an obligation on the public employer to recognize or bargain with their organizations. *Smith v. Arkansas State Highway Comm'n Employees Local 1315*, 441 U.S. 461 (1979). The right of public employees to associate may be constitutionally protected, but such right could not supersede the public interest.

In the absence of laws specific to the subject, governments were successful in claiming in the courts that collective bargaining would amount to an abrogation of governmental discretion, that organization of personnel and determination of pay conditions were governmental functions, and that governmental functions might not be delegated. Bargaining, agreements, and/or strikes would be intolerable invasions on the sovereign's absolute authority to act in the public interest.

While a few individual states began to grant public employees the right to organize and negotiate by statute, general acceptance of the concept of a legal duty on the part of the employer to bargain in good faith was facilitated by two events in 1962 President Kennedy's Executive Order 10988 covering federal service and a new law in Wisconsin. By 1987 thirty-four states had enacted collective bargaining statutes covering all or some occupational groups. *Public Sector Bargaining, Public Sector Labor Legislation An Evolutionary Analysis*, p. 189.

This shift has transformed the earlier concept of the government solely as sovereign into government as a dual entity; employer and sovereign. In the first, government as employer is delegating authority to bargain and reach agreement. In the second, as sovereign, the government retains ultimate right to act and therefore the responsibility to resolve conflicts over issues which may be seen to fall within the scope of bargaining, yet which also concern wider political/public interest. It is with this understanding of public sector labor relations that interpretations of the Kansas Professional Negotiations Act must be drawn.

The phrase "terms and conditions of professional service" has caused the most difficulty in resolving negotiability disputes. This difficulty is further complicated by the statutorily specified management prerogatives found in K.S.A. 72-5423(a):

"Nothing in this act. . . shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education. . . "

This reservation creates, in some instances, an overlap problem. By this is meant a given subject is arguably both a term and condition of employment and a prerogative which should be reserved to management. As the Illinois court noted in *Decatur Bd. of Ed. v. Ed. Labor Bd.*, 536 N.E.2d 743 (Ill. App. 4 Dist. 1989):

"Too many factors in school operations overlap, requiring a method for deciding between managerial exclusivity and employee participation through bargaining."

The difficulty of making bright-line distinctions between mandatory and non-mandatory subjects of negotiation was acknowledged by the Florida Public Employee Relations Commission in *Duval Teachers United v. Duval County School Board*, (quoted in 19 STETSON L. REV., *The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model*, p. 511 (1990)):

"Conceptually, the scope of bargaining can be viewed as a continuum. The management rights of a public employer . . . are at one pole; the bargaining rights of the employees . . . are at the other. Each proposed provision for the collective bargaining agreement falls somewhere along that continuum. At some point in the negotiating process it will be determined that the employer has an absolute obligation to negotiate regarding certain proposals. By the same standard, at some point in the negotiating process it will be determined that the employer's discretion in respect to certain proposals is beyond question."

Two standards have been developed to resolve this conflict. The overlap problem has been attacked by classifying a subject as mandatory if it is significantly related to wages, hours, and other

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terms and conditions of employment. *Fibreboard Paper Prods. Corp v. NLRB*, 379 U.S. 223 (1964).

As stated by the Court in *City of Orlando v. Florida PERC*, 435 So.2d 275 (5th DCA Fla. 1983):

"[I]n determining whether a matter should be deemed a mandatory bargaining subject, the courts. . . have recognized a legal distinction between those subjects which have a material or significant impact upon wages, hours, or other conditions of employment, and those which are only indirectly, incidentally, or remotely related to those subjects. . . [S]ince practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment."

Id. at 278-279.

Under the "significantly related" test the focus of the inquiry is upon the conditions of employment and the extent to which changes to a disputed subject affect a mandatory term and condition of employment. This standard has been criticized because it does not properly recognize the competing interests of the public employer and employee, while giving undue weight to conditions of employment. As the court observed in *Decatur Bd. of Ed. v. Ed. Labor Bd.*, 536 N.E.2d 743 (Ill.App. 4th Dist. 1989):

"Almost every policy decision made by a school district could be said to have a direct effect or, at a minimum, an 'impact' on conditions of employment." *Id.*, p. 745.

The second test to emerge that addresses the overlap problem is the balancing test which measures the interests of the public employer and employees. This is the approach favored by most courts and labor boards. See e.g. *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981); see generally *Annot. Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84

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A.L.R.3d 242 (1978). On the one side of the balance is the relationship the subject bears to wages, hours and working conditions (employee interest). On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. *Spokane Educ. Ass'n v. Barnes*, 517 P.2d 1362 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222-213 (1964)). Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. *Local 1052 v. Public Emp. Rel. Com'n*, 778 P.2d 32, 35 (Wash. 1989).

The Pennsylvania court in *Dept. of Transp. v. Labor Relations Bd.*, 543 A.2d 1255 (Pa. 1988)

explained the balancing test in this manner:

"[W]here an item of dispute is a matter of fundamental concern to employees' interest in wages, hours and other items and conditions of employment, it is not removed as a matter subject to good faith bargaining . . . simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole." *Id.*, pp. 1256-1257.

The court concluded:

"In striking this balance the paramount concern must be the public interest in providing for effective and efficient performance of the public service in question." *Id.*, p. 1256.

This approach was specifically adopted by the U.S. Court of Appeals for the District of Columbia in *Newspaper Build of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), and appears to be the appropriate test to give proper interpretation to the statutory provisions of the Kansas Professional Negotiations Act. Such determination is consistent with the philosophy

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adopted by the Kansas appellate courts. In determining what areas are proper subjects for negotiation and agreement under the Professional Negotiations Act, the Kansas Supreme Court in *National Education Association v. Board of Education*, 212 Kan. 741 (1973) stated:

“The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole.” *Id.*, p. 753.

The court similarly adopted a balancing test to determine the negotiability of subjects under the Kansas Public Employer-Employee Relations Act. *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA*, 233 Kan. 801, Syl. ¶7 (1983).

The three-step balancing test adopted by the court in *San Mateo City School Dist. v. PERB*, 663 P.2d 523 (Cal. 1983) is the appropriate test for application under the Kansas Professional Negotiations Act:

“[A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.” *Id.*, p. 528.

The balancing test must be applied on a case-by case and item-by-item basis. *Dept. of Transport. v. Labor Relations Bd.*, 543 A.2d 1255, 1257 (Pa. 1988). In the instant matter, however, such an analysis seems superfluous. The legislature has defined “terms and conditions of professional service” to encompass “salaries and wages, including pay for duties under supplemental contracts”. K.S.A. 72-5413(l). If a topic is by statute made a part of the terms and conditions of

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professional service, then a topic is by statute made mandatorily negotiable. *NEA-Wichita v. U.S.D. No. 259*, 234 Kan. 512, Syl. 5 (1983). Under K.S.A. 72-5413(I) pay for duties under supplemental contracts is a mandatorily negotiable topic.

The Professional Negotiations Act places an obligation upon boards of education to meet and negotiate in good faith with their professional employees' exclusive representative regarding the terms and conditions of their employment. K.S.A. 72-5423(a). Under K.S.A. 72-5430(b)(5), it is a prohibited practice for a Board of Education willfully to refuse to negotiate in good faith with its professional employees' chosen bargaining representative. A well established labor law principle is that unilateral changes by an employer in terms and conditions of employment are prima facie violations of its professional employees' collective bargaining rights. *NLRB v. Katz*, 369 U.S., 736 (1962), ("Katz"). It is also well settled, however, that a unilateral change is not *per se* a prohibited practice. As the court concluded in *NLRB v. Cone Mills, Corp.*, 373 F.2d 595 (4th Cir. 1967):

"Thus, we think it is incorrect to say that unilateral action is an unfair labor practice per se. See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958). We think it more accurate to say that unilateral action may be sufficient, standing alone, to support a finding of refusal to bargain, but that it does not compel such a finding in disregard of the record as a whole. Usually, unilateral action is an unfair labor practice -- but not always."

There are two underlying reasons for this position. First, because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a "mandatory" bargaining item. *Allied Chem. & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 159 (1971). Second, since only

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unilateral changes are prohibited, an unfair labor practice will not lie if the "change" is consistent with the past practices of the parties. R. Gorman, *Basic Text on Labor Law*, 450-54 (1976).

After a negotiated agreement has been reached between a Board of Education and the exclusive representative of professional employees pursuant to K.S.A. 72-5413 *et seq.*, then during the time that agreement is in force, the Board of Education, acting unilaterally, may not make changes in items included in that agreement, *Kinsley-Offerle NEA v. Unified School District No. 347*, Kinsley, KS, 72CAE-5-1990, or changes in items which are mandatorily negotiable, but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included in the resulting agreement. *NEA-Wichita v. U.S.D. 259*, 234 Kan. 512 (1983).

Whether the unilateral change is viewed as beneficial or detrimental is irrelevant to the determination of whether there was a unilateral change in terms and conditions of employment. In *School Bd. of Indian River County v. Indian River County Education Ass'n, Local 3617*, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

"A unilateral increase in benefits could foreseeably do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."

Additionally, the United States Supreme Court explained in *Katz*, *supra*, 369 U.S. at 743, even in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively with the chosen representatives of his employees in much the same manner as a flat refusal to bargain.

The reason that unilateral action is prima facie unlawful is in the high degree of probability that it may frustrate a bargaining opportunity. Even if there has actually been a unilateral change in a term and condition of employment, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain. As the court noted in *Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51*, 353 N.W.2d 917, 921 (Minn. 1984):

“The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change 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 certified employees' organization's receipt of information 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); *NLRB v. Alva Allen Industries, Inc.*, 369 F.2d 310, 321 (8th Cir. 1966). The presumption that an employer's unilateral change in a term and condition of employment deprived the union of its right to bargain is rebutted when the union fails to request negotiation on the proposed change. *Cone Mills*, supra.

A corollary to this rule is that a certified employees' organization's failure to demand negotiations regarding a change in a term or condition of employment will not constitute waiver of the right to negotiate unless the record shows that the employer gave both adequate and timely notice of its intended action. See *Cone Mills*, supra. And, while the notice given need not be formal, it

must be sufficient under the circumstances to inform the union a decision has been made, or that one is imminent, and the specifics of the change, *before that decision is implemented*

Respondent asserts that the Professional Negotiations Act does not require the Board of Education to negotiate with Petitioner over the student council sponsor's supplemental salary because the PNA does not apply to non-bargaining unit employees and the individual holding the supplemental for student council sponsor at the time of the actions here in question was a member of staff not included in Petitioner's bargaining unit. *See generally*, USD 241 Proposed Findings of Fact Proposed Conclusions of Law and Memorandum Brief in Support, CAE-72-6-2004, pp. 24-31. The PNA as a whole, according to Respondent, "do[es] not require the Board to negotiate with the recognized professional employees organization's representative on terms and conditions of employment for anyone other than professional employees." Respondent misconstrues the Act's mandates by ignoring a critical fact.

In the instant matter, any member of the bargaining unit can serve in the role of student council sponsor. Finding of Fact No. 28. Historically, both the Board and Petitioner have recognized and honored their statutory obligation to bargain with regard to supplemental salaries, including that for the student council sponsor position. Finding of Fact No. 22. For the time period here in dispute, the parties Memorandum of Agreement reflected that the student council sponsor supplemental contract called for payment of \$357.50 for duties attendant to that function. *Id.* However, for whatever reason, the position was not filled by a certified staff member during the contract year 2003-2004 negotiations period, and apparently for some period of time precedent

thereto. *See* Findings of Fact Nos. 27-28. For two consecutive years, a member of the school district administration had encouraged the Board to increase the supplemental pay for student council sponsor, to reflect additional summer camp duties, but the Board did not notice up the issue for negotiations with Petitioner. Findings of Fact Nos. 23-24. Subsequently, the Board unilaterally increased the student council sponsor supplemental pay amount. Finding of Fact No. 25.

The critical fact alluded to above as being ignored by Respondent's argument is that the student council sponsor duties are open to any member of Petitioner's bargaining unit. Assuming arguendo that it is not sufficient, as Respondent suggests, that supplemental pay is delineated by the Act as a mandatorily-negotiable term and condition of professional service, the fact that any member of the unit can serve as student council sponsor makes such pay a term and condition of service and mandatorily-negotiable by application of the balancing test set out above: Supplemental pay for any position open to members of the bargaining unit is logically and reasonably related to hours, wages or an enumerated term and condition of employment, the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives, including matters of fundamental policy, essential to the achievement of the district's mission.

As noted above, a unilateral change is not *per se* a prohibited practice for two reasons. First, the duty to bargain exists only when the matter concerns a term and condition of employment.

Therefore, it is not unlawful for an employer to make unilateral changes when the subject is not a "mandatory" bargaining item. As previously addressed, supplemental pay is a mandatorily negotiable item, even where, as here, the person holding the supplemental was not a unit member, because the duties can be held by unit members. Second, since only unilateral changes are prohibited, an unfair labor (prohibited) practice will not lie if the "change" is consistent with the past practices of the parties. Respondent makes just such an argument in the instant matter.

Respondent urges that "the parties have a custom and practice of allowing the Board to determine supplemental salaries for Rule 10 employees." USD 241 Proposed Findings of Fact Proposed Conclusions of Law and Memorandum Brief in Support, CAE-72-6-2004, p. 31.

"Once a custom and practice has been established the proper venue for change is the negotiations process, not a prohibited practice. The Board has determined the Stuco position salary at least two years in a row and the basketball salary prior to the Stuco position. There is no question of the past practice of determining Rule 10 salaries. A past practice exempts the parties from the negotiations process on mandatory topics as long as the practice continues as it has in the instant case."

Id., p. 32 (citing to *Liberal-NEA v. U.S.D. No. 480*, Case No. 72-CAE-8-1992 (March 5, 1993)).

A past practice is a consistent prior course of conduct between the parties to a collective bargaining agreement that may assist in determining the parties' further relationship. *Lindskog v. U.S.D. 274*, Case No. 72-CAE-6-1992, at syl. ¶ 8 (December 11, 1992). In *Lindskog* the Kansas Secretary of Human Resources, applying the Kansas Professional Negotiations Act, recognized four situations in which evidence of past practices may be used to ascertain the parties' intentions. These four situations are:

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

The last of these situations appears applicable here.

Two views relative to the impact of past practices upon a memorandum of agreement have developed. Under the first view, it is reasoned that the only restrictions placed upon the parties are those contained in the written agreement. Each party continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. If an agreement does not require the continuance of existing conditions, a past practice would have no binding force regardless of how well established it may be. Under this view, the Respondent may not disregard the specific supplemental salary schedule set out in the negotiated agreement.

The second view emphasizes past practices as part of the contract, particularly those practices which have come to be accepted by employees and the employer alike, and have thus become an important part of the employment relationship. The written agreement is thought to be executed in the context of this working environment, and on the assumption that existing practices will remain in effect. Therefore, to the extent that existing practices are unchallenged during negotiations, the parties must be held to have adopted them and made them a part of their agreement.³ Cox and Dunlop, in an

³ The implication here that existing practices must be continued until changed by mutual consent during the term of the memorandum of agreement or by repudiation during negotiations, is drawn from the nature of the agreement itself and from the collective bargaining process.

"It is more than doubtful that there is any general understanding among employers and unions as to the viability of existing practices during the term of a collective agreement. . . . I venture

article dealing with national labor policy, urged that "a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed." See Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV.L.REV., 1097, 1116-17 (1950).

The latter is the more prevalent view. Smith, Merrifield & Rothschild, *Collective Bargaining and Labor Arbitration*, p. 253 (1970). The reasoning behind this view begins with the proposition that the parties have not set down on paper the whole of their agreement. As was observed "[o]ne cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." Cox, *Reflections upon Labor Arbitration*, 72 HARV.L.REV. 1482, 1499 (1959).⁴ Thus the public employee

to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that 'all existing practices, except as modified by this agreement, shall be continued for the life thereof, unless changed by mutual consent.' And I suppose that execution would also be blocked if the converse provision were demanded, namely, that 'the employer shall be free to change any existing practice except as he is restricted by the terms of this agreement.' The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitment, and the relentless search for cost-saving changes. . . ." Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV.L.REV. 999, 1012 (1955).

⁴ It is also argued that no matter how clear the language of the collective bargaining contract seems to be, it does not always tell the full story of the parties' intentions. Anyone familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics. It is hardly surprising, therefore, to find in the typical contract an "inartistic and inaccurate use of words that have a precise and commonly accepted meaning in law." Aaron, *The Uses of the Past in Arbitration*, *Arbitration Today*, Proceedings of the Eighth Annual Meeting of the National Academy of Arbitrators 6, 11 (1955). The language used in a contract may merely be attributable to an inexperienced or over-eager draftsman. Where contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties. The past practices of the contracting parties are entitled to great weight in determining the meaning of ambiguous or doubtful contractual terms. See *Hall v. Bd. of Ed.*, 593 A.2d 304, 307 (N.J. 1991). Absent any original intention with respect to this problem, the long-standing practice should be controlling.

organization-board of education contract includes not just the written provisions stated therein but also the understandings and mutually accepted practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain.

Archibald Cox not only agrees with this view but states the argument more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

“Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.” See Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV.L.REV., 1097, 1116-17 (1950).

This view has apparently been accepted by the U.S. Supreme Court. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), the Court concluded the collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.” Mr. Justice Douglas, speaking for the majority in the *Warrior & Gulf* case, reasoned a collective bargaining agreement may encompass more than what has been reduced to writing so in interpreting the collective bargaining agreement, one may look for guidance to various sources:

“The . . . source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it.”

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See also *Wyo. Val. West Educ. v. Wyo. Val. West Sch.*, 500 A.2d 907 (Pa. 1985). The common law of the workplace would include, at the very least, past practices of the parties.

To establish a past practice it must be proved both parties knew of the practice and have acquiesced in it. Evidence of mutual intent to adopt the course of conduct must be shown in order to sustain the practice. Five indices that assist in determining this mutual acceptance are: (1) clarity and consistency throughout the course of conduct; (2) longevity and repetition creating a consistent pattern of behavior; (3) acceptance of the practice by both parties; (4) mutuality in the inception or application of the practice; and (5) consideration of the underlying circumstances giving rise to the practice. *Lindskog*, at syl. ¶ 10; *R.I. Court Reporters Alliance v. State*, 591 A.2d 376, 379-80 (R.I. 1991).

Whether a past practice has been established, and the exact nature of such practice, is a question of fact for the presiding officer. *Lindskog*, at p. 44; *Unatego Non-Teaching v. PERB*, 522 N.Y.S.2d 995 (1987). In the instant matter, the record failed to establish that such a practice as claimed existed. Although Respondent makes much of the supposed past practice with regard to paying a Rule 10 basketball coach an amount other than that bargained for between the parties, the record conflicts with regard to the question of acquiescence in that practice by the Petitioner. While a witness for Respondent suggested no prior objection to basketball supplemental salary increase, testimony by Petitioner negotiating team member Dean Baum suggested that Petitioner did not acquiesce. Rather, Baum's credible testimony indicated that Respondent was advised by the teachers' negotiations committee chair that payment of an amount inconsistent with the MOA constituted a prohibited practice and that the parties subsequently negotiated the matter to their mutual satisfaction. See Finding

of Fact No. 29. With regard to Respondent's assertion that Petitioner acquiesced in prior unilateral payment of an extra-contractual amount of supplemental compensation to the student council sponsor, evidence established that none of the Petitioner's negotiators were aware of any instance of this prior to the July 14, 2003 Board meeting at which time the Board unilaterally increased this pay without prior advance notice that the issue was up for consideration. *See* Finding of Fact No. 25, 27. Clearly, if Petitioner representatives were unaware of deviation from the negotiated supplemental schedule, they cannot be said to have waived or acquiesced in such. By their actions requesting negotiation over the issue in subsequent bargaining sessions, Finding of Fact No. 26, and by its filing of the instant prohibited practice charge, Finding of Fact No. 45, Petitioner reaffirmed its disagreement with Respondent's position. Respondent's "past practice" argument is without merit.

"Whether an act or action constitutes a prohibited practice must be determined in each case based upon the facts and their effect on the negotiation process." *Garden City Educators v. U.S.D. No. 457*, 15 Kan. App. 187, 195 (1991). Supplemental pay, being a topic within the purview of "salaries and wages", a mandatorily negotiable term and condition of professional service, is itself a mandatory topic for negotiation. By its unilateral violation of the parties' negotiated agreement's supplemental pay schedule, that is, by increasing the pay for student council sponsor beyond that contained in the Memorandum of Agreement's salary schedule without first amending that provision through negotiations, or alternatively, by unilateral implementation following completion of good faith negotiation and statutory impasse procedures, Respondent's actions have the effect of circumventing the purposes for which the Act was designed, i.e., to promote stability in employer-

labor relationships between employer school districts and teachers organizations through negotiations over the terms and conditions of teachers' professional employment. By its action, Respondent unilaterally rejected negotiated terms concerning supplemental salaries previously determined and memorialized by the parties in their agreement thereby undermining the negotiating process and the Association's role as the teachers' exclusive bargaining representative. Moreover, if Respondent is allowed to fill low-paying supplemental positions with non-unit members and subsequently increase the position's pay to an amount more than double that of the negotiated agreement, allowing such action to stand undermines the negotiating process and the bargaining representative's role.

Under applicable law, Respondent's unilateral change to the mandatorily negotiable supplemental pay topic is a *per se* violation of its duty to negotiate in good faith. However, even were the law not to presume bad faith in such a unilateral violation, the record of this matter reveals independent evidence of Respondent's lack of good faith. See Findings of Fact Nos. 24-43. Respondent's unilateral violation of the parties' negotiated agreement's supplemental salary schedule constitutes a *per se* failure to bargain in good faith prohibited practice as defined by Kansas law.

In summary, where a board of education seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the board must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive

representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

In the instant matter, Respondent's unilateral change in a mandatorily negotiable term and condition of employment, i.e., pay for duties under the student council supplemental contract, constituted a statutorily prohibited action, a refusal to bargain in good faith, violative of K.S.A. 72-5430(b)(5).

ISSUE 3

Whether the complained-of actions of Employer Unified School District 241 Board member Larry Keller, advising at least one teacher that the teachers' negotiating team was not keeping rank and file members informed and advising that teachers should attend negotiating sessions, constituted a violation of K.S.A. 72-5430(b)(1)?

The petition filed in this matter asserts that a member of Respondent's board advised at least one member of the teachers' unit that their negotiating team was not keeping them well-informed about bargaining issues and urged teachers to attend. In doing so, the petition alleges, Respondent violated the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*

Statute provides that it is a prohibited practice for a board of education willfully to:

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

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

K.S.A. 72-5414 provides that:

"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."

Commonly referred to as an “interference” charge, this section of the PNA parallels K.S.A. 75-4333 of the Kansas Public Employer-Employee Relations Act and section 8(a)(1) of the Labor Management Relations Act. An interference charge “includes almost anything an employer might do that would tend to interfere with the statutory right to [labor union] representation.” Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KANS. L. REV. 243, 264 (1980).

Information presented on this charge, from which findings could be drawn, was relatively limited. See Findings of Fact Nos. 30, 31. Petitioner, as advocate for its position, has the burden of proof by a preponderance of substantial, competent evidence.⁵ Although the overall context and background of labor relations between the instant parties is supportive of Petitioner’s assertions, it is the finding and conclusion of the presiding officer that the evidence in this matter is not sufficient to sustain Petitioner’s burden of proof as to this question. Although Respondent’s board member’s remarks in question may well have been made to the unit member with an intent willfully to interfere with the exercise of rights protected by the Act, the explanation offered by the Board member raises a reasonable doubt regarding the exact contents of the statement and the intent with which it was made. Although certain actions of Respondent are found to be violative of K.S.A. 72-5430(b)(1), see, e.g., *ISSUE 1*, the evidence regarding *ISSUE 3* is insufficient to establish that the complained of action violates K.S.A. 72-5430(b)(1). Accordingly, this portion of Petitioner’s charges is dismissed.

⁵ For a more detailed discussion of the standards by which a prohibited practice charge of “interference” is to be judged, see *infra*, *ISSUE 6*, at p. 62-

ISSUE 4

Whether the totality of actions of Employer Unified School District 241 Board, e.g., telling Petitioner's negotiating team that the Board would not negotiate any further until the Board's salary offer was taken to the unit's rank and file, and, terminating negotiations and filing a unilateral impasse notice even though they had promised to meet with teachers one more time, were evidence of a refusal to negotiate in good faith, and constituted a violation of K.S.A. 72-5430(b)(5)?

The legislative parameters of the duty to bargain under the PNA are found in K.S.A. 72-5423(a):

"[W]hen such an [employees] organization is recognized, the board of education and the professional employees' organization shall enter into professional negotiations on request of either party at any time during the school year prior to issuance or renewal of the annual teacher's contracts."

K.S.A. 72-5413(g) defines "Professional negotiation" as:

"[M]eeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."

The Kansas Supreme Court in *Tri-County Educator's Ass'n v. Tri-County Special Ed.*, 225 Kan. 781, 783 (1979) has interpreted this to mean:

"Mandatorily negotiable items, when proposed by either party, must be negotiated in good faith by both parties."

K.S.A. 72-5430(b)(5) makes it a prohibited practice for a board of education or its designated representative willfully to:

"[R]efuse to negotiate in good faith with the representatives of recognized professional employees's organizations as required by K.S.A. 72-5423 and amendments thereto."

“Professional negotiations” as contemplated by the Kansas Professional Negotiations Act is something more than the mere meeting of the board of education with the recognized employee representative. The duty to negotiate or bargain in good faith is an “obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement” *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).⁶ This implies both “an open mind and a sincere desire to reach an agreement” as well as “a sincere effort . . . to reach a common ground.” *Id.*; see also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Herman Sausage Co.*, 43 LRRM 1090 (1958). “Professional negotiations” is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of “take it or leave it;” it presupposes a desire to reach ultimate agreement and thereby enter into a memorandum of agreement. A board of education must do more than sit down and chat. That the finder-of-fact must look beyond the fact that the employer met and entered discussions with the employees’ representative was succinctly stated in *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 46 (5th Cir. 1974):

“[M]erely meeting together or simply manifesting a willingness to talk does not discharge the federally imposed duty to bargain. (Citations omitted). Indeed, to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. (citations omitted).

⁶Where there is no Kansas case law interpreting or applying a specific section of PNA, the decisions of the national Labor Relations Board (“NLRB”) and of Federal courts interpreting similar provisions under the National Labor Relations Act (“NLRA”), 29 U.S.C. §151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state’s public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PNA. *Oakley Education Association v. USD 274*, 72-CAE-6-1992, p. 17 (December 16, 1992).

“Mechanically plodding through the forms of collective bargaining, therefore, does not suffice, for Congress has required the parties not simply to convene, but to meet and negotiate in a certain frame of mind - to bargain in good faith. Negotiating parties are thus statutorily adjured to enter discussions with an ‘open mind,’ and a sincere purpose to find the basis of agreement. . . . (citations omitted).”

The essential element is the intent to adjust differences and to reach an acceptable common ground, and the basic requirement of negotiating in good faith being that the parties must negotiate with the view of trying to reach an agreement. Morris, *The Developing Labor Law*, Ch. 13, p. 559 (1989). Specifically, good faith requires more than the proposal of a particular provision and absolute refusal to even consider modifications. *General Elec. Co. & Int’l Union of Elec., Radio & Mach. Workers*, NLRB 192 (1964). As Justice Frankfurter explained the concept of “good faith” in his concurring opinion to *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (1956):

“These sections [Section 8(a), (b) & (d), 29 U.S.C. § 151 (1985) of the National Labor Relations Act (“NLRA”)] obligate the parties to make an honest effort to come to terms; they are required to try to reach agreement in good faith. Good faith, means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness.”⁷

“Professional negotiations” refers to a bilateral procedure whereby the employer and the bargaining representative jointly attempt to establish the terms and conditions of professional service. The objective the Kansas legislature hoped to achieve by this process can be equated to that sought by the Congress in adopting the National Labor Relations Act (“NLRA”) as described by the

⁷As noted in *Oakley Education Association v. U.S.D. 274*, 72-CAE-6-1992, p. 19 (December 16, 1992): “It should therefore be noted that Section 8(d) of the NLRA and K.S.A. 72-5423(a) of the PNA place upon an employer a similar duty to bargain with the certified representative about employee wages, hours and other mandatory terms and conditions of employment. The language of K.S.A. 72-5430(a)(1) & (5) is almost identical to the language of Section 8(a)(1) and (5) of the NLRA.” Additionally, Section 8(b) prohibits similar

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U.S. Supreme Court in *H.K. Porter Co.*, 397 U.S. 99, 103 (1970):

“The object of this Act [the NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”

It is this type of “give and take negotiations” over terms and conditions of employment that the Kansas PERB has found to be required of the public employer under PEERA. *Local 1357, Service and Maintenance Unit vs. Emporia State University*, 75-CAE-6-1979, p. 3 (Feb. 18, 1980), and is equally required of a board of education under PNA.

When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of the professional negotiations process must be considered. *Duval County School Bd. v. Florida Public Employee Relations Comm.*, 353 So.2d 1244 (Fla. 1978). This “totality of conduct” is the standard through which the quality of negotiations is tested. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 169 (1941).⁸ “Although . . . state of mind may occasionally be revealed by declarations, ordinarily the proof must come by inference from external conduct.” Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1337, 1418 (1956). As Justice Frankfurter stated in his concurring opinion to *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (1956):

activities by an employee organization that are prohibited by K.S.A. 72-5430(b).

⁸The 'good faith' requirement of K.S.A. 72-5413(g) of the Professional Negotiations Act is also found in K.S.A. 75-4322(m) of the Public Employer-Employee Relations Act. The "totality of conduct" standard has been employed by the Kansas Public Employee Relations Board in considering charges of bad faith bargaining under PEERA. *Kansas Association of Public Employees v. State of Kansas, Adjutant General's Office*, 75-CAE-9-1990 (March 11, 1991).

“A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another’s state of mind. The previous relationship of the parties, antecedent events explaining behavior at the table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes the finding of absence of good faith one for judgement of the Labor Board . . .”

Except in cases where conduct fails to meet the minimum obligation imposed by law or constitutes an outright or per se refusal to bargain, all the relevant facts of a case are studied in determining whether the board of education or the recognized employee organization is bargaining in good faith.

In applying the “totality of conduct” standard, a party’s conduct is examined as a whole for a clear indication as to whether that party has refused to meet and confer in good faith. No single factor is usually relied upon as conclusive evidence that the party did not genuinely try to reach agreement. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 157 (J. Frankfurter, concurring 1956). One must evaluate the sincerity with which the employer undertakes negotiations by examining such factors as the length of time involved in negotiations, their frequency, progress toward agreement, and the persistence with which the employer offers opportunity for agreement. *NLRB v. Sands Mfg. Co.*, 91 F.2d 721, 725 (1938). In a law review article, a noted labor law commentator provides a summary of the “totality of conduct” test:

“In every case, the basic question is whether the employer acted like a man closed against agreement with the union. The Board can judge his subjective state of mind only by asking whether a normal employer, willing to agree with a labor union, would have followed the same course of action.”

Archibald Cox, *Good Faith Bargaining*, 71 HARV. L. REV. 1401, 1418-19 (1958).

The question of good faith involves subjective considerations that must be left to the inference-drawing function of the finder-of-fact. *N.L.R.B. v. Southwestern Porcelain Steel Corp.*, 317 F.2d 527, 528 (10th Cir. 1963). The question of whether a public employer has engaged in bad faith bargaining is essentially a question of fact. Since motivation is a question of fact, the presiding officer may infer improper motivation from either direct or circumstantial evidence. *N.L.R.B. v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985). An administrative agency empowered to determine whether statutory rights have been violated may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. *Republic Aviation Corp. v. N.L.R.B.*, 324 US 793, 800 (1944). In *Radio Officers'*, 347 U.S. 17 (1953), (*Radio Officer's*), the Court stated:

"An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experience officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries." Id. at 48-49.

A fact-finding body must have some power to decide which inferences to draw and which to reject. *Radio Officers'*, supra at 50. The finder-of-fact has the power to determine whether a party's conduct at the bargaining table evidences a real desire to come to an agreement, drawing inferences from the conduct of the parties as a whole. *Southwestern Porcelain*, supra at p. 528.

Applying the above principles to this case, an examination of the record as a whole finds a preponderance of the evidence supports Petitioner's position that Respondent failed to bargain in good faith. Viewed in its entirety the record reveals that Respondent's conduct in negotiations do not reflect a sincere desire to adjust differences and to reach an acceptable common ground.⁹

Much of the probative evidence on the intent of the Board of Education in regards to the 2003-2004 negotiations with Petitioner comes through the testimony of individuals involved. Credibility therefore becomes a determinative factor. The credibility of a witness is generally a matter for the determination of the finder-of-fact. *N.L.R.B. v. Ogle Protection Service, Inc.*, 375 F.2d 497, 500 (6th Cir. 1968). "It may be that the Board improperly gave what other persons would think undue credit to various circumstances. But it is not for [the court] to determine the credibility of witnesses; that is the function of the triers of the facts." *N.L.R.B. v. Aluminum Products Co.*, 120 F.2d 567 (7th Cir. 1941).

⁹ The Professional Negotiations Act (PNA) does not set forth the standard of proof necessary to establish a prohibited practice. The Kansas Supreme Court has indicated that an examination of the federal Labor-Management Relations Act, 29 U.S.C. 141-197, can "provide guidance" in interpreting the PNA. *U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources*, 247 Kan. 519, 531-32 (1990). 29 U.S.C. 160(c) provides in pertinent part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

"[T]he mere filing of charges by an aggrieved party . . . creates no presumption of unfair labor practices under the Act, but it is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence." *Boeing Airplane Co. v. National Labor Relations Board*, 140 F.2d 4323 (10th Cir. 1944). Findings of unfair labor practices must be supported by substantial evidence. *Coppus Engineering Corp. v. National Labor Relations Board*, 240 F.2d 564, 570 (1st Cir. 1957).

A similar position was adopted by the Kansas Supreme Court in *Swezey v. State Department of Social & Rehabilitation Services*, 1 Kan.App.2d 94, 98 (1977). From the demeanor of the witnesses, the directness and content of their responses to questions, experiences of the finder-of-fact, as well as from the record as a whole, the witnesses for the Petitioner generally appeared more credible than witnesses for the Respondent. Testimony of Petitioner's witnesses found more support in the record, including even information contained in minutes of the negotiations sessions produced and maintained by Respondent. Moreover, the testimony of Petitioner's witnesses generally appeared to establish occurrence of events inconsistent with good faith on the part of Respondent, while the testimony of Respondent's witnesses was largely circumscribed to more charitable characterizations of their actions and, in some instances, to outright denials of certain actions and events. On the record as a whole, it is the finding and conclusion of the presiding officer that the general characterizations and versions of events elicited from Petitioner's witnesses are more likely true than not. Standing alone the actions complained of and discussed above with regard to *ISSUE 1*, i.e., telling Petitioner it would negotiate no further unless its offer were taken to the rank-and-file for a vote, might not otherwise be sufficient to constitute a *per se* refusal to negotiate in good faith. However, when Respondent's conduct, generally detailed above in Findings of Fact Nos. 13-42, is viewed in its totality, it is the finding and conclusion of the presiding officer that Petitioner has established by a preponderance of substantial competent evidence that Respondent willfully refused to honor its statutory obligation to negotiate in good faith with regard to 2003-2004 contract talks.

ISSUE 5

Whether the complained-of actions of Employer Unified School District 241 Board in the charges detailed above at issue 1 constitute a violation of K.S.A. 72-5430(b)(5)?

The Kansas Professional Negotiations Act provides that it is 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. 72-5430(b)(5). K.S.A. 72-5414 provides that “[p]rofessional 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 service.” These provisions of the PNA mirror similar provisions contained in the labor relations statute governing public employer/employee labor relations in Kansas known as “PEERA”, or the Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.* In a “comprehensive article examining the nature and operation of PEERA”, *State v. Public Employees Relations Bd.*, 894 P.2d 777, 782, 257 Kan. 275 (1995), the article’s author, Raymond Goetz, observed that the “interference” provision of PEERA:

“really is a ‘catchall’ because of its broad general language. By its terms, it includes almost anything an employer might do that would tend to interfere with the statutory right to represent[ation]. The remaining . . . employer prohibited practices enumerated in [the Act] constitute specific applications of the sweeping prohibition against interference in [K.S.A.] 75-4333(b)(1).”

Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 264 (1980). Thus, Goetz concluded that “[a]ny conduct which would violate [K.S.A. 75-4333(b)] (2)

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through (8) would also violate [K.S.A. 75-4333(b)] (1).” *Id.* Such reasoning is equally applicable to the prohibited practices set forth in the framework of the Professional Negotiations Act, that is, conduct which would violate K.S.A. 72-5430(b)(2) through (8) also constitute a violation of K.S.A. 72-5430(b)(1). The presiding officer concludes that Respondent’s violations of K.S.A. 72-5430(b)(5), detailed above at ISSUES 2 and 4, are a violation of K.S.A. 72-5430(b)(1).

ISSUE 6

Whether the complained-of actions of Employer Unified School District 241 Board, by having Superintendent Scherling ask negotiators to sign a joint notice of impasse, constituted a violation of K.S.A. 72-5430(b)(1)?

As indicated above at *ISSUE 3*, Kansas law provides that it is a prohibited practice for a board of education willfully to:

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

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

K.S.A. 72-5414 provides that:

“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.”

K.S.A. 72-5430(b)(1) sets out what is commonly referred to as an “interference” charge. An interference charge “includes almost anything an employer might do that would tend to interfere with

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the statutory right to [labor union] representation.” Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KANS. L. REV. 243, 264 (1980).

This section of the PNA parallels K.S.A. 75-4333 of the Kansas Public Employer-Employee Relations Act and section 8(a)(1) of the Labor Management Relations Act. In light of the close parallel between these sections of the Professional Negotiations Act and the NLRA, it is appropriate to examine federal interpretations of the NLRA, where those decisions are consistent with the purposes of the Kansas Professional Negotiations Act. Of course, where the legislature has modified the Act, or otherwise departed from the NLRA's statutory scheme, it can be inferred that the legislature intended a different result, and, with respect to those areas where the Professional Negotiations Act differs from the NLRA federal authority may be of limited value.

As the Kansas Supreme Court stated in *National Education Association v. Board of Education*, 212 Kan. 741, 749 (1973):

“In reaching this conclusion we recognize the differences, noted by the court below, between collective negotiations by public employees and ‘collective bargaining’ as it is established in the private sector, in particular by the National Labor Relations Act. Because of such differences federal decisions cannot be regarded as controlling precedent, although some may have value in areas where the language and philosophy of the acts are analogous. See K.S.A. 1972 Supp. 75-4333(c), expressing this policy with respect the Public Employer-Employee Relations Act.”

K.S.A. 72-5430(b) sets forth eight categories of conduct which, if undertaken by the board of education or its representative, constitute a prohibited practice and evidence of bad faith in professional negotiations. However, such conduct is to be considered a prohibited practice only if

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engaged in “*willfully*.” The Professional Negotiations Act unfortunately does not define “*willful*.”

One must look to other sources for its meaning.

Black's Law Dictionary, 5th ed., provides the following definitions of the word “*willful*”:

“An act or omission is '*willfully*' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.”

In *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984), the Kansas Supreme Court defined the term “*willful act*” as it appears in the Kansas Wage Payment Law, K.S.A. 44-313 *et seq.*, as an act “indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another.”

As written, K.S.A. 72-5430(b) indicates a legislative intent to impose a requirement of some blameworthiness. This interpretation finds support in the fact that K.S.A. 72-5430(b) is patterned after section 158(a) of the federal Labor Management Relations Act which does not contain the word “*willfully*,” and which has been interpreted as not requiring specific intent. See *N.L.R.B. v. Burnup Sims, Inc.*, 379 U.S. 21 (1964). Accordingly, it would appear that the Kansas legislature added the word “*willfully*” to require that proof of a prohibited practice under the Kansas Professional Negotiations Act involve the showing of intent to do wrong, e.g., intent to do something the law

forbids or to do something with a bad motive, such as anti-union animus, or with indifference to the natural consequences of one's actions.

The question of whether action is taken in interference with activities protected by K.S.A. 72-5414 is essentially a question of fact. Since motivation is a question of fact, the Secretary of Human Resources may infer intent from either direct or circumstantial evidence. In *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1953), the Court stated:

“An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experience officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries.”

Id. at 48-49.

Interference and coercion are “subtle things” requiring “a high degree of introspective perception,” *Radio Officers'*, supra at 51, such that actual interference or coercion need not be proved but that a tendency is sufficient, and such tendency is sufficiently established if its existence may reasonably be inferred from the character of the alleged prohibited activity. A fact-finding body must have some power to decide which inferences to draw and which to reject. *Radio Officers'*, supra at 50.

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To determine whether the board of education's conduct interferes with, coerces or restrains professional employees in the exercise of rights protected by the Act, several inquiries must be made:

1. Are the professional employees engaged in protected activities as set forth in the Act?
2. Is there a reasonable probability that the employer's conduct will have an interfering, restraining or coercive effect on the professional employees?
3. To what extent must the employer's legitimate business motives be taken into account?

Louisburg Teachers' Association v. Unified School District No. 416, Louisburg, Kansas, 72-CAE-1-1991 (November 29, 1991)

Under K.S.A. 72-5414, professional employees have the right to "form, join or assist professional employee organizations, to participate in professional negotiations with the boards of education through representatives of their own choosing for the purpose of establishing, maintaining or improving terms and conditions of professional service". When the board of education's conduct infringes on these protected activities it can be said that there is interference with, coercion or restraint of employees in the exercise of statutorily-protected rights. See *American Ship Building Co. v. NLRB*, 380 U.S. 300, 308 (1965).

The initial inquiry then is whether Petitioner negotiators to whom Superintendent Scherling proposed to join in the impasse declaration were engaged in a protected professional employee activity? If not, the inquiry need go no farther. If they were engaged in protected activity, then it must be determined whether it was reasonably probable that the employer's conduct would have an

interfering, restraining or coercive effect on those involved or on other members of the professional employees' bargaining unit.

With regard to this initial inquiry, the record makes clear that the Petitioner negotiators sought out to join in Respondent's impasse declaration were engaged in the very sorts of activities sought to be protected from interference, restraint and coercion by the Act. Petitioner's negotiators were "assist[ing] professional employee organizations, to participate in professional negotiations with the boards of education", "for the purpose of establishing, maintaining or improving terms and conditions of professional service" and thus were engaged in expressly delineated protected activities. *See generally*, Findings of Fact Nos. 35-43.

The second inquiry under the framework for analysis set forth above is whether "there [is] a reasonable probability that the employer's conduct will have an interfering, restraining or coercive effect on the professional employees". *Supra*, p. 65. Again, based upon a thorough review of the record, it appears clear that Superintendent Scherling's actions, her persistent attempts to secure for Respondent's impasse declaration the acquiescence and participation of three different teacher negotiators through not less than four separate requests, would have as their natural consequence a "chilling effect", upon not only the affected negotiators, but also upon any other unit member(s) who became aware of Scherling's action. By seeking participation and acquiescence in Respondent's impasse declaration through the signature of any of several teacher negotiators, in spite of the Board's knowledge that such would preclude a planned prohibited practice filing, would place tremendous pressure on those individuals, tending to discourage them in their efforts as

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representatives of bargaining unit interests. From an objective viewpoint, there is a reasonable probability that the employer's conduct in question would have an interfering, restraining or coercive effect on the employer's professional employees as to their exercise of rights secured by the Act. *See generally*, Findings of Fact No. 35-43.

As to the third inquiry, merely proffering a legitimate reason for the questioned action is not, in itself, sufficient. The reason must be *bona fide* and not pretextual. If the proffered reason is a mere litigation figment or was not relied upon, then the reason is pretextual. *F.O.P. Lodge #4 v. City of Kansas City, Kansas*, Case No. 75-CAE-4-1991, p. 27 (Nov. 15, 1991). It appears to the presiding officer that the reasons proffered during the hearing on this matter by Superintendent Scherling were not in fact *bona fide* and were merely pretextual. Scherling's proffered reasons that she extended the "opportunity" to join in the impasse as a "courtesy" and to make the teachers organization aware of Respondent's intent were contradicted and called seriously into question by her acknowledgment that she could have informed the teachers simply by advising that the Respondent did in fact plan to seek unilateral impasse. Finding of Fact No. 40. Further, the presiding officer infers from the persistence with which Scherling sought the three negotiators' signatures, one of them on two separate occasions, Findings of Fact Nos. 38, 40-42, that this explanation does not reflect the true motive for her actions.

The presiding officer concludes that, by having Superintendent Scherling seek the signatures of teacher negotiators on a notice of impasse, Respondent violated K.S.A. 72-5430(b)(1). Based upon his review of all the evidence, the presiding officer finds and concludes that Respondent willfully,

that is with intent to do something the law forbids, interfered with, restrained or coerced professional employees in the exercise of rights granted in K.S.A. 72-5414.

CONCLUSION

The underlying purpose of the Professional Negotiations Act is to encourage good relationships between a board of education and its professional employees. *Liberal - NEA v. Bd. of Education*, 211. Kan. 219, 232, 505 P. 2d 651 (1973). The goal of the PNA law has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. Free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most favorable climate for successful bargaining. Employees ought to be fully informed as to all issues relevant to collective bargaining negotiations and the parties' positions as to those issues.

A board of education has a fundamental right to communicate with professional employees in a non-coercive manner during collective-bargaining negotiations as to its proposals and the course of negotiations. The board is not required to watch passively and rely upon the certified representative to accurately and fairly present both sides of the issues to the bargaining unit membership. A board which communicates without threat of reprisal or force or promise of benefit does not *per se* violate the requirement of good faith bargaining.

In the instant matter, however, careful consideration of the record and of the parties' arguments persuades the trier-of-fact that Respondent violated the Professional Negotiations Act as detailed above. It is the hope of the presiding officer that the information contained in this order will provide guidance to the parties in the development and maintenance of a successful bargaining relationship consistent with the legislative intent demonstrated in adopting the Professional Negotiations Act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that as to *ISSUES 1* and *6*, the Respondent is found to have committed prohibited practices as set forth in K.S.A. 72-5430(b)(1) for the reasons set forth above. Respondent shall cease and desist activities prohibited by K.S.A. 72-5430(b)(1).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to *ISSUES 2, 4* and *5*, the Respondent is found to have committed prohibited practices as set forth in K.S.A. 72-5430(b)(5) for the reasons set forth above. Respondent shall cease and desist refusing to negotiate in good faith mandatorily negotiable terms and conditions of professional service.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to *ISSUE 3*, the evidence of record is insufficient upon which to conclude that the alleged actions constitute a prohibited practice and same is hereby dismissed.

IT IS FURTHER ORDERED that Respondent shall return to the bargaining table and negotiate in good faith with Petitioner concerning the matters properly before them.

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IT IS FURTHER ORDERED that Respondent shall, for a period of not less than 30 school days, post a copy of this order in a conspicuous location in all facilities operated by Respondent where members of the professional employees' association are employed.

IT IS SO ORDERED.

DATED this 12th day of October, 2005.



Douglas A. Hager, Presiding Officer
Office of Labor Relations
427 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

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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 A.J. Kotich, Chief Counsel, 427 SW Topeka Blvd., Topeka, Kansas 66612.

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager, for the Office of Labor Relations of the Kansas Department of Labor, hereby certify that on the 14th day of October, 2005, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action through their attorneys of record in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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