BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

Ottawa Education Association, Complainant, vs. Unified School District 290, Ottawa, Kansas, Respondent.	*	CASE NO: 72-CAE-5-1983
Unified School District 290, Ottawa, Kansas, Complainant, vs. Ottawa Education Association, Respondent.	*	CASE NO: 72-CAEO-2-1983
Ottawa Education Association, Complainant, vs. Unified School District 290, Ottawa, Kansas, Respondent.	*	CASE NO: 72-CAE-8-1983

ORDER

Comes now this 16th day of Aug, 1983, the above captioned matters for consideration by the Secretary of Human Resources.

APPEARANCES

Ottawa Education Association, appears by and through its counsel, Mr. Paul Harrison, Director, Sunflower UniServ District, 116½ South Main, P. O. Box 409, Ottawa, Kansas 66067.

Unified School District 290, appears by and through its counsel, Ms. Pat Baker, Attorney at Law, Kansas Association of School Boards, 5401 S. W. 7th Street, Topeka, Kansas 66606.

PROCEEDINGS BEFORE THE SECRETARY

1. Complaint 72-CAE-5-1983 filed on April 26, 1983 by Paul Harrison on behalf of Ottawa Education Association.

72-CAE-8-1983
72-CAE-5-1983

2. Emergency declared by Secretary designee, Jerry Powell, on April 26, 1983, which required an answer to be filed within twenty-four (24) hours.

3. Answer to complaint received April 28, 1983, under signature of Patricia E. Baker, Attorney for Unified School District 290.

4. Complaint 72-CAEO-2-1983 filed on May 4, 1983 by Ms. Pat Baker, Attorney for Unified School District 290 against Ottawa Education Association.

5. Motion to Grant Relief sought by Petitioner filed May 6, 1983, by Paul Harrison on behalf of Ottawa Education Association.

6. Answer of respondent, Ottawa Education Association, received May 6, 1983, under signature of Mr. Paul Harrison.

7. Motion to Dismiss complaint 72-CAEO-2-1983 filed on May 6, 1983, by Paul Harrison.

8. Hearing scheduled for June 7, 1983.

9. Request to amend response filed May 25, 1983, by Ms. Pat Baker.

10. Amended answer of Respondent filed May 25, 1983, by Ms. Pat Baker.

11. Motion to Deny respondent's request to amend answer filed June 1, 1983, by Mr. Harrison.

12. Complaint 72-CAE-8-1983 filed on June 2, 1983, by Mr. Paul Harison on behalf of Ottawa Education Association.

13. Hearing rescheduled for June 24, 1983.

14. Answer to complaint 72-CAE-8-1983 received on June 10, 1983, under the signature of Ms. Pat Baker, Attorney for Unified School District 290.

15. Hearing held June 24, 1983 and June 27, 1983 in Ottawa, Kansas before hearing examiner Jerry Powell.

16. Brief to complaint 72-CAEO-2-1983 filed July 11, 1983, by Paul Harrison.

FINDINGS OF FACT

1. That the Ottawa Education Association is the certified representative of professional employees of U.S.D. 290.

2. That the Board of Education of U.S.D. 290 is the appropriate employer/respondent in this matter.

3. That Ethel Barry Robinson is the chief negotiator for the O.E.A. (T - 42)

4. That the O.E.A. served the Board via U.S.D. 290 superintendent Roger Nelson with their notice to negotiate on January 25, 1983. (T - 43)

5. That the Board of Education of U.S.D. 290 served the O.E.A. with their notice to negotiate on January 25, 1983. (T - 45)

6. That the O.E.A. received on February 4, 1983 from Mr. "Bud" Beeman, President of the Board of Education of U.S.D. 290, a document entitled "Position List" which further

explained the purpose and intent of the board's proposals. (T - 48)

7. That the document referenced in finding of fact number six (6) contained no reference to the amendment or deletion of articles entitled: maintenance of standards, reproduction of agreement, transfer and assignment, release time for preparation of records, activity passes, or master agreement. (T - 48, 49)

8. That the Board of Education , via a letter written by Mr. "Bud" Beeman and delivered to the O.E.A. on February 4, 1983, indicates their refusal to negotiate, "the items which are not mandatorily negotiable which are in the contract, and which neither party has listed." (T - 50)

9. That the letter referenced in finding of fact number eight (8) also lists seven subjects from the O.E.A. notice that the Board of Education was declining to negotiate, specifically; the provision on elementary counselors, class size limits, teacher involvement in curriculum and decision making, teacher aides, in-service recertification credit, assignment and transfer, and semi-monthly salary period. (T - 51)

10. That the O.E.A. letter dated February 7, 1983, acknowledged the non-mandatory nature of three items proposed for negotiations and removed them from the bargaining process. (T - 53)

11. That on February 18, 1983 the O.E.A. received a copy of the existing contract with certain articles "blocked" out. (T - 56)

12. That the O.E.A., by letter to Mr. Charles Beeman dated March 14, 1983, removed an additional proposal from the bargaining process leaving class size limits, in-service recertification credit, and semi-monthly salary periods from the original list submitted in finding of fact number nine (9).

13. That the master agreement between the Board of Education of U.S.D. 290 and the Ottawa Education Association contains the dates of August 1, 1982 and July 31, 1983 as the duration or terms of the agreement. (T - 85, Complainant's Exhibit 10)

14. That the O.E.A. from January 25, 1983 until the date 72-CAE-5-1982 was filed, changed their position regarding the topic heading under which the items of "class size," "recertification through in-service," and "semi-monthly pay periods" were mandatorily negotiable. (T - 111)

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15. That the board refused to negotiate at the meeting of May 19 in light of the prohibited practice filed by the O.E.A. (T - 4)

16. That the Board indicated at the May 19 meeting that they would negotiate further if the prohibited practice 72-CAE-5-1983 on file were dropped. (T - 6)

17. That the O.E.A. indicated on May 25 that the prohibited practice complaint 72-CAE-5-1983 would be dropped if agreement could be reached at the bargaining table. (T - 19)

ISSUES

1. Does the act contemplate the continuation of items currently contained in the professional agreement into a successor agreement if not noticed for negotiations by either party prior to February 1 of the year in question (1983). (Does the agreement contain a definite termination date?)

2. Is it necessary to notice for negotiations all items included in an existing agreement prior to alteration of those terms and conditions of employment.

3. Are maintenance of standards, reproduction of agreement, transfer and assignment, release time for preparation of records, activity pass, and master agreement mandatory subjects of bargaining?

4. Did the Board, by their action of indicating that six items from the existing agreement would be dropped from the successor agreement, commit a prohibited practice?

5. Are the proposals under the topical headings of class size (work load/pupil ratio) recertification credit through in-service training, and semi-monthly pay periods mandatorily negotiable?

6. Did the Board of Education of U.S.D. 290 commit a prohibited practice by its refusal to negotiate the issues outlined in issue number five (5)?

7. Were the actions of the Board of Education, relative to bargaining in light of a pending prohibited practice addressing negotiability, a refusal to bargain in good faith as contemplated within the statute?

8. Were the actions of the O.E.A., in filing and discussing 72-CAE-5-1983, any form of harassment, coersion or intimidation of the Board of Education and as such a prohibited practice within the meaning of the Act?

CONCLUSIONS OF LAW - DISCUSSION

The first and possibly the most important issue to be addressed in the three prohibited practices under consideration in this order deals with expiration or continuation of a negotiated agreement under the Professional Negotiations Act.

Petitioner would have the Secretary believe that any item not noticed as a new item or an amendment to an existing item continues into a successor agreement. Respondent argues that the contract contains an expiration date and that the entire agreement, other than those items noticed, dies on that date.

In examining the question, the Secretary must look to the language of the statute and at the same time must ascertain the intent of the language. Perhaps the best place to begin is the definition of "Professional Negotiations."

K.S.A. 72-5413 (g) states:

> "(g) 'Professional negotiations' means meetings, 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 Secretary is of the opinion that the legislature intended to require the parties to come together jointly as equals to address issues relative to terms and conditions of professional service which were areas of concern. The legislature then went a step further by attempting to delineate "terms and conditions of professional service." The various "tests" and "laundry lists" were attempts by the legislature to identify the exact problem areas which the boards and teachers groups are obligated to discuss and allowed discussion even on those matters fixed by statute or constitution of the state. The legislature saw fit to allow the employees the right to select representatives with exclusive representation rights "for the purpose of establishing, maintaining, protecting, or improving terms and conditions of professional service." (Emphasis added) This language suggests to the Secretary that the legislature anticipated some sort of a continuing process to be engaged in by the parties. Further, substance is lent to this interpretation by the language found at K.S.A. 72-5423 (a)which states in part:

> "Notices to negotiate on new items or to amend an existing contract must be filed on or before February 1, in any school year by either party, such notices shall be in writing and delivered to the superintendent of schools or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired."

Certainly K.S.A. 72-5423 (d) places an upper limit of two years on the duration of any agreement lawfully made under the Act. The Secretary is not convinced, however, that the intent of that provision is to nullify the work, time and effort expended on the part of both parties over their years of bargaining. The Secretary believes that the provisions of K.S.A. 72-5423 (d) allow the parties to agree to waive their right to bargain each and every year. Agreements of this type are not uncommon in the private sector and frequently accompany a clause (re-opener) which limits the subjects to be discussed during the term of the agreement. An additional clause used in the private sector which could be used in the public sector to avoid problems of this type in the future is one called a "successor" or "evergreen" clause. That is, a specific clause would be contained in the agreement which would serve to continue those issues not specifically noticed. The language of the Kansas statute appears to the Secretary to eliminate the need for a successor clause. If the provisions of an agreement did not continue in the absence of a notice, there would be no such thing as a notice to amend. Each notice would be served to negotiate "new" items in the "new" agreement.

The Secretary is hardly convinced that the legislature intended to force the parties to "rehash" those items which had previously been discussed, incorporated into an agreement, and functioned trouble free during the "life" of the contract. The right to notice new items and amendments to existing agreements extends to both the employee organization and to the board of education. While the board has the right, in the absence of a negotiated agreement, to implement provisions they deem to be in the public interest relative to properly noticed terms and conditions of employment, the Secretary does not believe the board may change <u>any</u> item not so noticed for change or addition. It must be remembered that the collective bargaining process accomplishes, as one of its by-products, the fostering of more harmonious relationships between employers and their employees. This is a very important product in the public sector due to the critical nature of the services provided in the interest of the public at large. The Secretary is of the opinion that a provision requiring the reopening and/or renegotiation of each contractual provision each year would be counterproductive and in fact disruptive to the labor management relationship. An important consideration of the Secretary in arriving at his conclusion is the unique nature of public sector labor relations. It is assumed that governmental agencies, including boards of education, will not come in and go out of existence but will continue in perpetuity. Recognizing this fact, the legislature provided means of establishing a contract and revising that contract on a periodic basis. The Secretary believes this to be a productive method of arriving at an agreement, altering the provisions of the agreement in need of change, continuing those provisions not in need of change, and fostering improved relationships by making the process progressive in nature. The legislature has been consistently clear in their desire to avoid disruption in public service predicated on collective bargaining. The principle of a continuing agreement in the absence of a notice to amend fulfills that end. In summary, therefore, the Secretary finds that any provision in an existing agreement, not properly noticed for bargaining, continues into the successor agreement. In addition, K.S.A. 72-5423 clearly sets February 1 as the last date on which those notices must be served. Notices submitted subsequent to February 1 have no force and/or effect and need not be honored by the other party to the process.

The second issue identified by the Secretary deals with the requirement to notice other than mandatory subjects prior to the time those items may be changed. The Secretary adopts much of the same logic expounded in answering issue number one when considering the second issue. In short, the parties have no obligation initially to discuss or incorporate other than mandatory subjects into any agreement. Once that has been done, however, and a "permissive" subject appears in an agreement, the parties have reason to depend on the existence of the provisions of the article. The Secretary draws no distinction between

mandatory and non-mandatory subjects, relative to the requirement for notice prior to change, once those provisions have been incorporated into a collective bargaining agreement. Certainly once any provision is properly noticed it becomes "fair game" in bargaining. Prior to notice however both mandatory and permissive subjects contained in the bargaining agreement continue free from unilateral alteration.

Issue three deals with the mandatory or permissive nature of six items proposed for deletion from a successor agreement by the board. It appears clear from the record that those subjects were not properly notice for bargaining prior to February 1. In light of the Secretary's ruling on issues one and two, the negotiable nature of the six subjects is immaterial at this time. In summary, the subjects were not noticed and may not therefore be altered or dropped from the successor agreement via any unilateral action by the board of education.

The forth issue to be addressed by the Secretary deals with indications made by the board of their intention to remove certain items from a successor agreement. Very obviously, much of this order deals with the obligations of the parties which must be fulfilled prior to alteration of a collective bargaining agreement. While the adoption of the position taken by the board could certainly serve as an impediment to fruitful negotiations, this is a case of first impressions. The board adopted a stance on the removal of items they viewed as permissive without the guidance of previous rulings by the Secretary. In addition, while the board was clear in what they intended to do, no action was ever actually taken. The Secretary finds, therefore, that while the actions of the board could in the future constitute bad faith bargaining, there existed a reasonable doubt in the instant case. The Secretary is highly reluctant to find a party guilty of a prohibited practice when a good faith doubt occasioned the offense. The Secretary reminds the parties that the question has, however, been answered in this order and will be dealt with more sternly if repeated. Keeping in mind the intent of the law; i.e., fostering more harmonious labor management relationships, the Secretary encourages the parties to identify good faith questions and present them jointly to the Secretary for determination.

Issue five also deals with the negotiability of three issues which were noticed for bargaining but over which a dispute exists regarding the mandatory versus the permissive nature of those issues. Specifically, the issues are: class size (work load/pupil ratio), recertification credit through in-service training and semi-monthly pay periods.

CLASS SIZE - WORK LOAD/PUPIL RATIO

In reviewing questions of negotiability, the Secretary has previously admonished the parties for attaching improper headings or titles to their proposals which has caused some of the confusion at the bargaining table. The Secretary has, nonetheless, reviewed the language

of specific proposals in determining negotiability and will do so in this instance. The foregoing is mentioned especially in response to the subject of class size. All jurisdictions have consistently held that class size per se is not negotiable. The language of the class size proposal does not attempt to limit the size of a class but rather deals with the compensation a teacher earns when dealing with classes containing over a certain number of students. While the effect of such a provision might be to encourage the board of education to lower the teacher/pupil ratio, the decision to do so is left in the hands of management. The proposal itself seeks rather to appropriately compensate professional employees in accordance with the amount of work they perform for the district. The proposal might well "fit" under the "salaries and wages" or the "hours and amounts of work" topics in the law or both. One thing, however, is clear. The language which proposes additional compensation for additional work is a mandatory subject of bargaining in the eyes of the Secretary.

RECERTIFICATION CREDIT THROUGH IN-SERVICE TRAINING

The Secretary has previously issued an opinion on the above captioned subject and incorporates that opinion as his ruling on the subject. The opinion states:

> "I believe there can be no doubt that the number of in-service days is a mandatorily negotiable issue under the heading of hours and amounts of work. Further, I can envision a proposal which relates in-service training to the employee appraisal procedure. The association's proposal on in-service, however, does not fit within that heading. Rather the proposal and the existing contract language seem to mandate that an in-service committee be established and that such committee determine what programs be offered. I find nothing in the "list" of mandatorily negotiable items contained in K.S.A. 72-5413 (l) which relates to the make up of an in-service committee.
>
> Both Chee-Craw and Tri-County speak to in-service education. These cases utilize the "impact test" which was formerly found in the Professional Negotiations Act. There are, so to speak, new rules of the game at this point in time. That is, the impact test no longer exists. Proposals must directly relate to a mandatory subject rather than impact on such a subject.
>
> Please do not misunderstand my determination that these proposals fall within the category of permissive subjects as advice to refuse to negotiate the subjects. Quite the contrary, I advise employers and employees to negotiate any subject which might be posing a problem to either party. Problem solving is the very intent of collective bargaining. Open and full communication can only lead to a better relationship between employers and employees which in turn affords better service to your clients."

SEMI-MONTHLY PAY PERIODS

The Secretary is persuaded that the frequency as well as the amount of pay falls within the statutory meaning of salaries and wages. The Secretary recognizes the concern of the board in incurring additional expenses if the proposal on semi-monthly pay periods is adopted. Complainant in this matter must also recognize these additional costs to the district. The funds available to any district are fixed amounts. As money is expended in one area, the

remaining resources of the district are reduced. The fact that a proposal may increase administrative costs is not, however, determinative of its negotiability. The Secretary is of the opinion that frequency of pay period is a mandatory subject of bargaining under the topical heading of salaries and wages.

In issue six, complaint asks the Secretary to find that the Board of Education was guilty of a prohibited practice via their refusal to bargain the issues outlined in issue five above which were determined to be mandatory subjects. Obviously, a great deal of confusion was encountered in the negotiations at issue in this matter. The Secretary is aware that a good faith doubt regarding negotiability can arise during the bargaining process. The Secretary also recognizes the problems which the parties experience when questions of negotiability surface late in the bargaining process. Part of this problem can be eliminated if the parties will utilize the avenue provided by the statute. Traditionally, the parties have viewed the time frame for bargaining to commence on February 1 and reach a conclusion triggered by the June 1 statutory impasse date. The assumptions about the conclusion of bargaining are, for the most part, correct. A closer reading of the statute, however, directs the parties to meet at <u>any</u> time during the school year, at the request of <u>either</u> party, to enter into professional negotiations. The February 1 date then serves as a deadline rather than a mandatory starting date for negotiations. Certainly, many of the issues which obstruct bargaining could be identified and resolved in a more timely fashion if the process were commenced at an earlier date. Resolution of those questions does not necessarily have to come in the form of relief granted in a prohibited practice charge. On several occasions the Secretary has issued opinions dealing exactly with the question of negotiability and does so in an effort to help the parties preserve their relationship by eliminating the need for adversarial confrontations relative to the scope of bargaining. In the instant case, respondent did not seek an opinion of the Secretary but flatly refused to bargain those issues over which a negotiability question existed. When they adopted that posture, the stage was set for the instant charge of refusal to bargain. Inasmuch as two of the three issues in question were found to be mandatory subjects, the Secretary is left with no alternative but to find that the Board's refusal did constitute a prohibited practice. It is, therefore, the order of the Secretary that the Board of Education cease and desist in their unfair acts and negotiate the subjects of class size (work load/pupil ratio) and semi-monthly pay periods.

Issue seven is much akin to issue six but deals with a refusal to bargain issues on which no negotiability question was in existence. The Secretary is of the opinion that the existence of a question regarding negotiability does not necessarily provide an avenue for the cessation of all negotiations. In some circumstances the cessation of bargaining would be reasonable. For example, it would be impractical to expect the parties to engage in

fruitful good faith bargaining on economic items if negotiability questions existed on other economic items. As stated before, the expendable funds of the district are a fixed amount. If bargaining took place on economic items and agreements were reached, those agreements would be voided by the requirement to bargain other economic items or proposals found to be mandatory subjects. Items or subjects which carry no economic impact would not be affected by any ruling on the negotiability of economic subjects. In the instant case, the Respondent ceased all negotiations based in large part on the fact that the negotiability questions were "hanging over their head" and asked that an impasse be determined to exist. The issues remaining on the table in this case were economic as were the subjects before the Secretary for determination. The Secretary rules, therefore, that the Board of Education was within its rights when it refused to bargain further, pending resolution of the negotiability questions.

Issue eight raises the question of whether the Ottawa Education Association committed a prohibited practice when it filed a prohibited practice complaint and discussed the complaint during negotiations. The Board would have the Secretary believe the O.E.A. harassed, coerced and intimidated the Board when it filed 72-CAE-5-1983 and discussed the complaint during negotiations. The Secretary has previously ruled in 72-CAEO-3-1982, and in this order, that the right to file a prohibited practice is granted to both parties under the Professional Negotiations Act. It would seem illogical, therefore, to deem the exercise of that right to be a prohibited practice. Each case, however, must be viewed on its own merit. In the instant case, the Secretary is not convinced that the actions of the O.E.A., in filing their complaint, were anything other than justifiable. The Secretary also ruled in the aforementioned order that the offer to withdraw a prohibited practice complaint during negotiations is proper and not bad faith negotiations. The examiner stands on the precedence set in the ruling on 72-CAEO-3-1982 and finds, therefore, that O.E.A. did not commit a prohibited practice when it filed 72-CAE-5-1983 and discussed the complaint during negotiations.

In summary the Secretary finds the following:

Issue 1 - Any provision in an existing agreement, not noticed for change by February 1, continues into the successor agreement.

Issue 2 -Prior to notice and bargaining, both mandatory and permissive subjects contained in the agreement continue free from unilateral change.

Issue 3 - Dismissed - immaterial at this time.

Issue 4 - No prohbited practice.

Issue 5 - (1) Class Size - Work Load/Pupil Ratio
Mandatory subject of bargaining.

(2) Recertification Credit Through In-Service.
Permissive subject of bargaining.
(3) Semi-Monthly Pay Periods
Mandatory subject of bargaining.

Issue 6 - Board ordered to negotiate the sujbects of class size (work load/pupil ratio) and semi-monthly pay periods.

Issue 7 - No prohibited practice.

Issue 8 - (72-CAEO-2-1983)
No prohibited practice.

IT IS SO ORDERED THIS 16th DAY Aug 1983, BY THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES.

for JERRY POWELL

Jerry Powell, Secretary Designee
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