

BEFORE THE SECRETARY OF HUMAN RESOURCES  
OF THE STATE OF KANSAS

IN THE MATTER OF THE COMPLAINT \*  
AGAINST EMPLOYER FILED BY: \*  
Iola-NEA-KNEA \*  
vs. \*  
USD 257 - Iola, Kansas \*

CASE NOS: 72-CAE-1-1989  
72-CAE-2-1989

Come now on this 25<sup>th</sup> day of August, 1988, the above captioned cases for consideration by the Secretary of Human Resources.

APPEARANCES

Complainant, appears through David M. Schauner, General Counsel, KNEA.

Respondent, appears through John R. Toland, Attorney at Law.

PROCEEDINGS BEFORE THE SECRETARY

72-CAE-1-1989

- 1) Complaint against employer, requesting emergency treatment, filed by complainant on July 22, 1988.
- 2) Denial of request for emergency treatment served on both parties on July 22, 1988.
- 3) Complaint served on Respondent for answer on July 22, 1988.
- 4) Conference call pre-hearing conducted on August 3, 1988. Emergency determined and hearing procedures communicated to all parties.
- 5) Confirmation and summary of pre-hearing conference call sent to parties on August 3, 1988.
- 6) Formal hearing scheduled for August 12, 1988. Notice of hearing sent to parties on August 5, 1988.

72-CAE-2-1989

- 7) Complaint against employer filed by complainant on August 10, 1988.

8) Conference call conducted on August 11, 1988. Cases combined for hearing purposes.

9) Formal hearing conducted on August 12, 1988. All parties in attendance.

FINDINGS OF FACT

1) That Iola-NEA is the certified representative of the appropriate bargaining unit of professional employees in USD 257, Iola, Kansas, as contemplated by the act.

2) That the Board of Education of USD 257 is the employer of the professional employees of USD 257 and is the appropriate Respondent to these actions as contemplated by the act.

3) That these matters are properly before the Secretary of the Department of Human Resources for determination as contemplated by the act.

4) That the assistant superintendent of USD 257 was the individual who developed the "4 day rotation plan". (T-22)

5) That the "4 day rotation plan" was developed in response to the directions of the Board of Education to develop a plan for the equalization of instruction received by elementary students in the area of art, music, library, and physical education. (T-22, 23, 26)

6) That the teachers of art, music, library, and physical education are referred to in USD 257 elementary facilities as "special teachers" as opposed to "teachers of special education" and/or "teachers of self-contained classrooms". (T-24, 25)

7) That the "4 day rotation plan" was implemented to change, from the 5 day schedule, the number of times that each special subject was offered. (T-26)

8) That under the "4 day rotation plan" some special subjects were offered more often and some were offered less often. (T-27)

9) That the "4 day rotation plan" was implemented beginning with the 87-88 school year and replaced the previous "Monday through Friday" or "5 day schedule". (T-28)

10) That the "4 day rotation plan" was the creation of the assistant superintendent of schools in USD 257 in response to the board's directive for equalization. (T-29, 89)

11) That USD 257 employs 9 "special teachers". (T-35)

12) That the implementation of the "4 day rotation plan" resulted in more student contact time for seven special teachers and less student contact time for two special teachers. (T-35, 36, 120, 121, 176)

13) That the overall length of the duty day did not change from prior years with the implementation of the "4 day rotation plan". (T-37)

14) That the duty day in the elementary schools of USD 257 consists of seven hours and 15 minutes. (T-37)

15) That the duty day in the elementary schools of USD 257 is divided into before and after school periods of 30 minutes each, student contact time, lunchtime, and preparation/planning time. (T-37, 38)

16) That an increase or decrease in student contact time has a corresponding opposite effect on preparation/planning time. (T-38, 60, 120, 121)

17) That complainants' exhibit 1 was delivered to the Respondent on or about February 1, 1988. (T-45)

18) That the complainant attempted, on more than one occasion subsequent to February 1, 1988, to negotiate with the Respondent in regard to the "4 day rotation plan". (T-49, 110, 161)

19) That the Respondent has consistently, since February 1, 1988, taken the position that the "4 day rotation plan" is not a mandatory subject of bargaining. (T-49, 110, 111, 161)

20) That the implementation of the "4 day rotation plan", in changing the amount of student contact time for special teachers, also had the effect of changing student contact time for other teachers. (T-64, 65)

21) That the assistant superintendent of USD 257 developed a survey relative to the "4 day rotation plan" (Complainant's Exhibit #5, T-65)

22) That the "4 day rotation plan" survey was conducted only among the professional employees at the elementary level. (T-66)

23) That one purpose of the "survey" was to determine the level of support among elementary faculty for the "4 day rotation plan". (T-73)

24) That the complainant had no involvement in the preparation, conduct, or tabulation of the "survey" or its results. (T-76)

25) That the Respondent created the "4 day rotation plan" in an effort to equalize the instructional time received by all elementary students of USD 257 in the "special subjects". (T-88, 89)

26) That one purpose of the "survey" was to evaluate the performance of the "4 day rotation plan" toward fulfillment of its equalization goal. (T-100)

27) That the "4 day rotation plan" was presented to the Board of Education by the assistant superintendent in April of 1987. (T-112)

28) That the chief spokesperson of Iola-NEA bargaining appeared before the Board of Education at their regular meeting on or about June 1, 1987 and expressed her opinion that the "4 day rotation plan" was a negotiable item. (T-114, 161)

29) That the assistant superintendent interviewed individual teachers in determining the amount of time to be devoted to each special subject on the "4 day rotation plan". (T-169, 170)

ORDER

The instant cases come forth in the form of two prohibited practice charges filed by the Iola-NEA (the association) against the Board of Education of USD 257, Iola, Kansas (the board). The first of the two cases deals with a single issue, that being the negotiability of what is referred to as the "4 day rotation plan"

(the plan). That case has been captioned as 72-CAE-1-1989. The second case deals with the conduct of a survey by the board in regard to the "4 day rotation plan" with the allegation that the survey of individual teachers, on a mandatory subject of bargaining, denies the association of their right to exclusive representation of the bargaining unit. That case has been captioned 72-CAE-2-1989. In accordance with the understandings reached relative to the combination of these two cases for hearing purposes, any decision regarding "the survey" must be predicated with a finding that "the plan" was a mandatory subject of bargaining. For that reason each case will be discussed separately in this order.

For the sake of clarity, the examiner will elaborate on some of the procedural matters which transpired relative to these cases. First, while these matters were both declared emergencies, the complainant waived receipt of an answer on 72-CAE-2-1989 until August 12, 1988, the date of the formal hearing, and did in fact receive the Respondent's answer on that date. Second, after the record was closed, the parties entered into an agreement for the submission of briefs on case number 72-CAE-2-1989. During the proceedings of record, it was determined that all briefs, were to have been submitted by August 16, 1988 and the examiner was to have issued his order on or about August 19, 1988. In light of the newly agreed upon briefing schedule it was further agreed that the examiner's order would be issued on or about August 26, 1988.

72-CAE-1-1989

In this case the complainant alleges that a "4 day rotation plan" is a mandatory subject of bargaining under the heading of hours and amounts of work. It further alleges that the subject was properly noticed for negotiations and was repeatedly raised during bargaining with the only response by the board being that the subject was not a manditorily negotiable term and condition of employment.

The board counters that it believes the establishment of such a plan is an administrative function and one which need not be negotiated. The board also asserts that the plan was implemented in September of 1987, more than 6 months prior to the filing of this case, and therefore falls beyond the 6 month limitation for filing contained within K.S.A. 72-5430a. And finally the board argues that even if "the plan" was manditorily negotiable, the notice to negotiate "the plan" failed to fulfill the statutory requirements of K.S.A. 72-5423(a).

In order to fully consider this complaint one must first understand the differences and the similarities between the 4 day plan and the plan previously in existence which I will refer to as the 5 day plan.

USD 257 in Iola, Kansas provides, in addition to other instruction, classes in art, music, library, and physical education on the elementary level. In this case those were referred to as special subjects taught by special teachers. The board has not, however, seen the necessity of hiring a teacher for each subject at each elementary facility. In order to provide these special subjects at each facility, the special teachers of those subjects rotate from school to school.

For not less than four years prior to the 1987-1988 school year the district had provided those special subjects and employed its special teachers on a 5 day rotating schedule or what could be referred to as a Monday through Friday schedule. Under the 5 day plan a particular special teacher assigned to teach his/her speciality at school "A" on Mondays would be teaching at school "A" each and every Monday of the term. The 4 day plan in the alternative ignores any designation as to the day of the week and rotates the presentation of those subjects every 4 days of attendance. Under the 4 day plan a particular special teacher assigned to teach his/her speciality at school "A" on day 1 of the plan would be teaching at school "A" on each and every day 1 of the term.

By way of further example, assume that Wednesday of a particular week the schools are closed because of snow. Assume further that Monday of that week is day 1 on the 4 day schedule. Under those assumptions, Tuesday would be day 2, Wednesday would be a non-attendance day and therefore not counted, Thursday would be day 3 and Friday would be day 4. If, however, school was conducted on all 5 days as usual, Monday would be day 1, Tuesday day 2, Wednesday day 3, Thursday day 4, and Friday day 1 again.

Similarities which existed under the 4 day plan and the 5 day plan included the length of the duty day and the subjects each special teacher was required to teach. The duty day under both plans consisted of 6 hours and 15 minutes of "school" plus a 30 minute period of time before school and 30 minutes after school for a total time in service of 7 hours and 15 minutes per day for each teacher. In addition, there was nothing in the record to indicate that any teacher was required to teach more, less, or different subjects under either plan.

Much was indicated at the hearing that the 4 day plan was confusing to the professional employees. Much was also indicated at the hearing that the board felt a strong obligation to equalize the level/quantity of instruction being provided to elementary students of the district. The fact that an issue might be confusing does not, in and of itself, make it a mandatory subject of bargaining. Similarly, however, the best of intentions do not make an issue a management right. Negotiability of a subject may be determined by contrasting the subject with the list of terms and conditions of employment outlined at K.S.A. 72-5413(1). If the subject falls within that list, regardless of how it might be captioned, it is a mandatory subject.

Before the examiner may review the subject to determine its negotiability he must address two defenses raised by the Respondent which, if valid, could preclude further consideration of this complaint.

The first defense, timeliness of the complaint, is raised pursuant to language contained at K.S.A. 72-5430a(a) which states in pertinent part:

"Any controversy concerning prohibited practices may be submitted to the secretary. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six months of the date of the alleged practice by service upon it by the secretary of a written notice, together with a copy of the charges."

The record clearly reflects that the intention of the board to implement the 4 day plan was communicated to the elementary faculty from the assistant superintendent through the building principals during the last few weeks of the 86-87 school year which occurred in May of 1987. The record is equally clear that the 4 day plan was in fact implemented with the beginning of the 87-88 school year. The Respondent seems to argue that since the association did not file charges against the board when the plan was implemented, or for 6 months thereafter, they should somehow be precluded from filing charges relating to the plan henceforth. The examiner agrees that charges in regard to actions which took place in the beginning of the 87-88 school year would be untimely if filed more than 6 months after their occurrence. The charge before the examiner is not, however, that the plan was implemented in August or September of 1987 but that it was not negotiated in February and after in 1988. The February date clearly falls within the statutory 6 month limitation and the examiner finds, therefore, that the complaint in 72-CAE-1-1989 is timely filed.

The second defense of the Respondent, the lack of a sufficient notice to negotiate, is raised pursuant to the language contained in K.S.A. 72-5423(a) which states in pertinent 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 chief administrative officer of the board of education 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."

Again the record is clear that the 4 day plan was an issue of no small amount of controversy in USD 257. Shortly after the intentions of the board were communicated to the association the association communicated to the board its belief that the plan was a mandatory subject of bargaining. That opinion was expressed to the board and/or the superintendent of schools on more than one occasion between June of 1987 and February of 1988 and was consistently met with the board's response that the subject was not manditorily negotiable.

The Respondent now asks the examiner to find that an issue, which 1) was the subject of considerable controversy and discussion, 2) was so clear that the board never sought clarification of the proposal even when meetings were held for that purpose, 3) was so clear that the board had sufficient information to determine that it was not negotiable, and 4) was so clear that their posture was absolutely unwaivering from June of 1987 until August of 1988, suddenly lacked the clarity required by K.S.A. 72-5423(a) when it appeared in the February 1st notice served on the board. Certainly, as a general rule the more verbage contained in the notice to negotiate the easier it is to discern the "purpose of the new or amended items desired". The statute, however, uses the terms "reasonable" and "understandable" detail. Those terms set no clearly defined parameters for the notice. What is reasonable and understandable to one may be outlandish and confusing to another. In this case the 4 day rotation plan was obviously an issue of considerable notarizety and interest in USD 257. The board had adequate information about what was intended by the proposal from which it could make the determination that it was not negotiable. If the proposal was not presented with adequate clarity and detail so as to be understood, the it follows that the board refused to negotiate without understanding that which it was rejecting. Quite simply, the proposal was either understood or it was not.

"Reasonable" and "understandable" are terms to which the only measure which may be somewhat accurately applied are the conditions in existence in each district. In USD 257, as was demonstrated by the record, notices to negotiate are exchanged in a form which can require additional meetings to provide more complete understanding. Testimony on the record indicates that the first meeting of the parties is conducted with the primary purpose of clarification of the articles the parties have noticed and exchanged for bargaining. It is also readily apparent within complainant's exhibit one that many noticed articles are described in very few words, yet none of those articles were rejected as being unreasonably vague or not understandable. The examiner is of the opinion that the parties own actions have defined what "reasonable" and "understandable" mean in USD 257. He is also of the opinion that based on the norms established in USD 257, the article listed on complainant's one as article 4 meets the parties own definition of what constitutes reasonable and understandable detail of a notice to negotiate. The examiner is therefore convinced, based on all the foregoing, that the board was adequately "noticed" by the contents of complainant's exhibit number 1.

Having found the complaint to be timely filed and the notice to negotiate to be sufficient, the examiner will now address the negotiability of the 4 day rotation plan.

Very obviously, the definition of terms and conditions of employment as outlined at K.S.A. 72-5413(1) does not contain items captioned "4 day rotation plans", "5 day rotation plans", or for that matter any "rotation plans". The caption placed on an article noticed for negotiations is not, however, controlling in the determination of its negotiability. One must look to the article itself.

The 5 day plan in use within USD 257 prior to the 1987-88 school year, as previously described, failed to make allowances for school days missed because of special activities, holidays, bad weather, etc. The effect of the shortcomings in the 5 day plan resulted in an unequal amount of instruction received by the students depending on which subject they were to be receiving on the day classes were cancelled. The purpose of the 4 day plan was to remedy those inequities and equalize the instruction provided. The effects of the 4 day plan were to increase the number of times some classes were offered and to reduce others. In addition, "the plan" increased student contact time for some teachers and reduced it for others. The plan also resulted in more planning time for some teachers and less for others. In short, the 4 day plan altered the amount of work that several professional employees were previously performing under the 5 day plan. It altered not only the contact versus planning hours of work but also the frequency with which they would provide the instruction. The examiner is not insensitive to the problems encountered by the board and further believes that it is incumbent upon the board to attempt to remedy those problems. The examiner is of the opinion that when those remedies alter a term and/or condition of employment, however, they must be negotiated. Changes such as those occasioned by the implementation of the 4 day plan are exactly the items in need of negotiation. They are without doubt changes in "hours and amounts of work" as contemplated in K.S.A. 72-5413(1).

In its brief and during the hearing, the board indicated that special teachers had in general, considerably less contact time with students than did other teachers. The board argued that conditions of the past should not be the norm from which no change may be made without negotiations. In the alternative the board suggests a norm that represents "reasonable" amounts of instructional time. The examiner does not believe that any "norm" need be established in order to resolve this matter. He is of the

opinion that past practice establishes a firm level of the "hours and/or amount of work" expected by the board and provided by the employee. When that level is to be changed it must be bargained. The board may well have a legitimate position that some teachers actually "teach" considerably more or less than others on the average. The examiner cannot, however, permit the board to alter hours and amounts of work unilaterally to equalize teaching loads. To do so would allow a mandatorily negotiable subject to be changed for the "special teachers" this year, and conceivably for any other fragmented segment of teachers next year, third grade teachers for example, high school English teachers the following year, and so on and so forth until all hours and amounts of work had been changed for all employees without benefit of bargaining. The examiner does not believe the legislature intended to allow the Professional Negotiations Act to be so easily rendered meaningless. The 4 day rotation plan is nothing more than a change in hours and amounts of work required of "special teachers". The motivation for the change, while certainly appearing to be noble and well intentioned, does not set aside the obligation of the board to negotiate the issue in good faith as a mandatory subject of bargaining.

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The complaint in this case deals with a concept, known in labor relations as "exclusivity". The statute which bestows this right is K.S.A. 72-5415(a) which states:

"When a representative is designated or selected for the purposes of professional negotiation by the majority of the professional employees in an appropriate negotiating unit, such representative shall be the exclusive representative of all the professional employees in the unit for such purpose."

K.S.A. 72-5415(b) then states:

"Nothing in this act or in acts amendatory thereof or supplemental thereto shall be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education, a superintendent of schools or other chief executive officer employed by a board of education."

At first blush it would appear that the provisions of K.S.A. 72-5415(b) would serve to set aside certain of the rights accorded to the designated representative of the professional employees. That, however, is not the case.

In the opinion of the examiner, the provisions of subsection (b) outlined above simply give unaffiliated employees the right to express their own opinions or positions to a board of education or its agents. There is nothing in that subsection which would allow or permit the board to solicit that input, nor is there anything within that subsection which would allow the board to respond to that input. All negotiations in regard to terms and conditions of employment must be conducted with and only with the designated representative.

"Negotiations" is a process which contemplates more than the simple receipt of input. It contemplates the good faith exchange of proposals, positions, and the information and rationale which led to the adoption of positions. The receipt and study of information certainly allows the board to adopt a position which represents a broad cross section of the constituency they serve. The examiner is likewise of the opinion that the board's position should reflect the wishes of the community they serve. It must be remembered, however, that the professional employees have the right to select a representative to serve as their spokesperson in communicating their wishes to the board, and the board has the obligation to negotiate terms and conditions of employment "exclusively" with that designated representative. Negotiations might be veiwed as an attempt to reconcile the wishes of all of the "special interest" groups present in the district. Parents have wishes, students have wishes, community business have wishes, school administrators have wishes, and teachers have wishes. The provisions of K.S.A. 72-5415(a) simply tell the board with whom they may, and in fact must, discuss those teacher wishes in regard to manditory terms and conditions of employment.

In the instant case the board of education, through it's agents, conducted a survey of the professional employees in regard to the 4 day rotation plan, a subject found to constitute a manditorily negotiable term and/or condition of employment. The survey contained four questions which can only be viewed as attempting to elicit the wishes of the professional employees relative to the plan. Specifically the question were:

- "(1) List the things you like about the 4 day rotation:"
- "(2) List the problems with the 4 day rotation:"
- "(3) Assuming the 4 day rotation would be continued, how could we improve it for you?"
- "(4) If a vote were to be taken, what would you prefer:
  - (1) Continue with 4 day rotation.
  - (2) Return to 5 day schedule."

The board had taken the position that the 4 day plan was a non-mandatory subject and was conducting the survey which, if the 4 day plan was not manditory, they would have had no obligation to do. That is, management rights may be exercised with or without input from the professional employees or their designated representative. The board obviously recognized the valuable information about the plan which could be derived from the professional employees and therefore commissioned the survey. The examiner applauds the board for their perception and foresight but must take exception with the vehicle used to garner that information. The appropriate vehicle would have been through the negotiations process.

In summary, the examiner finds that the survey conducted by the board of education amounted to a form of individual negotiations with members of the appropriate bargaining unit and therefore a denial of the rights accorded to the complainant in this matter, all in violation of K.S.A. 72-5430(b)(5) and (6).

The last issue to be addressed by the examiner is the appropriate relief to be applied to remedy the wrong which has been done. The complainant, as the first form of relief in both cases, asks the examiner to require the Respondent to cease and desist the 4 day rotation plan immediately and prevent the board from implementing the plan for a period of one year. As the examiner noted in reply to the Respondent's defense that the complaint was not timely filed, the plan was put into effect with the beginning of the 1987-88 school year which was considerably more than 6 months ago. As noted earlier, the time has passed for the litigation of that action. Therefore, while the action may have been an illegal act when it occurred, no complaint was filed when it occurred or for 6 months thereafter, and the examiner is therefore without authority to now reverse that action. In the opinion of the examiner when the 6 month statute of limitations expired, the 4 day plan became a past practice of the board which may only be altered pursuant to the entire negotiations process including, if necessary, the unilateral action of the employer subsequent to good faith participation in the entire bargaining process (negotiation, mediation, fact-finding).

The complaint in case number 72-CAE-1-1989 was that of a refusal to bargain in good faith. The examiner believes that the appropriate relief, therefore is a requirement to bargain in good faith with the Respondent of the teachers which is the second form of relief sought in both cases. The complainant in these matters asks the examiner to find that the appropriate time for bargaining be subsequent to February 1 of 1989 for a 1989-90 contract. Once again the complaint deals with a failure to bargain in regard to the 1988-89 contract and the appropriate remedy is an order to bargain, and if necessary procede to mediation and fact-finding, prior to the issuance of the 88-89 contract. If the examiner were to order that negotiations be postponed until the 89-90 bargaining season he would be ordering no remedy at all. That is, either party could cause bargaining to take place then through the submission of a timely notice to negotiate the subject, filed on or prior to February 1 of 1989.

It might be argued that a return to the bargaining table at this time, just prior to the beginning of the school year, could create hardships on either or both of the parties. To that the examiner would respond that either the refusal to bargain is in need of remedy or it is not. If it is in need of remedy then the only appropriate remedy is an order to bargain. And finally, the decision not to bargain, and the decision to delay filing of charges until such a late date in the process, were not decisions of the examiner. Any difficulty occasioned by the relief ordered may cause the parties to seek assistance in a more timely fashion when problems of this sort surface in the future.

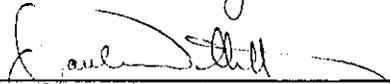
The last form of relief sought deals solely with "the survey". It asks that the employer be ordered to cease and desist from conducting such surveys in the future, and in regard to mandatory terms and conditions of employment, it is so ordered. On management rights issues, however, the board may do as it pleases. The request also seeks the destruction of the survey results and a prohibition on the use of those results in bargaining.

In deliberation on this matter it is noted that, first, the examiner has found that the purpose of the survey was to determine the problems, concerns, and wishes of the professional employees in regard to the 4 day plan. The examiner has also found that henceforth, information of that sort must be communicated by the designated spokesperson for the professional employees. Second, there can be very few people who would believe that an interview conducted by management, in regard to a management program, on a one-on-one basis with the employee, in which responses are recorded and attributed to the interviewee, and in regard to such a controversial subject, could result in anything except guarded answers and tainted results. Logic dictates that confidential assessments result in more candid responses. It is precisely to open the channels for free and uninhibited communication between labor and management that employees are given the right to select representatives. Certainly no one expects the results of that survey, if used in bargaining, to suddenly cause the teachers to

alter their position on the 4 day plan. Their "real" position will be communicated to their representative, who will in turn communicate it to the administration. Third, there can also be very few people who would believe that the destruction of the survey results would suddenly wipe them from everyone's mind. What the examiner does believe would serve as proper remedy follows. The survey was improper and the results of that survey should not, therefore, be utilized in the bargaining process. The results of the survey stand so great a chance of being in error that they are viewed by the examiner as being worthless but may be maintained by the district for whatever other use they may have outside of the negotiations process. And finally, as stated previously, the board must cease and desist from conducting such surveys in the future on manditory subjects of bargaining.

A summary of the relief granted on both cases includes an order by the examiner that the parties return to the bargaining table to negotiate in good faith in regard to the 4 day plan for the 88-89 school year. If the parties are unable to arrive at mutually agreeable dates for those negotiations the examiner retains the right to set those dates. The examiner also orders the board to cease and desist the conduct of surveys among professional employees in regard to manditorily negotiable terms and conditions of employment. And finally, while the board is not ordered to destroy the results of the survey, it is ordered to refrain from the use of those results in the bargaining process.

It is so ordered this 25<sup>th</sup> day of August, 1988.

  
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Paul K. Dickhoff, Jr.  
Hearing Examiner  
Designee of the Secretary of the  
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