

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

IN THE MATTER OF THE COMPLAINT *
AGAINST EMPLOYER FILED BY: *
*
NEA-GOODLAND *
*
vs. * CASE NO. 72-CAE-4-1987
*
BOARD OF EDUCATION USD 352, *
GOODLAND, KANSAS *
*

ORDER

Comes now on this 9th day of September, 1988, the
above captioned case for consideration by the Secretary of Human
Resources.

APPEARANCES

Complainant, NEA-Goodland appears through David M. Schauner,
Attorney at Law.

Respondent, Board of Education, USD 352 appears through
Norman D. Wilks, Attorney at Law.

PROCEEDINGS BEFORE THE SECRETARY

- 1) Prohibited practice complaint filed by complainant on
October 30, 1986.
- 2) Complaint sent to Respondent for answer on October 30,
1986.
- 3) Respondent's answer to complaint received on November
20, 1986.
- 4) Answer of Respondent sent to Complainant on November 21,
1986.
- 5) Pre-hearing scheduled for December 23, 1986. Notice
sent to parties on December 5, 1986.
- 6) Case held in abeyance at request of parties.
- 7) Request for update of case status sent to parties on
April 1, 1987. No response.
- 8) Request for update of case status sent to parties on May
5, 1987. Amendment to complaint to be filed.

- 9) Amended complaint received from Complainant on May 21, 1987.
- 10) Amended complaint sent to Respondent for answer on May 22, 1987.
- 11) Answer to amended complaint received from Respondent on July 21, 1987.
- 12) Answer to amended complaint sent to Complainant on July 23, 1987.
- 13) Formal hearing scheduled for September 30, 1987. Notice of hearing sent to parties on August 31, 1987.
- 14) Request for continuance of hearing received from Respondent on September 23, 1987. Continuance granted on September 28, 1987.
- 15) Formal hearing rescheduled for December 15, 1987. Notice of hearing sent to parties on November 23, 1987. (Hearing cancelled by blizzard).
- 16) Formal hearing rescheduled for April 6, 1988. Notice of hearing sent to parties on January 22, 1988.
- 17) Formal hearing conducted on April 6, 1988. All parties in attendance.
- 18) Transcript of proceedings received on May 9, 1988.
- 19) Post hearing briefs of parties received on:
 - Complainant - June 8, 1988
 - Respondent - June 10, 1988.

FINDINGS OF FACT

- 1) That the Board of Education of USD 352 is a Board of Education as that term is defined in K.S.A. 72-5413(b) and is, therefore, a proper Respondent in these proceedings.
- 2) That NEA-Goodland is a Professional employee's organization as that term is defined in K.S.A. 72-5413(e) and is, therefore, a proper Complainant in these proceedings.
- 3) That this matter is properly before the Secretary of the Department of Human Resources for determination.

4) That in the fall of 1985 the Respondent created a 15 member committee whose task it was to write an evaluation document for USD 352. (T-15)

5) That the "committee" created to write an evaluation document was comprised of two school board members, four school administrators, five teachers, two community members, and two high school students. (T-16)

6) That the "committee" met monthly in meetings that lasted from one hour to one and one half hours. (T-17)

7) That the "committee" was chaired by the assistant superintendent of USD 352, Mr. Steinert. (T-18)

8) That the "committee" produced and/or approved an evaluation document. (Complainant Exhibit #5, T-25)

9) That the only member of NEA-Goodland that served on the "committee" was Joan Walker. (T-24)

10) That Joan Walker, during her service on the "committee" was not empowered to serve as a representative of NEA-Goodland. (T-24)

11) That the last meeting of the "committee" was in May of 1986. (T-26)

12) That in May of 1986 the Respondent adopted the evaluation document produced by the "committee". (T-29)

13) That the Respondent issued unilateral contracts to its "professional employees" for the 86-87 school year. (T-29)

14) That in the 86-87 contract the Respondent unilaterally adopted and implemented evaluation procedures and criteria which were different than those contained in the 85-86 contract. (T-30, 123, 144)

15) That on or before February 1st, 1986 both the petitioner and the Respondent exchanged notices to negotiate contractual provisions dealing with evaluations. (T-46, 47)

16) That during negotiations on the 86-87 contract the Respondent agreed to negotiate evaluation "procedures" but maintained that the evaluation "form/document/criteria" was not manditorily negotiable. (T-68, 105)

17) That pages 17 through 29 of Complainant's Exhibit #5 are considered by the Board of Education to constitute "evaluation criteria". (T-108)

18) That the "Professional Improvement Plan" was not reviewed by the Board of Education to determine its negotiability prior to its adoption by the Board in late May of 1986. (T-116, 117)

19) That a less than satisfactory rating on the "Professional Improvement Plan" could result in discipline, termination, or non-renewal of the recipient. (T-121)

20) That pages 6 through 9 of Complainant Exhibit #5 are considered by the Board of Education to constitute "evaluation procedures". (T-123, 128)

21) That none of the procedures or the criteria contained in the "Professional Improvement Plan" adopted by the Board of Education were placed on the table for consideration during bargaining between the parties over the 86-87 contract. (T-123)

CONCLUSIONS OF LAW/DISCUSSION

The instant case comes forth as a prohibited practice charge filed by NEA-Goodland against the Board of Education of USD 352, Goodland, Kansas. Pursuant to the mutual agreement of the parties, and the amended complaint filed by NEA-Goodland, the only issue under consideration by the secretary is the negotiability of an item referred to by the parties as professional employee evaluation criteria.

The Complainant in this case alleges that evaluation criteria as well as evaluation procedures are mandatorily negotiable. The Respondent does not dispute the negotiability of evaluation procedures but takes the position that evaluation criteria is a management right to determine and, therefore, not a mandatory subject.

The examiner, in a review of this question, turns first to a reading of K.S.A. 72-5413(g) which states:

"'Professional negotiations' means 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(l) then defines terms and conditions of professional service wherein it states:

"'Terms and condition of professional service' means (1) salaries and wages, including pay for duties under supplemental contracts; hours and amounts of work; vacation allowance, holiday, sick, extended, sabbatical, and other leave, and number of holidays; retirement; insurance benefits; wearing apparel; pay for overtime; jury duty; grievance procedure; including binding arbitration of grievances; disciplinary procedure; resignations; termination and nonrenewal of contracts; re-employment of professional employees; terms and form of the individual professional employee contract; probationary period; professional employee appraisal procedures; each of the foregoing is a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; and (2) matters which relate to privileges to be accorded the recognized professional employees' organization, including but not limited to, voluntary payroll deductions, use of school or college facilities for meetings, the dissemination of information related to the professional negotiations process and related matters to members of the bargaining unit on school or college premises through direct contact with members of the bargaining unit, the use of bulletin boards on or about the facility, and the use of the school or college mail system to the extent permitted by law, reasonable leaves of absence for members of the bargaining unit for organizational purposes such as engaging in professional negotiating and partaking of instructional programs properly related to the representation of the bargaining unit; and (3) such other matters as the parties mutually agree upon as properly related to professional service. Nothing in this acts amendatory thereof or supplemental thereto, shall authorize the diminution of any right, duty or obligation of either the professional employee or the board of education which have been fixed by statute or by the constitution of this state. Except as otherwise expressly provided in this subsection, the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiation proposal would not prevent the fulfillment of the statutory or constitutional objective. Matters which relate to the duration of the school term, and specifically to consideration and determination by a board of education of the question of the development and adoption of a policy to provide for a school

term consisting of school hours, are not included within the meaning of terms and conditions of professional service and are not subject to professional negotiation."

Obviously the definition of terms and conditions of employment contains the language "professional employee appraisal procedures;". The statute, however, does not define what is intended by the use of the word "procedures".

In its post-hearing memorandum brief the Respondent in this case indicates that in order to properly issue a decision in this matter the examiner must interpret the provisions of not only K.S.A. 72-5413(1) but also the provisions of K.S.A. 72-9001 through 72-9006 inclusive. While the examiner does not believe his authority extends to the interpretation of statutes other than K.S.A. 72-5413 et seq., he can certainly read and take guidance from their contents.

Interestingly, K.S.A. 72-9003 contains the following language:

"Every board shall adopt a written policy of personnel evaluation procedure in accordance with this act and file the same with the state board." (Emphasis added)

K.S.A. 72-9001 et seq., like K.S.A. 72-5413 et seq., contains no definition of what is intended by the use of the term "procedure". K.S.A. 72-9003 and K.S.A. 72-9004, however, outline the contents of those "procedures" to include not only when and how evaluations are to be performed but those subsections also contain certain minimum "criteria" which must be included in the evaluation "procedure". Similarly, the board must read the word "procedure" as used in K.S.A. 72-9003 as authorizing their establishment of "criteria", as that is certainly what they are now attempting to do without benefit of bargaining. That is to say, K.S.A. 72-9001 et seq., permits the board to develop evaluation "procedures" and the board interprets the word procedure as encompassing evaluation "criteria". Also of particular interest to the examiner is the language contained in K.S.A. 72-9004(c). K.S.A. 72-9004 in general, seems to set minimum requirements regarding "criteria" that the evaluation

procedure must meet. The provisions of subsection (c) then appear to say that the evaluation procedure (which if read in accordance with board actions would include establishment of procedure and criteria)," should be developed by the board in cooperation with the persons responsible for making evaluations and the persons who are to be evaluated," (Emphasis added). That same subsection then appears to make optional the involvement of any others in the development of the plan. In the opinion of the examiner it certainly appears that the intent of the legislature was to provide certificated employees with input not only into the "form" of the evaluation plan but also into its "substance", all of which is limited to some degree by the mandates of K.S.A. 72-9001 et seq.

The most enlightening fact to be revealed by a reading of K.S.A. 72-9001 et seq., is that the legislature has seen fit to include both form (procedures) and substance (criteria) in its directives regarding evaluation procedures. The legislature saw no need to individually define each nor to separate them as board rights versus teacher rights. The separation of criteria from procedure first appears in the minds of the parties in attempting to isolate items over which there is no obligation to bargain. The Professional Negotiations Act makes no such distinction, and the examiner is not inclined to do so either. Testimony on the record indicates that in many areas, procedure and criteria are inseparable one from the other. In addition, to find that procedures are negotiable while criteria is a separate and a non-negotiable issue would be non-sensical or at very least would greatly minimize the value of participation in the process of establishment of the evaluation system. By way of example, it make little difference the frequency with which one is to be evaluated or by whom the evaluation is to be completed (procedures) if the evaluation measures their height, weight, eye color, and ability to juggle (criteria). The foregoing ridiculous example is used to emphasize a point. One major purpose of the Professional Negotiations Act is to provide a vehicle for the professional employees to use in community with

their employer in regard to the establishment, maintenance, and/or improvement of their conditions of employment. The receipt of a satisfactory evaluation has a direct bearing on the maintenance or improvement of those conditions of employment while a less than satisfactory evaluation can result in discipline or the non-renewal of employment. Evaluation scores are also often used in the computation of lay-off and recall scores all of which are conditions of employment. It is illogical, in the mind of the examiner, therefore, to believe that the legislature would grant employees the right to be represented on issues so critical to their employment without simultaneously granting their input into the only meaningful articles on which those decisions are made.

The opinion of the examiner is further fortified by other language contained at K.S.A. 72-5413(1), specifically wherein it states:

"Except as otherwise expressly provided in this subsection, the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiation proposal would not prevent the fulfillment of the statutory or constitutional objective."

The examiner believes that the legislature intended professional negotiations to encompass full and open discussion on issues and subjects of real meaning to the professional employees. The examiner can think of no issue or subject with any more meaning or impact on the professional employee's conditions of employment than the "criteria" upon which their continued employment will be based.

In summary, the examiner believes that the legislature envisioned full and open discussions over a multitude of subjects, regardless of their impact on the employee or on the operation of the educational system, and regardless of the fact that the matter may be the subject of a statute or of the state constitution so long as it's objective is fulfilled. In this case the objectives of two laws must be balanced. Those laws are K.S.A. 72-9001 et seq., whose objective it is to provide for the improvement of the educational growth and performance of the certificated employee and thereby the educational service provided

by the district, and K.S.A. 72-5413 et seq., whose objective it is to provide for the establishment, maintenance, and improvement the conditions under which certificated employees are employed. The examiner, recognizing the desire of the legislature to harmonize the employer/employee relationship, sees no conflict created in statutory objectives by allowing employee bargaining in regard to the particulars over which their performance will be evaluated. In the alternative, a denial of the right to bargain over "criteria" renders nearly meaningless any discussions over "procedures". It matters little when evaluations are conducted or by whom they are conducted if the employer may unilaterally set the standards by which performance is to be judged. An unscrupulous employer could, under that set of conditions, bargain regarding "procedures" and follow those "procedures" to the letter of the contract while setting unreasonable and arbitrary evaluation "criteria", dismissing employees who failed to meet that "criteria", and rendering meaningless the employee's right to be represented in regard to "professional employee appraisal procedures".

Based on all the foregoing, the examiner is convinced that the legislature contemplated inclusion of the criteria upon which one is evaluated in their use of the words "employee appraisal procedures" when defining those subjects listed at K.S.A. 72-5413(1) as terms and conditions of employment and over which bargaining is mandatory.

RELIEF

In this case USD 352 currently evaluates professional employees under two systems. The first system may be referred to as the "old plan" which was the system in effect prior to May 19, 1986. The second system may be referred to as the "new plan" which was included within the unilaterally established "contract" issued by the board of education for the 1986-87 school year. The

Complainant does not seek to have any evaluations vacated but rather seeks a finding that the entire evaluation system, including "procedures", "forms", and "criteria", is manditorily negotiable. That finding has been made and the Respondent is, therefore, ordered to negotiate the entire evaluation system in the future or any portion thereof upon receipt of a timely and sufficient notice to negotiate. In addition, the Respondent is ordered to immediately abandon the "new plan" for all employees and evaluate all employees under the procedures, forms and criteria in effect prior to May 19, 1986, the "old plan". The "old plan" shall remain in effect until such time as the bargaining process has been utilized in good faith in regard to any changes in that plan.

It is so ordered this 9th day of September, 1988.



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