

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

KINGSLEY-OFFERLE-NEA,)
)
Petitioner)
)
vs.) Case No. 72-CAE-5-1990
)
U.S.D. #347, KINGSLEY, KS,)
)
Respondent)

INITIAL ORDER

On the 1st day of May, 1990, the above captioned prohibited practice complaint filed by Petitioner, Kinsley-Offerle-NEA, came on for hearing before Monty R. Bertelli, presiding officer and designee for the Secretary of Human Resources.

APPEARANCES

Petitioner: Appeared by Marjorie A. Blaufuss, staff attorney, Kansas-National Education Association, 715 West Tenth, Topeka, Kansas 66612

Respondent: Appeared by M. Moran Tomson, attorney at law, P.O. Box 310, Johnson, Kansas

SYLLABUS

1. PROHIBITED PRACTICE - Jurisdiction of the Secretary to Construe a Negotiated Agreement. The Secretary may lawfully construe a negotiated agreement between a school board and its professional employees if construing the agreement is necessary to determine if a prohibited practice has been committed pursuant to K.S.A. 72-5430a.
2. PROHIBITED PRACTICE - Duty to Negotiate in Good Faith-During term of professional agreement - Unilateral change in mandatory subject negotiations. After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 et seq., the school board may not act unilaterally to make changes in subjects which are mandatorily negotiable and included in the agreement during the time that

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agreement is in force.

3. PROHIBITED PRACTICE - Duty to Negotiate in Good Faith - During Term of Professional Agreement - Per Se violations. Unilateral changes in mandatory subjects of negotiation during the term of a professional agreement are normally regarded as per se refusals to negotiate and a violation of K.S.A. 72-5413(b)(5). It is the failure to negotiate, rather than the absence of good faith, which lies at the heart of any violation involving unilateral change of mandatory subjects of bargaining.

FINDINGS OF FACT

1. The Board of Education of Unified School District No. 347 (hereinafter referred to as the "Board") is a school district organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.

2. The Kinsley-Offerle National Education Association (hereinafter referred as "Association") is the exclusive representative of the professional employees of the Board, certified as such pursuant to K.S.A. 72-5413 et seq.

3. The hearing is authorized pursuant to K.S.A. 72-5430a(a) and K.S.A. 77-517.

4. During negotiations for the 1989-90 contract, the Association properly noticed the topic of supplemental salaries for negotiations and presented a package to the Board which contained proposals concerning salaries for supplemental contracts. (Transcript at 11, 60, 80-81, 262.)

5. Included in this package was a proposal that the supplemental contract for the sponsorship of the pep club and

cheerleaders be combined and offered as one supplemental contract for one salary. (Transcript at 10-11, 60, 80-81.)

6. The Board asked the members of the Association's negotiating team for their rationale for the proposal, and the Association's representatives explained they believed the duties of pep club and cheerleading sponsor were not properly being fulfilled, and the duties between the two areas were sufficiently close to allow the same sponsor to work with both groups. (Transcript at 10-12, 60, 80-81.)

7. There had been no pep club sponsor during the 1988-89 school year. (Transcript at 16, 18, 262.)

8. The cheerleading sponsor for the 1988-89 school year had been Rita Brown, who was not a certified employee of the District. (Transcript at 151.)

9. High School Principal Glenn Suppes believed during the 1988-89 school year it would be important to fill the pep club position during the 1989-90 school year because of a prior lack of supervision, guidance and school spirit. (Transcript at 198.)

10. During negotiations, the Board offered no counter proposal concerning the combined cheerleader/pep club sponsorship. (Transcript at 11-12, 60, 80-81, 96, 262.)

11. On or about July 10, 1989, the parties ratified the 1989-90 negotiated agreement. (Transcript at 99; Petitioner's Exhibit 1.)

12. Included in the ratified agreement was a provision for supplemental salary for a combined cheerleader and pep club sponsorship to be paid at four percent of the base teacher's contract or \$797.00 (Transcript at 14; Petitioner's Exhibit 1 at 9.)

13. During August 1989, Rita Brown refused to accept a supplemental contract for the combined cheerleading/pep club sponsorship. (Transcript at 113, 119, 158, 161.)

14. Principal Suppes individually offered the cheerleading/pep club supplemental to Bobbie Lewis and Marilyn Bauer, both previous sponsors and certified teachers in the district. (Transcript at 171-72.)

15. At a meeting on August 18, 1989, Principal Suppes informed the high school faculty the pep club position was available. (Transcript at 172, 176.)

16. On August 21, 1989, district Superintendent Lonn Poage asked Association President Sally Maack for a meeting of the Association officers to discuss the problem with filling the cheerleader/pep club supplemental contract. (Transcript at 100-01.)

17. The afternoon of August 21, 1989, Superintendent Poage, Principal Glenn Suppes, Association President Sally Maack and Association Secretary-Treasurer Marilyn Bauer met in the Superintendent's office. (Transcript at 62, 101, 112, 188.)

18. At the August 21st meeting, Superintendent Poage asked permission to split the combined cheerleader/pep club sponsorship and offer two individual supplemental contracts at a salary of \$797.00 each. (Transcript at 64, 102, 230.)

19. Ms. Maack and Ms. Bauer stated they did not have authority to make that decision and agreed to poll the members of the Association.

20. Ms. Maack sent a letter "to all members of K-O NEA" which provided:

"Cheerleading/Pep Club was negotiated as a single contract this year rather than separate. Rita Brown will not sign her contract this way. The Administration want us to give them approval to separte [sic] this into two positions with 4% going to each sponsor. Mr. Suppes would really like to see an active pep club. Do we, as an association want to allow them to offer this seperately [sic], file a grievance, or have them find someone that will do both cheerleading and pep club." (Transcript at 103; Petitioner's Exhibit 2.)

21. Sally Maack had neither the authority nor the intent to offer the split positions to Association members through her letter (Transcript at 178-79, 448.)

22. The twenty-one members of the Kinsley-Offerle Education Association were polled, either in person by an Association representative or by telephone, concerning the members' desire to allow the combined cheerleading/pep club supplemental to be split and offered separately.

23. At no time during the polling process were Association members asked whether they would be willing to accept either or both of the split positions. (Transcript at 534, 437.)

24. In a letter to Superintendent Poage dated August 24, 1989, Ms. Maack indicated twelve of the seventeen Association members who responded to her poll were opposed to changing the terms of the supplemental contract as found in the negotiated agreement. (Transcript at 105-06, 190; Petitioner's Exhibit 3.)

25. At no time between August 21, 1989, and August 28, 1989, did the Board and the certified professional employee representative engage in professional negotiations as defined by K.S.A. 72-5413(g) on the subject of pay for the duties under a supplemental contract(s) for the pepclub/cheerleader sponsorship.

26. At no time was the question of splitting the combined supplemental contract presented to all members of the bargaining unit. (Transcript at 46, 104, 272, 442-42.)

27. At no time did the teachers' bargaining unit ratify a change in the negotiated agreement to allow separate supplemental contracts for a cheerleading sponsor and a pep club sponsor with salaries of four percent of the base salary or \$797.00 each. (Transcript at 143, 438-39, 442-43.)

28. In a letter to Ms. Maack dated August 28, 1990, Superintendent Poage stated:

"I'm in receipt of your letter to your membership concerning our administrative request to split the cheerleading/pep club sponsorship and joining the eight period day committee with your requested advisory committee to the superintendent. I understand the association is not interested in allowing us to do either....

For your information, I have directed Mr. Suppes to fill the cheerleading and pep club sponsorships with two people. As you know, we didn't have a certified teacher volunteer for the joint position. We will be filling this position outside of the negotiated agreement due to lack of interest by the certified staff." (Transcript at 106; Petitioner's Exhibit 4.)

29. On August 29, 1989, Rita Brown signed a supplemental contract to act as cheerleading sponsor for the 1989-90 school year at a salary of \$797.00. (Transcript at 163; Respondent's Exhibit 5.)

30. On or about August 28, 1989, Marry Ellen Schinstorck, the high school secretary, signed a supplemental contract to act as the pep club sponsor for the 1989-90 school year. (Transcript at 245.)

31. On September 11, 1989, the Board approved a supplemental contract for cheerleading sponsor for Ms. Brown with a salary of \$797.00 and a supplemental contract for pep club sponsor.

32. After the August 28, 1989, decision to split the pep club/cheerleading sponsorship no member of the teacher's bargaining unit was offered the split supplementals for sponsorship of the cheerleaders and pep club at a salary of \$797.00 for each position. (Transcript at 124, 133, 292-94.)

CONCLUSIONS OF LAW AND OPINION

ISSUE #1: IT THE SECRETARY WITHOUT JURISDICTION TO HEAR AND DECIDE PETITIONER'S PROHIBITED PRACTICE COMPLAINT?

The threshold issue which must be decided is whether the Secretary of Human Resources of the State of Kansas has jurisdiction to entertain Petitioner's complaint. It apparently is the Board's position the dispute in this case is contractual in nature and the "resolution of contractual disputes is not, however, within the jurisdiction of the Secretary of Human Resources." Rather, the appropriate forum for the dispute is the grievance procedure set forth in the Agreement and/or the district court. In support of this position the Board cited two prior decisions of the Secretary of Human Resources written by the Secretary's designee Jerry Powell. They are case No. 72-CAE-2-1981, In the Matter of Diane Marie Taylor, Complainant v. Unified School District #501, Topeka, Kansas, Respondent, hereinafter referred to

as "Taylor", and Case No. 72-CAE-16-1981, National Education Association - Topeka, Complainant v. Unified School District #501, Topeka, Kansas, Respondent, hereinafter referred to as "NEA-Topeka".

The Board claims the Secretary did not have jurisdiction to find a violation of K.S.A. 72-5413(b)(5) in this case because the existence of the prohibited practice did not turn entirely upon the provisions of the Professional Negotiations Act (hereinafter referred to as the "Act"), but upon a good faith dispute as to the correct meaning of the provisions of the collective bargaining Agreement. The Agreement contained a provision, Article VIII, which allowed the filing of a grievance "based on an alleged violation, misinterpretation, or a misapplication by the district of a negotiated contract or agreement." The Board's position is that this provision of the Agreement provides the exclusive means for resolving disputes between the parties and that the prohibited practice provisions of the Act are inapplicable. The Board contends that since the Association failed to timely file a grievance pursuant to the Article VIII of the Agreement it can not now seek relief under the Act in the guise of a prohibited practice complaint.

In evaluating this contention it is important first to point out that the Agreement contains no arbitration clause. K.S.A. 72-5424 provides, in pertinent part:

"A board of education and a professional employee's organization who enter into an agreement covering terms and conditions of professional service may include in such agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application or violation of such agreement" (emphasis added)

However, "Arbitration" is defined in Black's Law Dictionary, 5th ed. as follows:

"The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." (emphasis added).

In this case the Agreement did provide grievance procedures but the procedures do not meet the statutory requirement of "final and binding arbitration". Additionally, the grievance procedure in the agreement cannot be fairly considered "arbitration" because the proceedings are not conducted by an "impartial (third) person". Rather the person deciding the merits of the complaint, at each level of the Article VIII grievance procedure, would have been an individual or individuals against whom the grievance was filed. Such a procedure does not satisfy the requirement for a fair and impartial hearing contemplated by K.S.A. 72-5424 or K.S.A. 72-5430(a).

It should also be noted that the parties did not intend at the time of negotiating their Agreement that Article VIII would be

employed to resolve prohibited practice disputes arising under K.S.A. 72-5430a. As Superintendent Lonn Poage testified:

"A. I don't think the grievance procedure is set up to be prohibited practice complaint court." (Tr. p. 302)

* * *

"Q. (By presiding officer) Was it your testimony that you believe that the grievance procedure was not intended to handle the prohibited practice complaints?"

"A. But if this - - (interrupted)"

"Q. Yes or No?"

"A. Yes. That's what I said."

The intent of the parties, however, may not be important. In the Taylor case cited by the Board, Shawnee County District Court Judge James M. MacNish, Jr. addressed the jurisdiction issue in response to a Motion for Reconsideration in Case No. 81-CV-1137. In his Memorandum Decision and Order dated October 17, 1985 Judge MacNish stated:

"An arbitrator has the power to rule on matters concerning the interpretation and application of a professional agreement. Diane Taylor claimed her contract was violated by the Board's anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under 72-5430. That power is given to the Secretary of Human Resources under K.S.A. 72-5430(a)."

Mr. Powell was correct when he stated in his August 17, 1981 Order in the Taylor case that "Nothing in K.S.A. 72-5430 authorizes the secretary to make a determination that either party to a memorandum of agreement has violated such agreement". However that statement must be read in the context of the whole decision. Mr. Powell ruled that Ms. Taylor did not have standing to file a K.S.A. 72-5430(b)(5) prohibited practice complaint alleging a refusal to negotiate in good faith. Mr. Powell did not have to review the professional agreement to reach his decision for it was an issue of law not fact. Once he dismissed the prohibited practice complaint the only issue remaining was a breach of contract allegation which, standing alone, as Mr. Powell correctly stated, was beyond the jurisdiction of the Secretary to determine.

It should be noted, following Judge MacNish's determination that a prohibited practice had in fact been committed, upon remand Mr. Powell in his December 9, 1986 order did review and interpret the Agreement to determine the appropriate remedy.

Likewise the statement cited by the Board from Mr. Powell's decision in NEA-Topeka is correct as written. That statement is as follows:

"In the opinion of the examiner, the payment of supplemental/differential salary amounts that exceed contractual amounts is not a prohibited practice under K.S.A. 72-5413 et seq, unless it can be shown that the excess salary amounts were derived by negotiations between the school board and individuals other than the professional employee's representative. If differential/supplemental salary amounts represent a

departure from the stated contractual amounts, complaints may be filed either through the grievance procedure, if one exists, or the district courts. The resolution of contractual disputes is not, however, within the jurisdiction of the Secretary of Human Resources."

If the excess salary amounts were negotiated by the school board and exclusive representative of the professional employees then no prohibited practice occurred and any dispute arising concerning those amounts was contractual. Resolution of contract disputes is not within the jurisdiction of the Secretary of Human Resources as Mr. Powell correctly states.

Conversely, however, excessive salary amounts negotiated between the school board and anyone other than the exclusive professional employee representative would evidence a prohibited practice. As Mr. Powell concluded in NEA-Topeka:

"The examiner has determined that negotiations involve the endeavor to reach agreement and the authority to negotiate for the professional employees rests exclusively with the representative, if one has been designated by the professional employee" (Page 5).

* * *

"In the opinion of the examiner, the school board's positive action on individual salary requests does constitute negotiations as defined by statute." (Page 5).

* * *

"Thus, the board's general practice of acting on salary request. . . does circumvent the exclusive representation rights of NEA-Topeka." (Page 6)

It is clear from the decision of Mr. Powell in NEA-Topeka that, but for the determination of a statute of limitations bar, the school board would have been found to have committed a

prohibited practice. Also, and of importance to the instant case, the Secretary retained jurisdiction to hear and decide that case, even though the complaint was contract-based in order to decide the prohibited practice complaint.

As a general rule, the secretary should not impose his own view of what the terms and conditions of the professional agreement should be. Nor does the Secretary have the authority under K.S.A. 72-5430a to interpret a professional agreement where the issue is solely one of interpretation or application of the agreement. But where the Secretary in enforcing a statutory right the legislature has considered necessary to facilitate negotiation between professional employees and school boards toward fair terms and conditions of professional service, the Secretary may construe a professional agreement to decide a prohibited labor practice complaint without exceeding the jurisdiction of K.S.A. 72-5430a. However, the Secretary, in making a prohibited practice determination should scrutinize only that portion of the agreement necessary to reach a decision.

If it were true, as the Board contends, that the Secretary has no jurisdiction to consider a professional agreement prior to an authoritative construction by the Courts, professional employee organizations would face inordinate delays in obtaining vindication of their statutory rights. To accept the Board's position, the Association, in this case, would have been required to complete the

four step grievance procedure, appeal to district court for a determination that the Board's actions were a violation of the Agreement and proceed with any necessary appellate court reviews. Only then would the Association acquire a right to bring a prohibited practice complaint before the Secretary for resolution. Petitioner would then have to go back to the Secretary to begin a prohibited practice proceeding to enforce its rights under the Act. In all probability this cumbersome procedure would add years to the already lengthy period required to gain relief through the Secretary.

In the labor relations field, as in few others, time is crucially important in obtaining relief. The Kansas legislature did not intend to place obstacles in the way of the Secretary's effective enforcement of statutory duties. In fact, K.S.A. 72-5430a(a) provides for expedited hearings and orders by the Secretary in emergency situations. To adopt Respondent's position would make such provision a nullity. There can be no question the Secretary may construe the professional agreement negotiated by the parties when such interpretation is necessary to the determination of a prohibited practice complaint.

The Board's motion to dismiss is therefore denied.

ISSUE #2: Has the Board of Education committed a prohibited practice by unilaterally changing the supplemental contract concerning the sponsorship of the cheerleaders and pep club from a combined position with a salary of \$797.00 to two separate positions each with a salary of \$797.00

The Professional Negotiations Act, K.S.A. 72-5413 et seq., places a reciprocal duty on the part of both the school board and the exclusive representative of professional employees to "negotiate in good faith" the terms and conditions of professional service. To refuse to negotiate is a prohibited practice pursuant to K.S.A. 72-5413(b)(5) and (c)(3).

The essential elements of good faith negotiations include "the serious intent to adjust differences", NLRB v. Insurance Agency International Union, 361 U.S. 477, 485 (1960); "an open mind and sincere desire to reach agreement"; and "a sincere effort ... to reach a common ground." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943). Mere discussions with the exclusive representative is not enough. See National Educational Association v. Board of Education, 212 Kan. 741 (1973).

The duty to negotiate in good faith created by K.S.A. 72-5413(b)(5) and (c)(3) is limited to mandatory subjects of bargaining. A mandatory subject of bargaining is a subject which the parties are required to negotiate. The appellate courts of Kansas have held that if a topic is by statute made a part of terms and conditions of professional service, then a topic is by statute

made mandatorily negotiable. NEA-Wichita v. U.S.D. 256, 234 Kan. 512 (1983); Tri-County Educator's Ass'n v. Tri-County Special Ed., 225 Kan. 781 (1979); NEA-Topeka, Inc. v. U.S.D. 501, 225 Kan 445 (1979). K.S.A. 72-5413(1) defines "terms and conditions of professional service", as they pertain to this case, to mean "(1) salaries and wages, including pay for duties under supplemental contracts;..." (emphasis added)

The duty to bargain does not cease with the signing of a professional agreement. Rather, it extends throughout the life of an agreement. As the Supreme Court has noted:

"Collective bargaining is a continuing process involving among other things day-to-day adjustment in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract. Conley v. Gibson, 355 U.S. 41, 46 (1957). See also City of Livingston v. Mont Council No. 9, 571 P. 2d 374 (1977).

Such a continuing duty imposes upon the board of education the obligation to negotiate with the professional employee's exclusive representative proposed changes in an existing agreement. See NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939). Unilateral changes in mandatory subjects of negotiation during the term of a professional agreement are normally regarded as per se refusals to negotiate and would be violations of K.S.A. 72-5413(b)(5) without regard to any consideration of good or bad faith. It is the failure to negotiate, rather than the absence of good faith, which

lies at the heart of any violation involving unilateral change of mandatory subjects of bargaining. The Developing Labor Law, Ch 13, The Duty to Bargain, at 562; See also Production Plated Plastics, Inc., 106 LRRM 1143 (9181); NLRB v. C&C Plywood Corp., 64 LRRM 2065 (1967) (U.S. Supreme Court decision). The very reason unilateral action is prima facie unlawful is the high degree of probability that it may frustrate bargaining opportunities, NLRB v. Cone Mills Corp., 64 LRRM 2536 (1967), while 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. Board of Education, 211 Kan. 219, 232 (1973). Thus a violation may be found despite the absence of a finding of bad faith and even where there is a possibility of subjective good faith. The Developing Labor Law, Ch. 13, The Duty to Bargain, at 564.

Reference to NLRB case law is not prohibited by the Professional Negotiations Act. As the court in National Education Association v. Board of Education, supra at 749:

"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

to the Kansas Public Employer-Employee Relations Act. We do not, however, believe those differences prevent our reaching the conclusion that a public employer may negotiate and be bound by its agreements relating to terms and conditions of employment.

The burden of affirmatively establishing a prohibited practice rests upon the complaining party, and the burden of proof never shifts. The evidence in the record reveals the Association, in accordance with K.S.A. 72-5423(a) noticed the subject of supplemental salaries for negotiation in the 1989-90 professional agreement and presented a proposal for a combined pep club/cheerleader sponsorship offered as one supplemental contract for one salary. (Tr. p. 11, 60, 80-81, 261-262). The Board did not present any counter-proposal. (Tr. p. 262). The ratified 1989-90 Agreement provided for a single pep club/cheerleader sponsor with a supplemental salary to be paid at four percent of the base teacher's contract or \$797.00. (tr. p. 14; Petitioner's Exhibit 1). The negotiated agreement was ratified by the Board and the professional employees and upon ratification by both parties the agreement became binding. (National Education Association v. Board of Education, 212 Kan. 741, 749 (1973); Tr. p. 139 285)

Defined as a "term and condition of professional service" by statute, the pay for duties under a supplemental contract is a mandatory subject for negotiation as a "salaries and wages" issue.

In the Taylor case cited by the Board, Jerry Powell noted in his

December 7, 1986 order the district court found the nepotism policy to be a wage issue which was included within the negotiated agreement. Mr. Powell concluded:

"There can be no doubt that a "wage issue" must be noticed and negotiated prior to implementation. Failure of an employer to comply with this procedure is a violation of K.S.A. 72-543 (b)(5). Further such a failure to notice and negotiate a mandatorily negotiable issue results in violation of K.S.A. 72-5430(b)(1) when applied to the individual employee."

Mr. Powell's interpretation of the law is consistent with Kansas appellate court decisions. While the courts have not been called upon to decide whether a unilateral change in a mandatory subject of bargaining contained in the professional agreement during the term of that agreement constitutes a prohibited practice, the court did hold in NEA-Wichita v. U.S.D. No 259, 234 Kan 512, Syl. 4 (1983) that:

"4. SCHOOLS - Teachers' Contracts - Board Cannot Make Unilateral Changes in Items Which Are Mandatorily Negotiable. After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 et seq., then during the time that agreement is in force, the board, acting unilaterally may not make 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 within the resulting agreement. Dodge City Nat'l Education Ass'n v. U.S.D. 443, 6 Kan. App. 2d 810, 635 P.2d 1263, rev. denied 230 Kan 817 (1981)."

Logic would dictate that if a board of education cannot unilaterally change mandatory items not discussed or included in the professional agreement during the term of that agreement the same restriction must apply to items which were included in the agreement.

In the instant case, the Board found it could not fill the combined pep club/cheerleader sponsorship from among the members of the faculty. At a meeting on August 21, 1989, Superintendent Poage sought permission to split the combined pep club/cheerleader sponsorship into two individual contracts at a salary of \$797.00 each. (Tr. p. 64, 102, 230). Ms. Maack and Ms. Bauer, indicated they lacked authority to change the terms of the agreement but agreed to poll Association members as to their preference. (Tr. p. 65, 102; Petitioner's Exhibit 3). On August 24, 1989, Ms. Maack advised the Superintendent the Association opposed splitting the pep club/cheerleader sponsorship.

By letter to Ms. Maack dated August 29, 1989, Superintendent Poage advised as follows:

"For your information, I have directed Mr. Suppes to fill the cheerleading and pep club sponsorships with two people". (Tr. p 106; Petitioner's Exhibit 4).

On that same day, Mary Ellen Schinstock signed a supplemental contract to serve as pep club sponsor at a salary of \$797.00. (Tr. p. 245), and on August 29, 1989 Rita Brown signed a supplemental contract to serve as cheerleading sponsor also, at a salary of

\$797.00, (Tr. p. 163; Respondent's Exhibit 5). Neither individual was a member of the certified faculty.

There can be no question the action of the Board constituted a change in a mandatory subject of negotiation; that the affect of doubling the negotiated salary was a substantial change; and that the change was made unilaterally without notice or negotiation with the Association. The Board, in its brief, even admits:

"Prior to that time (August 28, 1989), the administration of the school district acknowledged its problem and, on an informal basis, contacted the association to see if the matter could be amicable resolved. There was not a meet and confer that took place between the administration and the association." (emphasis added) (Respondent's Brief, p. 17-18; See also Tr. p. 293).

"Negotiation" is defined in Black's Law Dictionary as "the process of submission and consideration of offers until an acceptable offer is made and accepted." Here, there was no opportunity for submission and consideration of offers. The Board sought to have the sponsorship split. When its request was opposed, the Board unilaterally acted. At best, the Board's action can be characterized as the presentation of a proposal on a take-it-or-leave-it basis, a negotiation approach which is looked upon with disfavor. See General Electric Co., 57 LRRM 1491 (1964).

It would appear the Board made a bad bargain, at least as to combining the pep club/cheerleader sponsorship, when it negotiated the 1989-90 Agreement. Unfortunately, bad bargains do not justify

remedy by unilateral action regardless of the good intentions of the Board as they related to the interests of the students. Certainly, the Board's proposal to split the sponsorship was not the only means to address the problem of finding a sponsor. As Archibald Cox states in The Duty To Bargain In Good Faith, 71 Harvard Law Rev. 1401, 1439 (1958):

"Many empty discussions were gradually and unconsciously transformed into a bona fide exchange of ideas leading to mutual persuasion."

Unfortunately, other alternatives were not invited nor the opportunity for discussion allowed.

The Board's unilateral action constituted a per se refusal to negotiate in violation of K.S.A. 72-5413(b)(5), and these actions, committed without negotiation, and achieved through bypassing the exclusive representative, support an inference of lack of good faith. This inference grows stronger when coupled with the speed in which the administration acted to sign non-certified individuals to fill the split sponsorships once the decision to split the pep club/cheerleader sponsorship was made. The conclusion is inescapable the the Board committed a prohibited practice as set forth in K.S.a. 72-5413(b)(5).

While K.S.A. 72-1106(g) provides the Board of Education may employ non-certified personnel to supervise people in non-instructional activities, neither K.S.A.72-1106(g) nor the language or spirit of Rule 10 provide authority justifying unilateral action

of the type taken by the Board in violation of the Professional Negotiation Act's duty to negotiate in good faith.

ISSUE No. 3 - APPROPRIATE REMEDY

Framing an appropriate remedy in this case is complicated by the Association's delay in filing the complaint and the fact that the professional agreement upon which the complaint is based has expired, and presumably a new agreement has been or is being negotiated. The complaint was filed January 24, 1990, approximately five months after the action by the Board. By the time the matter came on for hearing, the school year was almost over and the cheerleading and pep club activities had terminated. It therefore would be inappropriate, if not impossible, to require any action relative to the pep club sponsor or cheerleader sponsor or the relatively small salary received for services performed.

Likewise with the expiration of the agreement, any requirement to return to the language and salary amount contained therein relative to the combined pep club/cheerleader supplemental contract would serve no useful purpose.

Therefore, the only appropriate remedy in this case appears to be a cease and desist order, as follows:

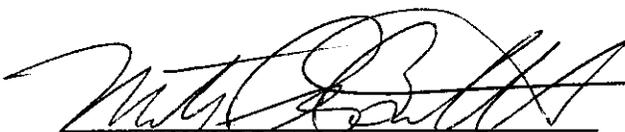
- 1) The Board shall cease and desist in engaging in any prohibited practice through the unilateral changing of terms and conditions of professional service contained in a current negotiated agreement;

2) The Board shall post in a conspicuous location in each school building within the district a copy of this order which shall remain posted for a period of at least 30 days.

3) The Board shall post in a conspicuous location in each school building within the district an acknowledgment that it has been found to have committed a prohibited practice and a statement of the Board's commitment to comply with the requirements of the Professional Negotiations Act in all future dealings with the certified representative of USD 347 professional employees, which shall remain posted for a period of at least 30 days.

The Association's request for assessment of costs including the cost of the transcript is hereby denied.

IT IS SO ORDERED THIS 10th DAY OF OCTOBER, 1990.



Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
1430 Topeka Blvd. - 3rd Floor
Topeka, Kansas 66612

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer which will become final fifteen (15) days from the date of service unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed with the Secretary of the Department of Human Resources, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of October, 1990, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

Marjorie A. Blaufuss
Kansas NEA
710 West 10th Street
Topeka, Kansas 66612
Attorney for Petitioner

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