BEFORE THE SECRETARY OF HUMAN RESOURCES OF THE STATE OF KANSAS

| | | |
|---|---|---|
| In the matter of:<br><br>Lawrence Education Association,<br><br>Petitioner,<br>v.<br><br>The Board of Education of U.S.D. 497, Lawrence, Kansas,<br><br>Respondent, | ) | Case No. 72-CAE-9-1989<br><br>Pursuant to K.S.A. 72-5413 et seq. and K.S.A. 77-501 et seq. |

PRESIDING OFFICER'S INITIAL ORDER

On the 18th and 19th days of December, 1989, the above captioned matter came on for hearing before William J. Pauzauskie, presiding officer.

I. APPEARANCES

David M. Schauner 715 W. 10th Street, Topeka, Kansas 66612 attorney for Petitioner.

Peter K. Curran, 824 Louisiana Street, P.O. Box 45, Lawrence, Kansas 66044 attorney for Respondent.

II. ISSUE

Whether the respondent committed a prohibited practice within the meaning of K.S.A. 72-5430(b)(5) or (6) by either:

(1) Not granting staff development in-service (IDP) points to a person who transferred from the Bonner Springs School District to the Lawrence USD 497, or

(2) Failing to negotiate with petitioner before unilaterally imposing a "while employed" restriction on the granting of IDP points to teachers in U.S.D. 497.

III. PROCEEDINGS BEFORE THE BOARD

1. The petition was filed on or about 2/16/89.

72-CAE-9-1989

2. The respondent answered the complaint on or about March 10, 1989.

3. The respondent moved to dismiss the complaint on the grounds of lack of jurisdiction on or about May 19, 1989.

4. The petitioner replied to the motion to dismiss the complaint on the grounds of lack of jurisdiction on or about the 19th day of May 1989.

5. The respondent filed a brief relating to jurisdiction May 22, 1989.

6. The respondent filed a reply brief relating to jurisdiction on or about June 9, 1989.

7. A hearing and oral argument was held September 26, 1989, considering the matters of jurisdiction.

8. The hearing officer denied respondent's motion to dismiss for lack of jurisdiction.

9. A hearing was held at Lawrence, Kansas, on December 18th & 19th, 1989, on the merits of the complaint.

10. Post hearing briefs were received on or about January 31, 1990, from complainant and respondent.

11. This hearing officer has reviewed all the briefs filed by the petitioner and respondent to date and viewed the cases cited therein.

## IV. FINDINGS OF FACTS

1. The petitioner Lawrence Education Association is the appropriate bargaining representative for the certified teachers employed by the Lawrence Board of Education USD 497, and is a proper petitioner.

2. The Lawrence Board of Education USD 497 is the appropriate employer within the meaning of K.S.A 72-5413(b).

3. In 1984 the Kansas Legislature enacted a law known as the In Service Education Opportunities Act which went into effect July 1, 1985 (K.S.A 72-9601 et seq.).

4. Pursuant to K.S.A. 72-9601 et seq. the board of education of each school district is authorized to develop policies and plans for delivery of in service education to certified personnel in the school district. (K.S.A. 72-9604)

5. Pursuant to K.S.A. 72-9601 et seq. each school district was authorized to apply to the state board of education for approval of its own in service education program, and if approved, would receive state aid for part of the costs of maintaining the program (K.S.A 72-9605).

6. The respondent has generally followed the requirements of K.S.A. 72-9601 et seq. in regard to the In Service Education Opportunities Act.

7. The respondent is a member of an in service "development council", which consists of both teachers and administrators from several area school districts.

8. The master agreement negotiated between the petitioner and respondent contained a provision for salary enhancement based on in service points. The agreement at Article VIII states as follows:

"Points earned through staff development in service hours may result in horizontal movement on the salary schedule using the following formula...To qualify for salary enhancement through this process, the teacher must have an approved individual development plan on file and meet the recertification guidelines set forth by the Kansas State Department of Education." (Emphasis added) (The individual development plan is hereinafter referred to as "the IDP".)

9. Tina Ballard (formerly L'Ecuyer) was a Bonner Springs elementary music teacher until 1987.

10. During her three years at Bonner Springs, Ms. Ballard accumulated IDP points pursuant to the Bonner Springs IDP plan.

11. Lawrence Public School music teachers were present at some of the same workshops that Ms. Ballard attended prior to transferring to respondent's employment. Lawrence Public School music teachers received validated IDP points for the workshops, but Ms. Ballard was denied any credit.

12. Ms. Ballard joined the Lawrence School District U.S.D. 497 in August of 1987.

13. Ms. Ballard called the Lawrence Public School's office to verify the validity of the IDP points of her Bonner Springs transcript at or about the time she became employed by the

respondent. She received verbal verification that all the points were valid. She was not notified that her Bonner Springs were not to be considered valid for salary enhancement, until she was employed by the respondent.

14. Ms. Ballard had an IDP on file which met the guidelines of the State Department of Education, and did not receive the points pursuant to Article VIII. Ms. Ballard at all times was a certified teacher pursuant to State law.

15. In June or July 1988 Ms. Ballard was informed that respondent would not recognize her Bonner Springs IDP in service points, or any points earned outside the respondent's district.

16. The respondent's IDP council voted that incoming employees could use in service points earned in another district for purposes of recertification, but not for movement on the collectively bargained salary scale.

17. The respondent had issued an informational document for the 1987 - 88 school year which made no mention of out of district exceptions to IDP points for salary enhancement.

18. On August 20, 1988, the respondent issued an informational document for school year 1988 - 89 which added new terms for counting in service points for salary movement. The new terms were "while employed" and "while employed by the district". The respondent unilaterally implemented this change without noticing the matter for negotiations.

19. The limiting language was repeated in the 1989 - 90 document.

20. The petitioner's and respondent's master agreement was renegotiated during the summer of 1988, and the exclusion of out-of-district points was not considered during negotiations. Article VIII (See Finding #8 above), remained the same. No bargaining occurred in 1988 between Petitioner and Respondent on Article VIII.

21. Ms. Ballard filed a formal grievance with respondent, concerning the IDP issue. The grievance has been held in abeyance by agreement of the parties pending this ruling.

23. On February 16, 1989, the petitioner Lawrence Educaiton Association filed its prohibited practice complaint in this matter, and the matter is now before this presiding officer for a decision.

24. The petitioner, Lawrence Education Association has never noticed the issue of in service points for collective bargaining.

25. The respondent's in service development team consists of administrators and teachers, but the team's activities do not constitute collective bargaining pursuant to K.S.A. 72-5413 et seq..

## V. DISCUSSION AND DECISION

Based upon the foregoing findings of fact, a review of the case decided in the party's briefs, and the record as a whole, I conclude that the respondent committed a prohibited practice by unilaterally changing a mandatorily negotiable subject of bargaining without first noticing same for negotiation.

I do not grant petitioner's requested relief of ordering that all the Bonner Springs in service credit points be automatically transferred to the Lawrence salary scale. The number of IDP points to be allowed on the salary scale may be decided through the parties' grievance procedure or by a cause of action in the District Court.

I do order the parties to immediately meet and confer concerning the appropriate number of in service credit hours that should be credited to each applicant who has applied for same, consistent with the credits given by the respondent for its employed teachers.

The foregoing conclusion of law is based upon the following analysis:

1. In service education is a mandatory subject of bargaining. Chee-Craw Teachers Association vs. USD 247, 225 Kan. 561, at 570, 593 P2nd 406 (1979).

2. Article VIII of the collectively bargained agreement does not have the qualifying language which respondent wishes to read into the article. Article VIII simply requires the transferring employee to meet two criteria: 1) The employee must have an IDP plan on file, and 2) the employee must meet the recertification guideline of the Kansas Department of Education. The petitioner's employees met both criteria and yet were denied the benefits of the master agreement, after becoming employed by the respondent.

3. The respondent's basic argument is that the IDP council and state law prevented them from granting petitioner credit under Article VIII.

However, the IDP council is not the school board, and the legislature did not implicitly repeal its express language in K.S.A. 72-5413(1) (which includes in service education as a mandatorily negotiable item) when it enacted K.S.A. 72-9601.

4. The IDP council cannot speak on behalf of the school board for matters which are mandatorily negotiable. The IDP council has no power to implement any policy or cause it to be binding on the parties to the collectively bargained agreement.

5. The law is clear that "A School Board may not make changes in a mandatorily negotiable items that were neither discussed during negotiations, nor included within the resulting agreement." Dodge City National Education Association vs. USD 443 6 Kan. App. 810, 635 P2nd 1263 (1981).

6. Section VIII of the collectively bargained agreement does not address the number of points a transferring teacher is to obtain under the agreement.

7. The respondent may not unilaterally deny IDP points to a transfering teacher, because the respondent may not unilaterally alter mandatorily negotiable items. Since the number of incoming credit hours was neither discussed during negotiations, nor included within their resulting agreement, the duty of the respondent is to negotiate the matter.

ANALYSIS OF RESPONDENT'S DEFENSES

I will next address the respondent's defenses, and why I did not find them meritorius.

Defense No. 1: K.S.A 72-9601 preempts collective bargaining. The Kansas Legislature has had notice of the Chee-Craw decision (supra) since 1979, and has not amended K.S.A. 72-5413(1) in response to that ruling.

Secondly, when the legislature enacted K.S.A. 72-9601 (which went into effect 7-1-85) it did not take that opportunity to amend the professional negotiations act, K.S.A. 72-5413 et seq.

Accordingly, I read the statutes together as part of an overall legislative scheme, and find the In Service Education Opportunites Act did not implicitly amend the Professional Negotiations Act.

Defense No. 2: No Jurisdiction. The enforcement provisions of the Professional Negotiations Act give the Secretary of Human Resources clear jurisdiction over this complaint. K.S.A. 72-5430(a) states:

> "any controversy concerning prohibited practices may be submitted to the secretary. Proceeding against the party alleged to have committed a prohibited practice shall be commenced...hearings on prohibited practices shall be conducted in accordance with the provisions of the Kansas Administrative Procedure Act...(b) the secretary shall dismiss the complaint or determine that a prohibited practice has or is being committed, and shall enter a final order granting or denying in whole or in part the relief sought...if there is an alleged violation of either subsection(b)(8) or (c)(5) of K.S.A. 72-5430, and amendments

> thereto, the aggrieved party or the secretary is authorized to seek relief in district court.

The prohibited practice alleged in this act is under K.S.A. 72-5430 b(5) and (6).

Subsection (b)(5) states that a employer may not:

> "refuse to negotiate in good faith with representatives of recognize professional employees, organizations as required in K.S.A. 72-5423 and amendments thereto;"

Subsection (B)(6) states that:

> "the employer may not deny the rights accompanying recognition of a professional employees organization which are granted in K.S.A. 72-5415 (exclusive representation of negotiating units) such representatives shall be the exclusive representative of all the professional employees in the unit for such purpose."

We agree with the respondent that this agency has only such powers that have been conferred upon it by law, expressly or by clear implication. Am Jur 2d Administrative Law Sect. 70, p.866; Bennett v. Corporation Commission 1227 Kan. 589, 596, 142 P.2d 810 (1943).

However, the legislature has expressly granted this agency the power to determine whether a prohibited practice has been committed, and I believe that power includes the power to interpret the contract of the parties, if a contract interpretation is necessary to decide the merits of the prohibited practice complaint.

The power utilized by this agency is consistent with general principles of administrative law. See State of Kansas ex rel Secretary of SRS v. Fomby, 11 Kan Ap. 2nd 138, 715 P.2nd 1045 (1986).

The respondent wishes to litigate this dispute in contract terms, and not professional negotiation act terms. The respondent argues a myriad of points to detract from the simple fact that mandatorily negotiable topics were unilaterally changed by respondent without notice to petitioner.

Defense No. 3. USD 352 v. NEA Goodland, Kansas Supreme Court Case No. 63641, decided January 19, 1990, hereinafter "Goodland").

Respondent argues Goodland is applicable and may require respondent to negotiate its in-service procedure but not the substance of its in service credit policy.

In Goodland, the Kansas Supreme Court upheld a district court ruling which concluded that professional employee appraisal procedures (involving "the mechanics" and "the how" and "the when" of employee evaluation) are mandatorily negotiable; but that the criteria used to evaluate areas of employee performance are matters reserved to management.

Goodland involved the interplay of K.S.A. 72-9001 et seq. and K.S.A. 72-5413(1). The Supreme Court decided that professional employee appraisal procedures, as specifically stated in K.S.A. 72-5413(e), are distinct from professional employee appraisal criteria as stated in K.S.A. 72-9001 et seq. However, the instant dispute involves IDP plans, not employee appraisal

procedures, and does not have a legislatively enacted distinction involving procedures vs. criteria.

Goodland has a substantially different history than does Chee-Craw. In Tri County Educators Association 225 Kan 781, 594 P2nd 207 (1979), the Supreme Court held that evaluation of employees was not a mandatorily negotiable item. The legislature later amended K.S.A. 72-5413(1) to include the term "professional employee appraisals procedures". There is no in-service credit hour procedures statute that sets out indepedent standards for in-service credit procedures.

Defense No. 4: Statute of Limitations. There was some evidence that Ms. Ballard was notified on or about May 4, 1988, that her IDP points from Bonner Springs would not transfer to Lawrence. There was also evidence that in August 1988, petitioner became aware of the respondent's unilateral change.

The petitioner, not Ms. Ballard, is the real party in interest. The rights of the bargaining agent are at issue in this decision, not the individual rights of a member. Individual rights of Ms. Ballard may be resolved utilizing the grievance process, which the parties negotiated, or may be resolved in the District Court.

I find the unilateral change was formally made by the respondent, and the petitioner was on notice of the change, on August 20, 1988. Since the prohibited practice in this case was filed on February 16, 1990, the petition was timely filed within

the 6 months period set out in K.S.A 72-5430a for prohibited practice complaints.

If Ms. Ballard has waited too long to file her grievance, or to file a breach of contract action in the District Court, her individual rights may be affected, but that question is not before the presiding officer in this case.

## CONCLUSION AND ORDER

In this case, the respondent encountered a question involving a mandatorily negotiable item. The exact subject of the question was not covered in the collectively bargained agreement, and had not been noticed for negotiations. The respondent answered the question by unilaterally imposing additional terms and conditions concerning the mandatorily negotiable item, without utilizing the collective bargaining process.

Accordingly, this hearing officer orders that the respondent cease and desist the prohibited practice of failing to negotiate in service hours, a mandatory subject of bargaining, for any member of the petitioner's bargaining unit, and orders the respondent to bargain over this matter pursuant to the professional negotiation act K.S.A. 72-5413 et seq.

This order is the decision of the presiding officer, and will become the final order of the Secretary of Human Resources in accordance with K.S.A. 77-530, unless appealed to the Secretary within 15 days in accordance with K.S.A. 77-527.

William J. Pauzauskie
Presiding Officer

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Secretary III in the Division of Employment Standards and Labor Relations of the Department of Human Resources for the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the presiding officer's initial order in prohibited practice complaint Case No. 72-CAE-9-1989 as the same now appears of record in the Department of Human Resources.

I do further certify that a true and correct copy of the above and foregoing Initial Order was served on each of the parties by depositing a copy in the United States Mail, first class, postage prepaid, on the 17th day of April, 1990, addressed to:

David M. Schauner
Kansas National Education Assn.
715 W. 10th Street
Topeka, Kansas 66612
Attorney for Petitioner

Peter K. Curran, Esq.
Attorney at Law
842 Louisiana Street
P. O. Box 485
Lawrence, Kansas 66044
Attorney for Respondent

I also certify that in accordance with K.S.A. 77-526(h), a true and correct copy of the above and foregoing initial order was served this 17th day of April, 1990, upon the Secretary of Human Resources by depositing a copy in the Department of Human Resources building mail, addressed to Ray D. Siehndel, Secretary of Human Resources, 401 Topeka Blvd., Topeka, Kansas 66603.

Sharon L. Tunstall

Sharon L. Tunstall