

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

Unified School District 440,
Halstead, Kansas,

Complainant,

vs.

U.S.D. 440 Teachers Association,

Respondent.

CASE NO: 72-CAEO-1-1985

U.S.D. 440 Teachers Association,

Complainant,

vs.

Unified School District 440,
Halstead, Kansas,

Respondent.

CASE NO: 72-CAE-5-1985

O R D E R

Comes now on the 2nd day of November, 1984, the above captioned cases for consideration by the Secretary of the Department of Human Resources. The Secretary has appointed Jerry Powell as hearing examiner to make a record and subsequently rule on the merits of the cases. The cases referenced above were consolidated by agreement of the parties in a pre-hearing conference conducted in the Secretary's Office, 512 West Sixth, Topeka, Kansas. Case number 72-CAEO-1-1985 is a case brought by the Board of Education of U.S.D. 440. The petition comes before the Secretary's representative under the signature of Richard Henderson, Superintendent, U.S.D. 440. The complaint alleges that U.S.D. 440 Teachers Association has engaged in prohibited practices within the meaning of K.S.A. 72-5430(c) (2) and (c) (3). Subsequent to the filing of 72-CAEO-1-1985 by the Board of Education of U.S.D. 440 the Office of the Secretary received a prohibited practice charge filed by the Halstead Teachers Association alleging that Unified School District 440, Board of Education had engaged in prohibited practices within the meaning of K.S.A. 72-5430 (b) (5). After an investigation of the charges contained in both of the aforementioned cases and a pre-hearing conference conducted by representatives of the Secretary, a hearing was ordered. Having

72-CAEO-1-1985

completed that hearing, the hearing examiner, Jerry Powell, is now entering this the final order of the Secretary of the Department of Human Resources in these matters.

PROCEEDINGS BEFORE THE SECRETARY

1. 72-CAEO-1-1985 received in the Office of the Secretary on September 25, 1984. This complaint was filed by Dr. Richard L. Henderson, Superintendent, U.S.D. 440, on behalf of the Board of Education U.S.D. 440.
2. Answer to complaint received in the Office of the Secretary on October 5, 1984, under the signature of David M. Schauner, Legal Representative, Halstead Teachers Association.
3. Pre-hearing conference conducted by Secretary's representative on October 22, 1984.
4. Evidentiary hearing conducted on November 2, 1984, commencing at 9:00 AM in Judge Reid's Courtroom, Harvey County Courthouse, Newton, Kansas, by hearing examiner Jerry Powell.
5. Briefs of the parties involved in 72-CAEO-1-1985 received November 21, 1984 and November 26, 1984.
6. Complaint 72-CAE-5-1985 received in the Office of the Secretary on October 9, 1984. This complaint was filed by Mr. David M. Schauner, Legal Representative for Halstead Teachers Association, on behalf of the Halstead Teachers Association.
7. Answer received in the Office of the Secretary on October 30, 1984, under the signature of David C. Burns on behalf of the Board of Education, U.S.D. 440.
8. Pre-hearing conference conducted by representatives of the Secretary on October 22, 1984 in the Office of the Secretary, Topeka, Kansas.
9. Evidentiary hearing conducted on November 2, 1984, commencing at 9:00 AM in Judge Reid's Courtroom, Harvey County Courthouse, Newton, Kansas, by hearing examiner Jerry Powell.
10. Briefs received from the parties involved in 72-CAE-5-1985 on November 21, 1984 and November 26, 1984.

A P P E A R A N C E S

Unified School District 440, appears by and through its counsel, David C. Burns, Attorney At Law, Speir, Strobert & Sizemore, P.O. Box 546, Newton, Kansas.

U.S.D. 440 (Halstead) Teachers Association, appears by and through its counsel, David M. Schauner, Attorney at Law, 715 W. 10th, Topeka, Kansas, 66612. Also appearing on behalf of the Teachers Association were Mr. David Kirkbride, Mr. Charles Robinson and Mr. Kenneth O. Butler.

FINDINGS OF FACTS

1. That 72-CAEO-1-1985 and 72-CAE-5-1985 were consolidated for hearing purposes by agreement of all parties concerned at a pre-hearing conference conducted in Topeka, Kansas.

2. That the Board of Education of U.S.D. 440 is the appropriate employer for purposes of this action.

3. That 72-CAE-5-1985 and 72-CAEO-1-1985 are properly and timely before the Secretary.

4. That U.S.D. 440 Teachers Association stipulates that binding fact-finding is not mandatorily negotiable. (T - 11)

5. That Bob L. Chalender, Ph.D, a Professor of Education and Administrative Chairman of the Department of Education, Fort Hays State University, was employed by U.S.D. 440 as the chief negotiator for the purposes of negotiating a labor contract with the Halstead Teachers Association.

6. That a Board proposal of items for negotiations was presented to the Teachers Association on January 30, 1984.

7. That binding fact-finding as a issue was not included in the Board's proposal given to the Teachers Association.

8. That a list of items that the teachers desired to negotiate with the Board was presented to the Board's negotiator by the teachers negotiating team.

9. That the teachers proposals included an item for negotiation labeled binding fact-finding.

10. That an explanation of binding fact-finding was given to the Board team by the teacher team early on in the negotiations procedure.

11. That the suggested language by the Teachers Association for binding fact-finding was as follows; "In the event that a negotiated

agreement is not effected at the bargaining table, the Board and the teachers agreed to be mutually bound by the decision of a fact-finding panel duly recognized by statute K.S.A. 72-5428."

12. That Dr. Chalender testified that the Board had indicated that they would not consider the issue of binding fact-finding because they (the Board) had a concern about abdicating their rights, as a Board, in making those decisions and that they (the Board) would not agree to such an item.

13. That the Board's decision referenced in the above finding was made immediately after the teacher's proposals were presented to the Board.

14. That Dr. Chalender testified that the term "negotiation" of the subject binding fact-finding might be confusing. That rather the Board had informed the teachers that they would not consider the subject of binding fact-finding. (T - 20)

15. That the Board's position on the issue of binding fact-finding did not change throughout the negotiations procedure. (T - 21)

16. That the Secretary of the Department of Human Resources' petition for impasse form was signed by both parties to the U.S.D. 440 negotiations on July 17, 1984. (T - 22)

17. That there was a negotiation session between the parties on July 17, 1984. (T - 23)

18. That the subject of impasse was mentioned by the teachers negotiator, Mr. Charles Robinson, at the negotiations session on July 17, 1984. (T - 23)

19. That the Secretary of the Department of Human Resources' petition for Declaration of Impasse was formally typed by the Clerk of the Board of Education, Eva Lee Butin. (T - 25)

20. That the Secretary of the Department of Human Resources' petition for impasse declaration form PNA - 009 was filed with the Secretary's Office, under the signature of Charles M. Robinson representing the employee organization and Bob L. Chalender representing the Board of Education. This petition form is marked as a single party request - UTA 440. The petition form under item or paragraph #5 list the number and description of issue in dispute

as: (1) salary and related items and (2) binding fact-finding.
(See District Exhibit #3).

21. That Dr. Chalender testified that he did not specifically any of the items contained on the petition for impasse to the Clerk of the Board to be typed upon that form. (T - 27)

22. That at the time the impasse petition was signed by the parties to the negotiations there remained only two items upon which agreement had not tentatively been reached. Those items were salary and related items and binding fact-finding. (T - 29)

23. That Dr. Chalender testified that he believed his signature on the impasse petition form signified that the two listed items had not been agreed upon. (T - 31)

24. That Dr. Chalender, Chief Negotiator, U.S.D. 440, sat in on all negotiation sessions on behalf of the Board. (T - 32)

25. That Dr. Chalender, as representative of the Board of Education U.S.D. 440, was given certain perimeters in which he was to negotiate. One of those perimeters was that he, Dr. Chalender, had no authority to agree to binding fact-finding. (T - 34)

26. That Dr. Chalender testified that the subject of binding fact-finding was discussed between the Chief Negotiator for both parties on at least two occasions. (T - 34)

27. That Dr. Chalender believes that an impasse would have probably been reached even if the subject of binding fact-finding had not been negotiated at the bargaining table. (T - 35)

28. That Dr. Chalender cannot recall whether or not the Clerk of the Board had typed the information on the impasse petition prior to the time that he and Mr. Robinson signed the impasse petition. (T - 37)

29. That Dr. Chalender recalls four people being present in the room the night the impasse petition form was signed. Those people were Eva Lee Butin, Clerk of the Board; Charlie Robinson, representing the Teachers Association; Superintendent of Schools Dr. Henderson; and Dr. Chalender. (T - 40)

30. That Dr. Chalender is not certain that he, as the Board's

representative ever specifically stated to the teachers bargaining team that binding fact-finding was not mandatorily negotiable. Rather, he recalls telling the team that the Board couldn't agree with binding fact-finding. (T - 41)

31. That Dr. Chalender believes that the terminology he used in explaining to the teacher team that the Board would not agree to binding fact-finding was communicating to them that the Board would not agree to negotiate the subject binding fact-finding. (T - 41)

32. That the first time the teachers indicated to Dr. Chalender that they wanted to take the issue of binding fact-finding to impasse was the final evening of negotiations, July 17th. (T - 41)

33. That the tape of the last negotiation session between the parties indicates that Mr. Robinson, in fact, did first mention that an impasse may have been reached. That Dr. Chalender then asked Mr. Robinson on what item impasse had been reached. (See tape of negotiation session, page 1)

34. That Dr. Chalender's statement to Mr. Robinson at the last negotiation session after Mr. Robinson had mentioned the items he believed to be at impasse was in part as follows " I don't see any bending on binding fact-finding and if you want to include that in the items we have to list as I recall that form specifically what it is that we are on impasse on". (See transcription of tape negotiation session, page 2)

35. That Dr. Chalender during the negotiation session indicated to Mr. Robinson that he believed either the Board could file the paper for impasse or that either party could file or they could file jointly. Further, Dr. Chalender states that it is his understanding that as soon as the impasse petition is in, the parties would be contacted by the Department of Human Resources. Further, Dr. Chalender indicated in those discussions that the Department of Human Resources would get the parties together to determine whether an impasse existed. (See transcription of tape, page 5)

36. That Mr. Robinson, Chief Negotiator for the Halstead Teachers Association agreed with Dr. Chalender's assessment of the procedure

subsequent to the filing of a petition for impasse with the Department of Human Resources. (See transcription of tape negotiation sessions, page 5).

37. That Eva Lee Butin serves as the Business Coordinator and Clerk of the Board of Education U.S.D. 440. (T - 47)

38. That Ms. Butin was present at the school building on July 17, 1984, at which time the parties were negotiating on a labor contract. (T - 47)

39. That Ms. Butin was in her office working when Dr. Chalender, Dr. Henderson and Charlie Robinson came in to ask her to type the impasse declaration. (T - 48)

40. That Ms. Butin had a copy of the proper impasse declaration form in her office which she produced for the parties to the negotiation. (T - 48)

41. That Ms. Butin was given instructions as to how to fill out the impasse petition form. Ms. Butin is not certain or cannot recall who gave her the instruction on how to fill out the impasse declaration form. (T - 49)

42. That item #4 on the impasse declaration petition entitled number of negotiation sessions was discussed by Ms. Butin, Charlie Robinson, and Dr. Chalender with regard to the number of sessions had by the parties.

43. That Ms. Butin mailed the impasse declaration form to the Secretary's Office on July 18, 1984.

44. That Ms. Butin testified that she typed the form the night of the 17th and that she observed both Mr. Robinson and Dr. Chalender sign the form on that night. (T - 54)

45. That Ms. Butin testified that she did not make any changes on the impasse declaration form after it was signed. (T - 54)

46. That Dr. Chalender indicated no reservations concerning the placement of binding fact-finding on the impasse declaration document when he signed the document in the presence of Ms. Butin. (T - 56)

47. That Richard L. Henderson, Ph.D, serves as the Superintendent of Schools, U.S.D. 440. (T - 61)

48. That Dr. Henderson served in the capacity of gathering information from the Board regarding the negotiations process. However, he did not serve, in the past negotiations, as Chief Negotiator. (T - 62)

49. That Dr. Henderson prepared the document specifying the issues that the Board desire to negotiate on behalf of the Board of Education U.S.D. 440. (T - 62)

50. That the Board was aware the teachers wanted to negotiate on the item of binding fact-finding. Dr. Henderson was aware of the fact that the Board did not desire to negotiate the item of binding fact-finding. (T - 64)

51. That Dr. Henderson recalls that on the night the impasse declaration was signed he and Dr. Chalender were proceeding to the district office when it was decided that they should invite Mr. Robinson to come to the district office with them in order to get the impasse form signed and sent off. (T - 68)

52. That Dr. Henderson recalls entering into portions of the conversation relating to the manner in which the impasse form should be completed. Specifically, he recalls discussing the number of negotiating sessions that had been held. (T - 70)

53. That Dr. Henderson provided a copy of the impasse declaration to the Board members by mail. (T - 72)

54. That the first time Dr. Henderson considered the impasse declaration to be other than a single party request, was upon receipt of a form letter from the Office of the Secretary of the Department of Human Resources. (T - 73)

55. That on the day Dr. Henderson received the letter referenced in the finding above he immediately placed a call to the Office of the Secretary. (T - 73)

56. That in the conversation between Dr. Henderson and Mr. Powell relating to the impasse declaration Mr. Powell explained that the statutory impasse date had already passed and therefore the primary importance of the document was to notify the Secretary's representative that an agreement had not been reached. (T - 74)

57. That there exists in the labor agreement expiring June 30, 1984 an article entitled "Grievance Procedures". (See Teachers Exhibit #1)

58. That grievance procedure referenced in the above finding consists of some six steps or levels. The first step or level provides for an oral statement by the aggrieved party to his or her immediate superior or administrator. The second level consists of the aggrieved party preparing a written statement of the grievance for submission to the superintendent, principal, and the association's building representative and one copy shall be kept by the aggrieved party. Level three consists of objective findings of fact relating to the grievance being made by the association grievance committee. The committee shall either counsel the aggrieved person to accept the school systems decision as indicated by the principal or to appeal that decision to the superintendent based upon the committee's findings of fact. Level four consists of a step wherein the aggrieved party may take his or her complaint directly to the superintendent of schools by filing the grievance in writing within the office of the superintendent of schools. Level five of the grievance procedure provides that the aggrieved party may take his or her complaint directly to the Board of Education by filing the grievance in writing with the office of the Clerk of the Board of Education. Level six of the grievance procedure provides that if a grievance pertains to alleged violation of the terms of the negotiated agreement the grievance may call for binding arbitration of the grievance. This level of the grievance procedure also provides that the decision of the arbitrator shall be final and binding on both parties. (See Teachers Exhibit #1, article entitled "Grievance Procedures").

59. That a grievance was filed by a Mr. Butler on behalf of all certified staff U.S.D. 440 on August 21, 1984. The grievance document states the date the grievance occurred to be August 13, 1984 and on going. The grievance report, in subsection D entitled "Relief Desired", states "removal of all attachment from bargaining units evaluations and removal of all COAS from the evaluation form". (See Teachers Exhibit #2)

60. That a response to the grievance filed August 21, 1984 was made by Mr. Carl E. Haetten, principal. That response was dated August 29, 198

and states that the relief requested cannot be granted. (See Teachers Exhibit #3)

61. That an undated memorandum was presented to Dr. Henderson by the U.S.D. 440 Teachers Association grievance committee stating that the response given by Carl E. Haetten was not acceptable. The memorandum further states, "So as to comply with the guidelines currently in use in this district handbook and negotiated agreement pursuant to the grievance process, we respectfully forward our complaint to you as required by level four." (See Teachers Exhibit #4)

62. That the grievance was received in Dr. Henderson's office on September 12, 1984. (T - 77)

63. That between September 12, 1984, and the end of October, 1984 Dr. Henderson received no further communication or contact from any teacher regarding the grievance on file. (T - 78)

64. That as of the date of the hearing, Dr. Henderson had not ruled on the grievance as filed by the Halstead Teachers Association. (T - 78)

65. That as of the date of the hearing, Dr. Henderson had received no request to have a meeting with regard to the grievance filed by the Teachers Association.

66. That the initials COAS stands for Comprehensive Objective Accounting System. Dr. Henderson views COAS as the master control for the conceptual control for evaluations within the district. A supervisor within a building may impose an assigned objective which requires the teacher to improve in a specific area. Therefore, the objective is an integral and vital part of the evaluation system. (T - 81)

67. That Dr. Chalender has never signed an impasse declaration form supplied by the Secretary's office prior to signing the one relating to the negotiating process this year in U.S.D. 440. (T - 84)

68. That Dr. Chalender testified that he had misunderstood the signing of the impasse declaration document. He believed that since there were signature blocks for both representatives to sign, he would be required to sign it at a later date if he did not sign on the night it was prepared. Therefore, Dr. Chalender signed the document on the evening of July 17th in order to expedite the process. (T - 84)

69. That Dr. Henderson signed the prohibited practice document on behalf of the Board of Education at the Board's direction after an executive session in which the Board discussed the matter and directed Dr. Henderson to sign and submit the document. (T - 86)

70. That the Board's salary proposal made during the negotiations is based in part on performance pay. (T - 87)

71. That Dr. Henderson believes that the granting of the grievance filed by the Teachers Association would have the affect of negating the possibility of performance pay. (T - 87)

72. That the evaluation system currently being utilized in the district has been in effect for more than the past two years for all professional employees. (T - 88)

73. That during the years that the evaluation procedure has been in force no one has indicated to Dr. Henderson that the evaluation procedures was illegally placed into effect. (T - 88)

74. That Dr. Henderson believes that there exists the possibility or probability that the parties at the bargaining table would have reached an impasse even if binding fact-finding had not been an issue under discussion. (T - 91)

75. That the first written objection made by Dr. Henderson regarding binding fact-finding being placed on the petition for impasse was on September 18th. (T - 94)

76. That Dr. Henderson does not recall any time during the negotiations when Dr. Chalender specifically stated to the teacher team that binding fact-finding is not mandatorily negotiable and that the Board would not negotiate the subject. (T - 101)

77. That the COAS system was not included within the evaluation article of the negotiated agreement through the negotiations process. (T - 104)

78. That the COAS system was made a part of the evaluation procedure by action of the Board in open session, during a meeting in 1981. (T - 107)

79. That Dr. Henderson believes that prior to the removal of any document from the evaluation file of a district employee an order would need to be fashioned by the jurisdiction ordering such removal. (T - 109)

80. That there exists an article entitled "Evaluation" within the negotiated agreement between Unified Teachers Association 440 and the Board of Education U.S.D. 440 which carried a effective date of August 1, 1982 through June 30, 1984. The evaluation article states in part that evaluation instruments will be developed by committees composed of the person or persons conducting the evaluation, the person or persons being evaluated and other personnel deemed as necessary by the Board of Education. Further, the evaluation article states that criteria and method of evaluation shall be developed by the committees. The article also states that an evaluation committee will be maintained to assess employee evaluation procedures and to make appropriate presentations and recommendations to the Board of Education. (See Teachers Exhibit #1)

81. That there exists in the negotiated agreement between the Board of Education and Halstead Teachers Association an article entitled "Committees Developed As A Result of the Negotiated Agreement". This article states that all committees developed as a result of the negotiated agreement will comport to the following guidelines: 1) Specific number of individuals of which 50% must be directly Board appointed (See Teachers Exhibit #1).

82. That the committee recommending that the COAS system be implemented consisted of all departmental chairman within the school system. Dr. Henderson made the request to the department chairman that they participate in the process. (T - 110)

83. That the committee selected by Dr. Henderson to consider the COAS system consisted of thirteen individuals. None of the individuals selected to serve were appointed by the Teachers Association. (T - 113)

84. That Dr. Henderson testified that he was waiting or holding any action on the grievance, filed with his office, until such time as

Mr. Butler contacted his office to present an oral statement concerning the grievance. (T - 116)

85. That sometime during the mediation process the Halstead Teachers Association offered to drop the grievance if a tentative agreement could be reached. (T - 117)

86. That the COAS attachments are a part of the evaluation. (T - 121)

87. That the Board's proposal on performance pay was closely tied to the COAS system. (T - 122)

88. That the teachers in U.S.D. 440 never requested that the evaluation committee formed in 1981, be continued or maintained. (T - 125)

89. That Dr. Henderson views the inclusion of COAS as a change in design of the evaluation procedure which complied with the language within the negotiated agreement. (T - 126)

90. That the evaluation document was never included within the negotiated agreement. (T - 126)

91. That there is a specific and direct link between COAS concept and the amount of salary a teacher in the district might be paid under the Board proposal for performance pay. (T - 128)

92. That Susan Basore is the current President of the School Board. Ms. Basore is serving her second term as President of the Board. Further, Ms. Basore was President of the Board during the time the current negotiations were being held. (T - 131)

93. That Ms. Basore, President of the school Board, believes that at no time during the negotiations process did the Board agree to negotiate an item called binding fact-finding. Additionally, Ms. Basore believes that the Board never agreed to take the issue of binding fact-finding through the impasse procedure. (T - 132)

94. That Kenneth O. Butler, Jr., is a teacher - coach in the U.S.D. 440 system. Mr. Butler is also a member of the local association and is currently serving as the President of the Halstead Teachers Association. (T - 134)

95. That Mr. Butler filed a grievance involving evaluations with the School Board in August, 1984. (T - 135)

96. That Mr. Haetten questioned Mr. Butler's position with the Halstead Teachers Association in light of the fact that an election had not been conducted at the time the grievance was filed. (T - 137)

97. That when the grievance involving evaluations was filed at level four Mr. Robinson, Chairman of the grievance committee initiated the action. (T - 140)

98. That the grievance involving evaluations was not filed until the end of the school year last year or the first of school this year because Mr. Butler and the negotiator for the school district did not previously realize that the objectives for improvement were being attached to the evaluations. This discovery was made by Mr. Butler by examining his files at the end of the previous school year. (T -140)

99. That an offer was made during mediation to drop or reduce the grievance in order to achieve a bilateral agreement with the school district. (T - 143)

100. That the date of mediation was September 22, 1984. (T -144)

101. That Mr. Butler was appointed President of the association at the end of the school year in May of 1984 by the then President, James Laughlin. This appointment was made without a meeting or election of the members of the organization. (T - 145)

102. That an election for President of the organization was conducted approximately one week after school started in the 1984-85 school year. (T - 146)

103. That Mr. Butler filed a grievance involving evaluation on behalf of the Teachers Association since he considered himself to be President of that Association even though an election had not been conducted at the point in time the grievance was filed. (T - 147)

104. That Mr. Butler had been evaluated under COAS in previous school years. Further, Mr. Butler had seen those evaluations made in previous years. (T -151)

105. That the members of the association grievance committee formed pursuant to provisions of the negotiated agreement subsection entitled "Grievance Procedure", were also individuals on whose behalf the grievance had been filed. (T -153)

106. That the definition section of the grievance procedure, as contained within the negotiated agreement between the Board and the Halstead Teachers Association, defines the term teacher as follows: "the term may include a group of teachers who are similarly affected by a grievance". (See Teachers Exhibit #1)

107. That Mr. Dave Kirkbride is currently serving as the Executive Director of the South Central Kansas NEA, a position in which he also served during the negotiations process in U.S.D. 440. (T - 159)

108. That Mr. Kirkbride testified as follows, " Charlie called to advise me that the long form impasse petition had been filed and that it was a joint request". Mr. Kirkbride further, testified that his reference to the long form was the same form that has been marked as District's Exhibit #3. (T - 160)

109. That Mr. Charles M. Robinson is a teacher, coach and instructor in U.S.D. 440. Mr. Robinson is a member of the Halstead Teachers Association and during the 1984 school year served as the Chief Negotiator for the Halstead Teachers Association. (T - 164)

110. That Mr. Robinson attended each and every negotiation session between the Teachers Association and Board. (T - 165)

111. That the first regular negotiation session took place sometime in March. (T - 166)

112. That Mr. Robinson does not recall a time at which Dr. Chalender stated that binding fact-finding was not a mandatorily negotiable subject or anytime when Dr. Chalender stated that the Board would not talk about binding fact-finding. Mr. Robinson does recall that Dr. Chalender stated during negotiations that the district would not agree to the proposal on binding fact-finding. (T - 167)

113. That Mr. Robinson does not recall that Dr. Chalender was present in the room in the district office on the night of July 17th when the impasse declaration form was completed. Mr. Robinson recalls that only Dr. Henderson, Eva Lee Butin and he were present in the room on that evening. (T - 171)

114. That Mr. Robinson recalls that the impasse declaration document was signed the evening of the 17th by himself and Dr. Chalender. Further, he recalls that the form was blank at the time he placed his signature on the document. (T - 172)

115. That Mr. Robinson testified that he was not present when Ms. Butin filled out the impasse declaration document. Further, he states that he received a copy of the document in the mail from the unified office. (T - 172)

116. That Mr. Robinson testified that a factual error was made on the impasse declaration document relating to his phone number. (T - 173)

117. That Mr. Robinson recalls a conversation with Dr. Henderson involving the grievance on approximately September 25th. Dr. Henderson suggested at that time that the grievance be put on hold temporarily. Mr. Robinson acknowledged that the grievance should be put on hold at that time. (T - 176)

118. That Mr. Robinson testified that the reason the grievance has been pursued to the superintendent's level was because the answer received from Mr. Haetten did not speak to the issue relating to the illegality of placing COAS in and making it a part of the evaluation without previously negotiating such a procedure. (T - 177)

119. That the teacher negotiating team did not meet with the Board of Education team between the time of July 17th and September 22nd, the date of the mediation meeting. (T - 178)

120. That Mr. Robinson first made his offer to reduce his demand with respect of the grievance or drop it all together on the day that mediation was had. (T - 178)

121. That Mr. Robinson believes the parties would be at impasse in negotiations even if the subject of binding fact-finding was not currently an issue on the bargaining table. (T - 179)

122. That Mr. Robinson placed the issue of binding fact-finding on the impasse declaration form since no agreement had been reached on that subject. (T - 181)

123. That the association agreed to drop the issue of binding fact-finding during mediation of the impasse in order to reach a tentative agreement on other matters. (T - 182)

124. That Mr. Robinson recalls Dr. Chalender stating that either party could file impasse declaration separately or that it could be filed jointly. Mr. Robinson does not recall a statement by Dr. Chalender to the affect that the Board desired to file jointly. (T - 187)

125. That Mr. Robinson testified that the school board position on binding fact-finding had not changed from their first position. He testified that "At first they weren't terribly interested in the article. We won't consider it or we won't bend." (T - 188)

CONCLUSIONS OF LAW/ORDER

The instant cases come before the hearing examiner alleging bad faith bargaining during the contract negotiations between U.S.D. 440 and the Halstead Teachers Association. Negotiations commenced in February, 1984 and proceeded through July 17, 1984, when an impasse declaration was filed with the Secretary of the Department of Human Resources. During that period of time approximately twelve negotiations sessions were held. The parties proceeded through the mediation process on September 22nd and at the present time a bilateral contract has not been reached. Both parties to the dispute have submitted their final positions on the issues at impasse and are now awaiting the appointment of a fact-finder. The fact-finding process has been delayed

by order of the Department of Human Resources with the concurrence of the parties. This delay was prompted by the nature of the two prohibited practice charges now pending.

U.S.D. 440 has charged the Teachers Association with two counts of bad faith bargaining in violation of K.S.A. 72-5430 (c) (2) and (c) (3). Those subsections state:

"(c) It shall be a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to:
(2) interfere with, restrain or coerce a board of education with respect to rights or duties which are reserved thereto under K.S.A. 72-5423 and amendments thereto, or with respect to selecting a representative for the purpose of professional negotiations or the adjustment of grievances;
(3) refuse to negotiate in good faith with the board of education or its designated representatives as required in K.S.A. 72-5423 and amendments thereto;"

The Board states in its pleading; "The refusal of the Teachers Association to drop this item (binding fact-finding) has led to impasse as evidenced by the petition for impasse declaration filed by the Teachers Association . . .". In count II of the charge the Board states; "The Teachers Association has filed a grievance seeking the removal from individual teacher files of all evaluations of teachers under an evaluation system implemented under the provisions of the negotiated agreement then in force . . .".

Subsequent to the filing of the prohibited practice complaint by the Board, the Association filed a prohibited practice charge against the Board. That charge alleges that the Board has engaged in bad faith bargaining in violation of K.S.A. 72-5430 (b) (5) which states:

"(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:
(5) refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto;"

Specifically the Association states that the Board did:

"On or about July 17, 1984, U.S.D. 440 and the Halstead Teacher's Association filed a joint impasse declaration including the listing of binding arbitration of fact-finding.

U.S.D. 440 now attempts to take the position that binding fact-finding is a permissive subject which cannot be taken into the impasse proceedings.

By its attempt to withdraw from the signed document of July 17, 1984, U.S.D. 440 has committed a prohibited practice."

It now appears to the examiner that two basic issues must be considered in order to resolve the two complaints now pending:

- 1) Is there now an obligation to proceed to fact-finding with binding fact-finding as an open issue?
- 2) Was the filing of the grievance an attempt to coerce the Board?

Certainly, there are other issues which will be addressed in this order. However, the above listed issues are of paramount importance. The examiner shall first address the bad faith issues relating to the subject of binding fact-finding and then turn to the issue of the grievance.

There is no dispute that the subject of binding fact-finding was properly "noticed" for negotiations by the Association. That proposal was as follows:

"Section 1. In the event that a negotiated agreement is not effected at the bargaining table, the Board and the teachers agree to be mutually bound by the decision of a fact-finding panel duly recognized by statute. K.S.A. 72-5428."

This article or issue may be captioned binding fact-finding but is, for all practicality, an interest arbitration clause. In light of the fact that K.S.A. 72-5413 et seq., is an open ended collective bargaining law it is obvious that the subject of "interest arbitration" or "binding fact-finding" is a permissive subject for negotiations. Counsel for the Association has, on the record, stated that the Association does not contend that binding fact-finding is a mandatory subject for negotiations. Rather, the Association contends that the subject was negotiated at the bargaining table and subsequently the Board agreed that the subject was at impasse. Further, the Association contends that the Board's chief negotiator agreed to take the subject through the impasse procedure by his act of signing the impasse declaration petition. The Board contends that the impasse declaration petition was a product of the Association, not a joint petition and that the Board's representative simply signed the petition

to signify that the Board was aware that the association had requested assistance at impasse. The Board further contends that they never desired to implement impasse proceedings but rather desired to continue negotiations.

A permissive subject is one which is by law, either an association or managements right. This right may be "discussed" or even "negotiated" by the parties at the bargaining table. The act of agreeing to negotiate a permissive subject does not in and of itself, bind the parties to take such a permissive subject through the impasse procedure. One party may give up their "right" through bargaining or they may agree to take the "right" or permissive subject to impasse. It obviously follows then that once the agreement is made a retraction of the agreement would constitute bad faith bargaining. Good faith bargaining dictates that one party may not force an impasse over a nonmandatorily negotiable subject.

The examiner is unclear with regard to the Board's Count I relating to impasse over a nonmandatorily negotiable subject. That is, the complaint clearly states that the association's action or refusal to "drop this issue (binding fact-finding) led to impasse." However, during the hearing the Board's position seemed to change to state that the inclusion of the issue (binding fact-finding) as an impasse item, constitutes bad faith bargaining. The record indicates that both the Board's chief negotiator and the Superintendent of Schools believe that an impasse would have been reached even if the subject of binding fact-finding had not been an issue in negotiations. The chief negotiator for the association agrees with this assessment and further states that they included binding fact-finding as an issue at impasse because he believed that the Board agreed with his position. Testimony shows that the Board's representative at the bargaining table never informed the association that the Board considered binding fact-finding to be nonmandatorily negotiable or that the Board refused to negotiate the subject. The Board indicated a position of; we won't agree to binding fact-finding, we won't consider it, we won't bend, whenever the subject surfaced. However,

the chief negotiator for the Board, the Superintendent of Schools, and the Board President testified that the Board never intended to "negotiate" the subject of binding fact-finding. Additionally, the Board never counter proposed on the subject and the record is void of evidence to indicate that the Board tendered any offer of a "trade-off" for binding fact-finding.

There exists a great deal of confusion commencing with the dialogue at the bargaining table between the negotiators for the parties. The Association's spokesman stated at the July 17 meeting that he believed the parties to be at impasse. The Board representative then made no positive statement concerning his belief that the parties were at impasse. His statements rather indicate his belief that representatives of the Department of Human Resources must rule that an impasse exists. Specifically the Board representative stated, "But . . . and then after he (PERB) makes that decision, it is his office that makes the decision of whether we really are at impasse or not." To this statement the Board representative replies, "I realize that." This dialogue shows that neither representative was aware, on that date, that the Department of Human Resources representatives have no jurisdiction to rule on the existence of impasse after the date of June 1, in the current school year. K.S.A. 72-5426 (a) provides the authority for the Department of Human Resources to investigate and rule on the existence of impasse prior to June 1. K.S.A. 72-5426 (d) states:

"(d) notwithstanding the foregoing provisions of this section, an impasse is deemed to exist if the board of education and the recognized professional employees' organization have not reached agreement with respect to the terms and conditions of professional service by the statutory declaration of impasse date and, on such date, the parties shall jointly file a notice of the existence of impasse with the secretary. Upon receipt of such joint notice, the secretary shall begin impasse resolution procedures in accordance with K.S.A. 72-5427 and 72-5428, and amendments thereto."

The confusion continues when the parties proceed to the district office to complete the impasse declaration form. Board representatives deny giving instructions to the clerk regarding the information needed by the clerk in order for her to complete her task. The clerk cannot recall exactly who gave her the appropriate information. The association

representative recalls signing a blank form while the other parties recall that the declaration was completed prior to the parties signing the form. The form is in evidence and has been signed by both parties.

In light of other evidence and testimony the examiner does not believe that a ruling relating to which party gave directions to the clerk or whether the form was blank or completed when signed, is necessary. Rather, the intent of the parties and the understanding of the impasse procedure weigh more heavily than the completion of the form. The examiner reaches this conclusion in light of the language found at K.S.A. 72-5426 (d).

A "jointly" filed notice of impasse on or after June 1, might take the form of one document or two documents. The important consideration to the Secretary is the concept of the parties regarding the issue at impasse. The examiner believes that the aforementioned dialogue between the parties at the bargaining table clearly indicates both parties intent.

The examiner is persuaded that the parties believed it was necessary for the Secretary to rule on the existence of and issues at impasse. Further, while the Board's positions on the subject of binding fact-finding during negotiations could be construed by the association as agreement to negotiate, the examiner is persuaded that the Board never intended to "negotiate" the subject. Notwithstanding however, the Board's intent to negotiate the subject, the examiner finds no evidence to indicate concurrence on taking binding fact-finding to impasse. The examiner can understand, however, how the association could misinterpret the Board's position. This misinterpretation coupled with the fact that impasse was inevitable regardless of the subject binding fact-finding, persuades the examiner that the association did not act in bad faith by including binding fact-finding as an issue at impasse.

The examiner must, therefore, rule that neither party acted in bad faith. Count I of 72-CAEO-1-1985 is therefore dismissed and 72-CAE-5-1985 is dismissed in its entirety. Further, the examiner directs the parties to proceed to fact-finding (if agreement is not reached on salary and related items) without addressing the issue of binding fact-finding. The examiner herein directs the representative of the

Secretary of the Department of Human Resources to order the fact-finder selected to serve in case 72-I-52-1984 to take no testimony or evidence and to issue no recommendation on the subject of binding fact-finding.

The second issue to be addressed by the examiner relates to Count II of the Board's complaint. This count alleges that the filing of the grievance was for the purpose of interfering with, restraining and coercing the Board with respect to rights granted by K.S.A. 72-5423. K.S.A. 72-5423 (a) states in part:

"(a) Nothing in this act or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education . . .".

The Board argues that the relief requested within the grievance would require the Board to remove certain documents from teacher evaluation files in violation of K.S.A. 72-9003. That Kansas statute states in part:

"Every board shall adopt a written policy of personnel evaluation procedure in accordance with this act and file the same with the state board. Every policy so adopted shall:

(a) Be prescribed in writing at the time of original adoption and at all times thereafter when amendments thereto are adopted. The original policy and all amendments thereto shall be promptly filed with the state board.

(b) Include evaluation procedures applicable to all employees.

(c) Provide that all evaluations are to be made in writing and that evaluation documents and responses thereto are to be maintained in a personnel file for each employee for a period of not less than three years from the date each evaluation is made."

The association argues that the filing of the grievance is a protected right and attempted to show that the COAS system did not comport to the contract terms. Further, the association alleges that the removal of a portion of an evaluation placed within a file illegally could be removed from that file without violating the provisions of K.S.A. 72-9003. The association alleges that implementation of the COAS system without complying with the negotiations procedure within K.S.A. 72-5413 et seq., renders the COAS system illegal.

A great deal of testimony was offered concerning the process utilized to implement the COAS system and whether this system was compatible with contract provisions.

The record indicates that the COAS "system" of evaluation was approved by the Board and implemented during 1981. Further, testimony indicates that evaluations were made of teachers, utilizing COAS, during that year. A negotiated agreement which may have been in effect at that time was not introduced during the hearing in the instant cases. It is therefore impossible for the examiner to determine whether the implementation of the COAS system was illegally included within the evaluation procedure. Additionally, the examiner has not been asked for such a ruling. The negotiated agreement (August 1, 1983 through June 30, 1984, Teachers Exhibit #1) containing an evaluation article, is equally unimportant to a determination in this matter. That is, the above referenced agreement was evidently entered into subsequent to the effective date of the implementation of the COAS "system". Here again the examiner has not been asked to rule on a possible contract violation.

A number of questions were raised during the hearing relating to the motives or intent of the association in filing the grievance. Questions were also raised concerning the President of the association, Mr. Butler's authority to file the grievance on behalf of the association. The record indicates that the Board received and processed the grievance even though they questioned Mr. Butler's authority. It appears that the Board's action of acceptance and subsequent processing of the grievance renders moot the need for any determination by the examiner of Mr. Butler's authority to file.

Certainly the motivation or intent behind any action is difficult to ascertain. Perhaps the right to file grievances should be addressed prior to taking up the question of motivation. K.S.A. 72-5414 states in part:

"Professional employees shall have the right to form, join or assist professional employees' organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service.

This statute grants the right to professional employees to join organizations in order to protect terms and conditions of employment.

K.S.A. 72-5424 (a) states:

"(a) A board of education and a professional employees' 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."

In this case the parties have entered into an agreement containing a grievance procedure which provides for arbitration. The association's grievance alleges that COAS attachments violated that agreement. In other words they are stating that the grievance is an attempt to protect a term and condition of employment. The examiner must find that the association had the "right" to file such a grievance. It then becomes the responsibility of the grievance procedure process for someone to make a determination as to whether the grievance has merit.

Assuming that the association is displeased with the disposition of the grievance at the Board level, the association could proceed to Level VI of the procedure. An arbitrator would hear the case and decide what relief, if any, should be granted. Level VI of the contracted grievance procedure states:

"the arbitrator shall be prohibited from changing any language of this agreement or awarding any relief greater than that sought".

Another section of the grievance procedure could come into play if the arbitrator should award the removal of COAS attachments from files and the district believed that such award was contrary to law. District court could be asked to review the award to insure that the award was not contrary to law. Any court determination that the award was contrary to law would nullify the award. Thus, the school districts "rights" as granted at K.S.A. 72-5423 (a), are protected by another vehicle (grievance procedure and court), for dispute resolution.

K.S.A. 72-5413 et seq., like most other labor laws contemplates a procedure negotiated between the parties to resolve these types of disputes. A determination regarding the legality of the relief requested on the face of the grievance, must be made subsequent to a determination that the grievance is meritorious. The examiner must find that the association had a right to grieve even though the relief the association requested may be illegal.

The hearing examiner is therefore without jurisdiction to overturn or interfere with the contracted grievance procedure.

The examiner does have jurisdiction to examine motive or intent to determine whether the Association filed the grievance in order to force a concession during negotiations.

The record reflects that the parties were negotiating an article entitled, "salary", which contained a provision for performance pay. Testimony from both parties state that performance pay is closely tied to evaluations, in particular the COAS system. The record does not indicate the circumstances under which the association offered to reduce or drop their grievances. Nor can the examiner ascertain from the record any concessions the Board may have made from their original proposal on performance pay. It is evident however, from the language of the proposal that a portion of a teachers salary would be directly tied to COAS. The record is abundantly clear that a dispute exists over the issue of whether the COAS attachments were made to evaluations in a legal manner. The examiner previously found that the proper vehicles to obtain such a legal determination is via the contracted grievance procedure. Therefore, while a portion of the intent behind the grievance may have been to force a concession in negotiations, such motive is overridden by the weight of the legal question. The examiner finds that the association did not expressly file the grievance to force a concession but rather to address a legitimate concern for all effected parties.

In sum the examiner has found that:

- 1) The Board has not agreed to take the permissive subject of binding fact-finding through the impasse procedure.
- 2) The Association did not force an impasse over a non-mandatorily negotiable subject.
- 3) That there was a good faith belief by the Association that the Board has agreed to take binding fact-finding through the impasse procedure.
- 4) That the subject of binding fact-finding is not a proper subject for consideration in the forthcoming fact-finding in U.S.D. 440 unless the parties enter into an agreement to include the subject subsequent to the issuance of this order.
- 5) That the Association has the right to file grievances believed to be violations of contract provisions.
- 6) That the Association intent surrounding the filing of the grievance was logically and lawfully motivated.

Based upon the foregoing conclusions and findings the examiner enters his final order.

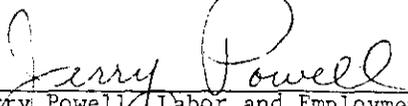
72-CAE-5-1985 is dismissed in its entirety.

72-CAEO-1-1985 is dismissed in its entirety with the provision that the Board of Education of U.S.D. 440 shall not be required to proceed to fact-finding concerning the issue of binding fact-finding. Further, the Secretary of the Department of Human Resources shall order the individual appointed by the Department of Human Resources to serve as fact-finder in the U.S.D. 440 dispute to take no evidence or testimony on binding fact-finding without a stated agreement of both parties to take such evidence and testimony.

IT IS SO ORDERED this 18th day of December, 1984.

KANSAS DEPARTMENT OF HUMAN RESOURCES

By


Jerry Powell, Labor and Employment
Standards Administrator
(Designee for the Secretary of
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