

**BEFORE THE SECRETARY OF LABOR
OF THE STATE OF KANSAS**

Junction City Education Association,)
 Petitioner,)
)
 v.)
)
Unified School District No. 475,)
Junction City, Kansas,)

 Respondent.)

Case No.: 72-CAE-1-2011

INITIAL ORDER OF THE PRESIDING OFFICER
Pursuant to K.S.A. 72-5430a

NOW on this 23rd day of April, 2012, the above-captioned prohibited practice charge comes on for decision pursuant to provision of the Kansas Professional Negotiations Act, *see* K.S.A. 72-5420, and of the Kansas Administrative Procedure Act, *see* K.S.A. 77-514(a), before presiding officer Douglas A. Hager, Designee of the Secretary, Kansas Department of Labor.

APPEARANCES

Petitioner, Junction City Education Association (hereinafter "Petitioner" or the "Association"), appears by and through counsel, David M. Schauner, Chief Legal Counsel, KANSAS NATIONAL EDUCATION ASSOCIATION. Respondent, Unified School District No. 475, Junction City, Kansas (hereinafter "Respondent", "Board" or "District"), appears by and through counsel, Mark Edwards, Attorney at Law, HOOVER, SCHERMERHORN, EDWARDS, PINAIRE & ROMBOLD.

PROCEEDINGS

This matter comes before the presiding officer as designee of the Secretary of Labor pursuant to a Prohibited Practice complaint filed by Petitioner. *See* Complaint Against Employer, 72-CAE-1-2011. In its complaint, Petitioner alleges that Respondent engaged in prohibited practices within the meaning of K.S.A. 72-5430(b)(1) and (b)(5). *Id.*, p. 1. Petitioner alleges that Respondent, by unilaterally adopting a change for the 2010-2011 school year to the Freshman Success Academy portion of the Junction City High School class schedule, has violated its statutory duty to negotiate in good faith. Complaint Against Employer, 72-CAE-1-2011, pp. 2-4. Petitioner requests that the Secretary find that the Board committed a prohibited practice when it unilaterally implemented its new schedule for the Freshman Success Academy of Junction City High School without first negotiating the change, order that the Board cease utilizing the new schedule until it has negotiated same with the Junction City Education Association, order that the Board pay all affected teachers their hourly rate for any extra work required by the new schedule and order that the Board post a copy of the Secretary's Order for thirty (30) days at all locations where unit members are employed and for any other relief deemed equitable by the Secretary. *Id.*

ISSUES OF LAW

The issues of law to be decided herein are as follows:

1. Whether Petitioner's filing of a grievance under the parties' Negotiated Agreement deprives the Secretary of Labor of jurisdiction over a prohibited practice charge stemming from the same nucleus of facts?

Initial Order of the Presiding Officer, 72CAE-1-2011, Junction City Education Association v. Unified School District No. 475, Junction City, Kansas

2. Whether the complained-of actions of Employer, Unified School District No. 475, constituted a violation of K.S.A. 72-5430(b)(5)?
3. Whether said actions constituted a violation of K.S.A. 72-5430(b)(1)?
4. And if either or both of issues number two and three are answered in the affirmative, what is an appropriate exercise of the Secretary's statutory discretion to remedy said violations?

FINDINGS OF FACT

1. The Unified School District No. 475, Junction City, Kansas is a school district duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.
2. The Junction City Education Association has been duly recognized as the exclusive bargaining representative of the professional employees of Respondent under the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*
3. For the school year 2010-2011, terms and conditions of professional service of the employees in question were established by the Negotiated Agreement entered into by the parties. *See* Joint Exhibit 1.
4. Article XI, Section A, paragraph 1 of the parties' Negotiated Agreement for school year 2010-2011 provides that "[t]he normal teaching load at the high school shall be five class periods per scheduling cycle (in general seven student periods) and duties as assigned by the principal during seminar period." This language has remained unchanged since the 1998-1999 contract year. *See* Joint Exhibit 1.

5. Article XI, Section B, paragraph 1 of the parties' Negotiated Agreement for school year 2010-2011 provides that "[w]hen a teacher accepts an additional daily class period on a regular basis beyond the normal teaching load it shall be considered an overload assignment." Joint Exhibit 1. High school teachers shall be compensated an additional one-sixth of salary schedule amount for an overload assignment. *Id.*
6. At the time of initial ratification of the teaching load language described above, the plan put forward to the faculty was one "in which the class periods were going to be 90 minutes . . . so you have five 90-minute class periods over a course of two days". Tr., p. 20.
7. The Freshman Success Academy, comprised only of ninth graders, is one of the subdivisions making up the Junction City High School, (hereinafter "JCHS"). Tr., p. 39.
8. JCHS' Career Academy is comprised of grades ten, eleven and twelve. Tr., p. 39.
9. Stan Dodds is Junction City High School's principal. Tr., p. 212. Melissa Sharp is the Freshman Success Academy's principal, a position she has held since 2002. Tr., p. 154.
10. The main campus for the Junction City High School is located at 900 North Eisenhower Street, Junction City, Kansas 66441. Respondent's Exhibit 4. Grades nine through twelve were located there for the 2009-2010 school year. Tr., p. 182.
11. Beginning with the 2010-2011 school year, the Freshman Success Academy, (hereinafter "FSA"), was moved from the main campus to its new location at 300 West 9th Street, Junction City, Kansas. Respondent's Exhibit 4.

12. Beginning with the 1997-1998 school year, Junction City High School used “block scheduling” to schedule its class periods, tr., p. 21, although the parties’ Negotiated Agreement does not use that terminology. Joint Exhibit 1.

13. During the 2009-2010 school year, the class schedule for Junction City High School, including Freshman Success Academy, consisted of a two-day cycle designated as “blue” days and “white” days. Respondent’s Exhibits 2 and 3.

14. “Blue” days consisted of four ninety-minute class periods, with six-minute “passing” periods between them:

1. 7:45 a.m. – 9:15 a.m.
2. 9:21 a.m. – 10:54 a.m.
3. 11:00 a.m. – 1:04 p.m. (including thirty minutes for lunch), and
4. 1:10 p.m. – 2:40 p.m.

15. “White” days consisted of three ninety-minute class periods and a seminar period, with six-minute “passing” periods between them:

1. 7:45 a.m. – 9:15 a.m.
2. 9:21 a.m. – 10:54 a.m.
3. 11:00 a.m. – 1:04 p.m. (including thirty minutes for lunch), and
4. 1:10 p.m. – 2:40 p.m. (seminar)

16. Seminar is a ninety-minute period that is used by students and teachers for homework, studying, tutoring, English language proficiency, instructional support, and other activities, such as making up a quiz or a test, attending a club meeting, etc. Tr., pp. 89-91, 93-94, 168, 172, 174.

17. Over the course of a cycle, that is, a two-day period, tr., p. 21, there are seven ninety-minute class periods plus a ninety-minute seminar, for a total of 720 minutes per two day cycle. Blue and White days alternate from day to day and week to week. Respondent's Exhibit 2.
18. Prior to the 2010-2011 school year, teachers teaching a normal load would have a ninety-minute seminar period, five ninety-minute instructional periods and two ninety-minute planning periods. Tr., pp. 21-22, 26-29. Students, over the course of the two-day cycle, would have seven class periods. Tr., p. 27.
19. For the 2010-2011 school year, the parties' Negotiated Agreement continued the block schedule described above. Respondent's Exhibit 7.
20. From its creation until the beginning of the 2010-2011 school year, the Freshman Success Academy had the same two-day cycle class schedule as the remaining grades at Junction City High School. Tr., pp. 39, 107.
21. Beginning with the 2010-2011 school year, the Board of Education implemented a relocation decision it had been planning for five years when it moved the FSA from the main JCHS building to a separate building located at 300 West 9th Street. Tr., pp. 187-188, 244-245.
22. Moving FSA to a separate location necessitated changes to bussing schedules to get student who ride the bus and those who participate in extracurricular activities back to the main campus in a timely fashion. Tr., pp. 157-160. This interrupts or cuts short fourth period. Tr., pp. 159-162.
23. After relocating the FSA, a blue day and a white day at the Freshman Success Academy has its first three ninety-minute periods as follows:

1. 7:45 a.m. – 9:15 a.m.
2. 9:21 a.m. – 10:54 a.m.
3. 11:00 a.m. – 1:04 p.m. (including 30 minutes for lunch),

and fourth period is divided into two forty-five minute subunits as follows:

4. 1:10 p.m. – 1:55 p.m. and 1:55 p.m. -- 2:40 p.m.
24. Over the course of a two-day cycle at Freshman Success Academy, there are six ninety-minute class periods, two forty-five minute instructional sessions and two forty-five minute seminar sessions, for a total of 720 minutes per two day cycle. The fourth period each day is separated into two forty-five minute blocks, the first for instructional time and the second for seminar. Tr., pp. 165-166.
25. The first forty-five minutes of fourth period is devoted to instructional time and the second forty-five minutes of fourth period is seminar. *Id.* This arrangement preserves instructional time, as the interruption near the end of fourth period for bussing impacts seminar time, not classroom, or instructional, time. Tr., pp. 170-171. Over the course of a blue and white two-day cycle, there are ninety minutes of the two-day cycle's fourth period devoted to instructional time and ninety minutes of the two-day cycle's fourth period are devoted to seminar. Tr., p. 175.
26. In the 2009-2010 school year, JCHS Principal Stan Dodds implemented physical education teacher Randall Zimmerman's strength and conditioning class during "Zero Hour" for which Zimmerman volunteered. In Zimmerman's Zero Hour class, two forty-five minute class sessions over the two day cycle constituted a ninety minute class period. Tr., pp. 226-227; Respondent's Exhibit 6.

27. The parties' Negotiated Agreement, Article IV contains a five-level grievance procedure. Joint Exhibit 2. Binding arbitration is not included in the parties' grievance procedure. Tr., pp. 46, 59-60, 149-150.

28. Unit members filed a grievance under the parties' Negotiated Agreement, alleging that the District's actions violated its teaching load provision, specifically alleging that "instead of a normal teaching load of five class periods per scheduling cycle and duties assigned during seminar, teachers were being required to teach six periods per scheduling cycle and duties assigned during seminar." Respondent's Exhibit 4.

29. Grievants were denied at each stage of the parties' negotiated grievance procedure. *Id.*

30. Evidence regarding the effect on unit member's hours and amounts of work created by changes to the FSA fourth period schedule was inconsistent and inconclusive. At most, the presiding officer finds that changes to the FSA fourth period schedule, by dividing it into two forty-five minute periods on both blue days and white days, has had only a nominal or *de minimis* effect on hours and amounts of work for Petitioner's unit members. *See, e.g.*, Tr., p. 88 (testimony of Jacinda Kinzie, who teaches English to non-English speaking ninth graders, that changes to fourth period "hasn't affected [her] workload."); Tr., pp. 72-73 (testimony of Linda Powers, Freshman Communication, that the change to fourth period causes "more work because you have to plan for 45 minutes differently" than for 90 minutes, but it is not the functional equivalent of "adding a prep" period, it just means "that you do have to re-prepare"); Tr., pp. 105-109 (testimony of ninth grade Science instructor, Carmen Hewitt, that she had to prep "differently" for two forty-five minute periods than

for one ninety-minute period and that splitting the class period created more work for her due to things such as the time it takes to shut down and power on computer equipment, inordinate delays for which have occurred on two occasions, and for set up and take down time for materials); Tr., p. 177 (testimony of FSA principal Melissa Sharp that since the change to a split fourth-period, she has had no teachers express to her a resulting increase in workload).

31. The presiding officer finds that the record is devoid of evidence to suggest that the Respondent's unilateral implementation of changes to fourth period schedule at the Freshman Success Academy were undertaken "willfully", that is, with an intent to do wrong or to cause injury to either the bargaining representative or to affected members of the professional employees' bargaining unit. Rather, the record suggests that the splitting of fourth period into two forty-five minute sessions, preserving instructional time in the first session and moving seminar to the later session, interrupted daily by the realities of bussing freshmen to the main campus, was a change consistent with applicable language of the Negotiated Agreement and that the change was made in response to re-location of the FSA.

CONCLUSIONS OF LAW/DISCUSSION

As previously noted, this administrative action comes before the presiding officer pursuant to provisions of the Kansas Professional Negotiations Act (hereinafter "PNA", or "the Act"). The PNA, found at K.S.A. 72-5413 *et seq.*, is the statutory framework governing the right of professional employees to negotiate over terms and conditions of professional service with employer school

boards in Kansas. *Teachers and the School Board—Negotiations in Kansas*, 15 WASHBURN L. J. 457 (1976); *Liberal-NEA v. Board of Education*, 211 Kan. 219, 225 (1973). The Labor Management Relations Act of 1947, a federal law governing labor relations in the private sector, had specifically excluded from its application the employees of states and their political subdivisions. *Id.*, p. 224. The Kansas legislature enacted the PNA in 1970, Kansas Session Laws, 1970, Ch. 284, § 1, to extend to professional employees of school districts collective bargaining rights which had been denied them by the Kansas Supreme Court’s 1964 decision in *Wichita Public Schools Employees Union v. Smith*, 194 Kan. 2 (1964). *Liberal-NEA*, 211 Kan. at 224-225.

The Act’s “underlying purpose . . . is to encourage good relationships between a board of education and its professional employees.” *Id.*, at 232. The PNA gives professional employees of school boards the right to form, join or assist professional employee organizations and to participate in professional negotiations with boards of education through representatives of their own choice for the purpose of establishing, maintaining, protecting and improving terms and conditions of professional services. K.S.A. 72-5414. “Terms and conditions of professional service” is statutorily defined to encompass certain topics, included among which are “salary and wages”, “hours and amounts of work” and “pay for overtime”. K.S.A. 72-5413(I)(1). Professional employees were also given the right to refrain from any or all of the foregoing activities. K.S.A. 72-5414

The Act provides mechanisms for enforcing the rights it confers. Similar to the prohibition of “unfair labor practices” under the National Labor Relations Act, the PNA bans certain enumerated “prohibited practices” in an effort to promote greater equality of bargaining power between

professional employees and school boards so that the parties may find improved ways of organizing their joint efforts to their maximum mutual benefit. By attempting to equalize the bargaining power between school boards and their professional employees, the Act advances its statutory objectives of improved professional employee-school board relations, giving employees a greater voice in decisions affecting their working conditions.

Two of the “prohibited practices” enumerated by the Act are alleged in this matter. K.S.A. 72-5430(b)(5) provides that it is unlawful for a board of education willfully to “refuse to negotiate in good faith with representatives of professional employees’ organizations”. The Professional Negotiations Act also provides that it shall be a prohibited practice for a school board or its designated representative willfully to interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414. K.S.A. 72-5430(b)(1). K.S.A. 72-5414 provides that “professional employees shall have the right to form, join or assist professional employees’ organizations, to participate in professional negotiation with boards of education . . . for the purposes of establishing, maintaining, protecting or improving terms and conditions of professional service”. For a comprehensive analysis why violation of a “(b)(5)” charge or of any of the other listed prohibited practice charges also constitutes a violation as a “(b)(1)” charge, *see* Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 264 (1980). The reasoning Goetz sets forth in his seminal article about the Kansas Public Employer-Employee Relations Act is equally applicable under the Kansas Professional Negotiations Act.

Before examining the law and the parties' arguments with regard to the prohibited practice charges herein, the presiding officer will address Respondent's assertion that Petitioner waived its right to pursue this matter by resort to the parties' negotiated grievance procedure.

ISSUE 1

Whether Petitioner's filing of a grievance under the parties' Negotiated Agreement deprives the Secretary of Labor of jurisdiction over a prohibited practice charge stemming from the same operative facts?

Respondent asserts that since the parties have negotiated a grievance procedure, concluding with a decision by the Board of Education that the parties agreed "shall be final", Respondent's Brief, p. 13, Petitioner is precluded from bringing this prohibited practice claim arising from the same facts.

"The Internal Arbitration Panel made a finding that the terms of the contract had not been violated This is precisely the issue that is before the Secretary framed as an alleged Prohibited Practice in failing to negotiate the 'hours and amounts of work.'

. . . .

The Negotiated Agreement between the parties clearly provides that the decision of the Board shall be final. By electing to pursue the Grievance procedure provided in the Negotiated Agreement, the phrase 'decision of the Board shall be final' becomes a 'forum selection clause'. Under Kansas law, if language of the forum selection clause contained in the agreement is clear, it has been given effect. (citation omitted). It is settled law in Kansas that the use of 'shall' in a forum selection clause generally indicates mandatory intent. (citation omitted).":

Respondent's Brief, pp. 14-15. Since Petitioner "elected to use the grievance procedure as outlined in the Negotiated Agreement, it became bound by the decision of the Board", and Respondent's motion to dismiss should be granted. *Id.*, p. 15.

However, Respondent cites no PERB administrative decision, nor any Kansas, or other-jurisdictional, caselaw *applicable to these facts* in support of this assertion. *See, generally*, Respondent's Brief. Respondent's motion must be denied. The instant dispute was filed pursuant to K.S.A. 72-4330 as a prohibited practice charge, that of refusal to bargain in good faith, a dispute over which this administrative tribunal alone has original jurisdiction. *See* K.S.A. 72-5430a; K.S.A. 72-5430(b)(5). *See also, NEA-Seaman v. Seaman Unified School District*, Case No. 72-CAE-14-1995, p. 8 (holding that authority to decide prohibited practice charges under Professional Negotiations Act is vested in Kansas Secretary of Labor). The prohibited practice charge of refusal to bargain in good faith, like the others spelled out in state labor relations laws, i.e., the Public Employer-Employee Relations Act and the Professional Negotiations Act, is designed to assist this agency in procuring and policing adherence to those laws. Adherence to the state's labor relations laws advances the legislature's policy determination that state government employees, employees of other local governmental units that exercise the right to opt-in to coverage by the law, and professional employees of state school districts, like their private-sector employee counterparts can join labor organizations and be represented in contract talks concerning terms of employment and with regard to employee grievances. *See, generally*, Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 263 (1980)(discussing legislative history and purpose of both the Public Employer-Employee Relations Act and the Professional Negotiations Act). Since Petitioner's complaint alleges commission of a prohibited practice, this tribunal has jurisdiction to hear the matter. There is no indication in the language of the Act to suggest that the legislature intended or

envisioned that parties to a Negotiated Agreement could remove jurisdiction over prohibited practices from the Secretary of Labor by agreement.¹ Respondent's motion to dismiss is denied.

ISSUE 2

Whether the complained-of actions of Employer, Unified School District No. 475, constituted a violation of K.S.A. 72-5430(b)(5)?

Kansas law provides that “[t]he commission of any prohibited practice, as defined in this section, among other actions, shall constitute evidence of bad faith in professional negotiation.” K.S.A. 72-5430(a). The Act further states that “[i]t shall be a prohibited practice for a board of education or its designated representative willfully to . . . refuse to negotiate in good faith with representatives of recognized professional employees’ organizations as required in K.S.A. 72-5423” K.S.A. 72-5330(b)(5). Petitioner requests that the Secretary find that the Board’s actions constitute a prohibited practice and order that the Board cease utilizing the new schedule until it has

¹ A related policy question is implicated. Under the *Collyer* doctrine, see *Collyer Insulated Wire*, 77 LLRM 1931 (1971), adopted administratively by decisions of the Public Employee Relations Board, see Initial Order of the Presiding Officer, International Association of Firefighters, Local 3309 v. City of Junction City, Kansas Fire Department, 75CAE-4-1994, dated January 20, 1994, pp. 36-59 (and Final Order of the PERB adopting same); Initial Order of the Presiding Officer, Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff’s Department, 75-CAE-3-2006 & 75-CAE-10-2006, dated April 9, 2009, pp. 88-22 (and Final Order of the PERB adopting same), while not required to do so, the Kansas PERB has indicated its willingness to defer to contractual grievance procedures where the parties have exhibited a prior stable bargaining relationship, the dispute is centered on a contractual, as opposed to statutory, violation and the parties’ negotiated grievance procedure culminates in binding arbitration. A prior administrative decision under the Professional Negotiations Act has suggested adoption of the *Collyer* doctrine in appropriate cases. Initial Order of the Presiding Officer, NEA-Topeka v. Board of Education, U.S.D. 501, Topeka, Kansas, 72CAE-1-2008, dated December 28, 2010, pp. 6-7. In this matter, however, in view that the parties’ negotiated grievance procedure did not culminate in binding arbitration, see Finding of Fact No. 25, conditions

negotiated same with the Junction City Education Association, order that the Board pay all affected teachers their hourly rate for any extra work required by the new schedule and order that the Board post a copy of the Secretary's Order for thirty (30) days at all locations where unit members are employed and for any other relief deemed equitable by the Secretary.

Petitioner asserts that the Board committed violations of K.S.A. 72-5430(b)(1) and (b)(5) when it unilaterally changed the 2010-2011 school year schedule at the Freshman Success Academy. Brief of Petitioner Junction City Education Association, (hereinafter "Petitioner's Brief"), Case No. 72-CAE-1-2011, p. 7. This is so, Petitioner urges, because the number of class periods is within the purview of a mandatorily negotiable topic specifically listed in K.S.A. 72-5413(l), that of "hours and amounts of work". Petitioner's Brief, p. 6. Petitioner asserts that the effect of Respondent's change to the schedule for the FSA was to add an extra teaching period. *Id.*, p. 5 ("[a]t issue in this case is whether the Board committed a prohibited practice . . . when it unilaterally changed the FSA's 2010-11 school year schedule by adding an extra teaching period.")

"Under the topic approach, '[a]ll that is required is that the subject matter of the specific proposal be within the purview of one of the categories listed under "terms and conditions of professional service" in K.S.A. 72-5413(l)' ". *Id.*, (citing to *U.S.D. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 969 (1984)). According to Petitioner's argument, as of the beginning of the 2010-2011 school year, the Freshman Success Academy was relocated from the JCHS building to a separate building. Petitioner's Brief, p.8. This move required FSA students to

necessary for deferral to a contractual grievance mechanism are not present.

be released ten minutes prior to the end of the school day. *Id.* A Scheduling committee comprised of both teachers and administrators failed to reach agreement on fixing the scheduling problem created by moving the FSA to a separate building. FSA Principal Melissa Sharp in turn devised and presented two options for resolving the scheduling challenge. *Id.* The first was to start and end the day at the FSA ten minutes earlier than at the main high school campus. *Id.* The second option split the fourth period into two forty-five minute sessions, making the first session for instructional time and the second session for seminar. Petitioner's Brief, p. 9. In this way, instructional time would be preserved and bussing would interrupt seminar time alone. *Id.* The Board implemented this option without negotiation and exhaustion of the Act's statutory impasse procedures. *Id.*

Relief from the commission of a prohibited practice can be granted in whole or in part by order of the Secretary of Labor. A well-established labor law principle is that unilateral changes by an employer in terms and conditions of employment are *prima facie* violations of its professional employees' collective bargaining rights. *NLRB v. Katz*, 369 U.S., 736 (1962), ("Katz").

It is also well settled, however, that a unilateral change is not *per se* a prohibited practice. As the court concluded in *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (4th Cir. 1967):

"Thus, we think it is incorrect to say that unilateral action is an unfair labor practice *per se*. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1423 (1958). We think it more accurate to say that unilateral action may be sufficient, standing alone, to support a finding of refusal to bargain, but that it does not compel such a finding in disregard of the record as a whole. Usually, unilateral action is an unfair labor practice -- but not always."

There are two underlying reasons for this position. First, because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to

make unilateral changes when the subject is not a “mandatory” bargaining item. *Allied Chem. & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 159 (1971). See also, *Board of Education, U.S.D. No. 352, Goodland v. NEA-Goodland*, 246 Kan. 968, 998, 785 P.2d 993 (1990)(ruling that where a proposal is not mandatorily negotiable, the board’s unilateral implementation of the proposal does not constitute a prohibited practice). Stated another way, failure to negotiate an item that by its nature is mandatorily negotiable amounts to a prohibited practice under K.S.A. 72-5430. *Board of Education, Unified School District No. 314 v. Kansas Department of Human Resources*, 18 Kan.App.2d 596, 599, 856 P.2d 1343 (1993). Second, since only unilateral changes are prohibited, an unfair labor practice will not lie if the “change” is consistent with the past practices of the parties, R. Gorman, *Basic Text on Labor Law*, 450-54 (1976).

After a negotiated agreement has been reached between a Board of Education and the exclusive representative of professional employees pursuant to K.S.A. 72-5413 *et seq.*, then during the time that agreement is in force, the Board of Education, acting unilaterally, may not make changes in items included in that agreement, Initial Order, *Kinsley-Offerle NEA v. Unified School District No. 347*, Kinsley, KS, 72-CAE-5-1990, or 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 in the resulting agreement. *NEA-Wichita v. U.S.D. 259*, 234 Kan. 512 (1983).

Under Kansas law, as Petitioner correctly noted, the question of whether a specific subject is mandatorily negotiable is determined by use of the “topic” approach. *U.S.D. No. 501*, at 969.

“Under this approach, a proposal does not have to be specifically listed under K.S.A. 72-5413(l) to be mandatorily negotiable as a term and condition of employment. All that is required is that the subject matter of the specific proposal be within the purview of one of the categories listed under ‘terms and conditions of professional service.’”

Id. As a preliminary matter, granting relief here would be appropriate only if it is determined that Respondent refused, by way of unilateral implementation, to negotiate in good faith with respect to a mandatorily-negotiable topic. *See NEA-Wichita v. U.S.D. No. 259*, 234 Kan. 512, 518 (1983); *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 969 (1984). Respondent does not directly argue that its action does not come within the purview of a listed term and condition of professional service. Rather, Respondent urges that the fourth period schedule change for Freshman Success Academy is consistent with past practices, is a managerial prerogative and does not constitute a change in “hours and amounts of work”. Respondent’s Brief. *See also*, USD 475’s Response to Junction City Education Association’s Brief. In effect, the reasoning implicit in Respondent’s position is that because this scheduling adjustment is consistent with the parties’ past practices, it does not constitute a unilateral *change* to the Negotiated Agreement, and because the scheduling adjustment does not change the “hours and amounts of work” for bargaining unit members, its actions do not come within the purview of a mandatorily negotiable topic.

In a series of decisions, the Kansas Supreme Court and Kansas Court of Appeals have broadly determined that a change in the number of teaching periods is *ipso facto* a change to “hours and amounts of work” and therefore a change to the “terms and conditions of professional service” which are mandatorily negotiable under the Professional Negotiations Act (PNA), K.S.A. 72-5413 *et*

seq. See, Chee-Craw Teachers Ass'n v. U.S.D. No. 247, 225 Kan. 561 (1979); Dodge City Nat'l Ed. Ass'n v. U.S.D. No. 443, 6 Kan.App.2d 810 (1981); NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512 (1983). Respondent takes issue with Petitioner's attempt to characterize the scheduling adjustment as the addition of an extra teaching period. *See* Respondent's Brief, pp. 3-4 (FSA splits fourth period but the class time in a two day cycle is 630 minutes plus ninety minutes of seminar equals a total of 720 minutes, the same as that at the main campus). The presiding officer concurs with this assessment. Although fourth period was split into two forty-five minute sessions, this does not lead the presiding officer automatically to conclude that its effect was to add an extra teaching period. Rather, Respondent's action divided a ninety minute teaching period into two forty-five minute sessions. The parties' Negotiated Agreement provided that the "normal teaching load at the high school shall be five class periods per scheduling cycle (in general seven student periods) and duties as assigned by the principal during seminar period." Finding of Fact No. 4. At the time of initial ratification of this language, the plan put forward to the faculty was one "in which the class periods were going to be 90 minutes." Finding of Fact No. 6. If a class period is going to be ninety minutes, then it seems that splitting a ninety minute class period two forty-five minute subunits, totaling ninety minutes, is consistent with the Negotiated Agreement's use of the term "class periods". Further, this "change" is consistent with the parties' past practices. *See* Finding of Fact No. 26.

Moreover, as Respondent's argument suggests, see Respondent's Brief, p. 16 ("one can only conclude that the evidence is underwhelming"), the record from which to find that this scheduling adjustment resulted in a change in hours and amounts of work for the teachers involved was less than

persuasive. As noted at Finding of Fact No. 29, the presiding officer does not find that the scheduling adjustment changed unit members' hours and amounts of work in anything more than a nominal or *de minimis* amount.² As noted by Respondent, *see* Respondent's Brief, pp. 24-25, "[t]eachers were not being asked to take on an extra class, an extra preparation period, any extra students or any additional time." Because the scheduling action does not change unit members' hours or amounts of work, in anything but a nominal or *de minimis* manner, it does not fall within the purview of a listed or mandatorily negotiable term or condition of professional service. The Secretary should exercise caution that its adjudication of prohibited practices is not unnecessarily burdened with cases that do not further the Act's statutory purpose to encourage good relationships between a board of education and its professional employees. While the Secretary seeks to ensure that the rights of Respondent school districts, professional employees' organizations and professional

² Under other statutory schemes governing labor bargaining relationships whether between governmental units and public sector labor organizations or between labor unions and private sector management a *de minimis* change in employment requirements or conditions is not subject to bargaining because it has no appreciable effect upon working conditions. *See, e.g., Association of Administrative Law Judges v. F.L.R.A.*, 397 F.3d 957 (C.A.D.C., 2005) (under the Federal Labor Relations Authority, a finding that agency had no duty to bargain over changes in conditions of employment with merely *de minimis* effect upon unit employees and FLRA's inference that there was a *de minimis* exception to duty to bargain was permissible construction of that statute); *In re Bloomfield Board of Education*, Conn. Board of Labor Relations, Decision No. 2821 (July 3, 1990) p. 6 ("[i]f a change is *de minimis* or insubstantial in its impact upon a major term or condition of employment, [the board] will decline to find [that] a prohibited practice has occurred"); *EAD Motors E. Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006) ("[T]he Board has made clear that in order to constitute a unilateral change that violates the Act, an employer's action must effect a material, substantial, and significant change in terms or conditions of employment.") *Seattle First Nat'l Bank v. NLRB*, 444 F.2d 30, 33 (9th Cir. 1971) ("A mere remote, indirect or incidental impact is not sufficient.").

employees under the Act are protected in situations involving changes in terms and conditions of professional service, the Secretary must also seek to discharge its responsibility in a fashion that promotes *meaningful* professional negotiations. Interpreting the Act to require negotiation over every single action, no matter how slight the impact of that action, does not serve the Legislative purposes behind the Act. Respondent's unilateral action, as it was not taken with regard to a term or condition of professional service, is consistent with the parties' past practices, and had at most a *de minimis* or nominal effect on terms and conditions of professional service does not constitute the prohibited practice of refusal to negotiate in good faith. Even were the courts on judicial review to disagree, finding for example, that Respondent's action came within the purview of hours and amounts of work, the presiding officer nonetheless would respectfully suggest that the Employer's action did not constitute a prohibited practice, as it was not done willfully, that is, with an intent to do wrong or to cause an injury to either Petitioner bargaining representative or its members. *See* Finding of Fact No. 30. Rather, the scheduling adjustment following relocation of the Junction City High School's Freshman Success Academy was an attempt by Principal Sharp to preserve instructional time while resolving a potential problem brought about by the need to transport freshmen to the main campus at the end of the school day. *Id.* In view of the resolution of this issue, issues number three and four are moot and will be addressed no further.

CONCLUSION

It is the finding and conclusion of the presiding officer that Petitioner's filing of a grievance

under the parties' Negotiated Agreement involving the same operative facts upon which this prohibited practice was determined did not warrant dismissal of the charge. In this case, where the Employer unilaterally adjusted the schedule of teaching periods in the manner described, consistent with past practices of the parties, but there is no substantial evidence that the hours or amounts of work required of teachers has increased in anything more than a *de minimis* way, the school district has not committed the prohibited practice charged. The presiding officer finds and concludes that Respondent's scheduling change was not a prohibited practice under applicable law.

ORDER

IT IS THEREFORE DETERMINED that the actions of Respondent, Unified School District No. 475, Junction City, Kansas, did not constitute a prohibited practice.

IT IS THEREFORE ORDERED that the prohibited practice complaint against Respondent be dismissed, with each side bearing its own costs.

IT IS SO ORDERED.

DATED, this 23rd day of April, 2012.



Douglas A. Hager, Designee of the Secretary
Office of Labor Relations
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, KS 66603

NOTICE OF RIGHT TO REVIEW

This Initial Order of the Presiding Officer is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Labor, either on the Secretary's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on May 11, 2012, addressed to: Chief Counsel Glenn H. Griffeth, Office of Legal Services, Kansas Department of Labor, 401 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

CERTIFICATE OF SERVICE

I, Loyce Oliver, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 23rd day of April, 2012, a true and correct copy of the above and foregoing Initial Order of the Presiding Officer was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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