

**BEFORE THE DEPARTMENT OF HUMAN RESOURCES
OF THE STATE OF KANSAS**

PRAIRIE VIEW TEACHERS
ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF U.S.D.
NO.362, La Cygne, Kansas,

Respondent.

Professional Negotiations Act:
Case No. 72-CAE-19-1995

Pursuant to K.S.A. 72-5413 *et seq.* and
K.S.A. 77-501 *et seq.*

INITIAL ORDER

On April 24, 1995, and again on July 10, 1995, this matter came on for telephone prehearing conference before Don Doesken, presiding officer. During the second prehearing conference, the parties agreed to submit this matter for decision on stipulated facts, which were received on September 19, 1995. Thereafter the parties submitted briefs, reply briefs and additional responses. On October 23, 1995 this matter was reassigned to Kansas Department of Human Resources staff attorney John Yeary to issue a decision as substitute presiding officer, pursuant to K.S.A. 77-514.

Appearances

Petitioner Prairie View Teachers Association appeared by its attorney, Marjorie Blaufuss of Kansas - NEA, 715 W. 10th, Topeka, Kansas 66612-1686.

Respondent Board of Education of Unified School District No. 362, La Cygne, Kansas appeared by its attorney, Mary Winter-Smith, 425 Main Street, P.O. Box 307, Mound City, Kansas 66056.

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Statement of the Case

The principal issue in this case is whether the Respondent Board of Education of Unified School District No. 362 ("Board") committed a prohibited practice when it unilaterally implemented a policy which required employees hired after February 1, 1995 to reside within the boundaries of the school district.

The Petitioner Prairie View Teachers Association ("Association") filed a Complaint on March 6, 1995 alleging that the Board engaged in a prohibited practice within the meaning of K.S.A. 72-5430(b)(1), (2), (3), (4), (5) and (6) when it adopted the policy entitled "GAH Staff Community Relations" at the Board's January 9, 1995 meeting. The Association contends the adoption of the policy violated the Board's obligation to negotiate in good faith regarding the terms and conditions of employment of the employees represented by the Association. However, the Board maintains that a residency requirement for employees is not a mandatory subject for bargaining.

Issues Presented for Determination

- 1) Whether the Board's residency policy for new teachers is a mandatorily negotiable condition of professional service which must be noticed by the Board for negotiation before it can legally become a condition of employment for the district's new teachers.
- 2) Whether the school board committed one or more willful prohibited practices in violation of K.S.A. 72-5430(b) when it implemented its residency policy for new teachers.
- 3) Whether and to what extent the Petitioner's request for relief should be granted pursuant to K.S.A. 72-5430a(b).

Findings of Fact

The parties have stipulated to the following facts:

1. Prairie View Unified School District No. 362 (Board or District) 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. Pursuant to the Professional Negotiations Act (PNA), K.S.A. 72-5413 *et seq.*, the Prairie View Teachers Association (Association), is the duly recognized exclusive representative for all full and part-time teachers employed by the district.
3. The Board and Association were at impasse in their negotiation of an agreement covering the 1995-1996 school year at the time these facts were submitted.
4. No previous agreement between the Board and the Association contained a residency requirement for the professional employees of the District, and the Board did not notice for negotiation for the 1995-96 school year, the residency policy at issue.
5. The negotiated agreement for 1994-1995 contains no residency requirement. (Amended Prohibited Practice Petition, Attachment D.)
6. During its regular meeting on Monday, January 9, 1995, the Board adopted Board policy GAH - Staff Community Relations, which states the following:

"All new staff members hired after February 1, 1995, for employment with U.S.D. 362 are required to reside within the boundaries of the district. New employees will be provided an 18 month grace period providing progress is being made toward establishing residency. All staff members employed with the school district prior to February 1, 1995, are exempt from the provisions of this policy. Staff members failing to comply with the policy will be subject to non-renewal for non-compliance. The board of education reserves the right to consider extenuating circumstances regarding the residency policy. All new employees shall be required to acknowledge in writing, at the time of their initial employment, that they are aware of and familiar with the residency policy."
7. The residency policy adopted by the Board does not apply to members of the professional bargaining unit hired by the Board prior to February 1, 1995.

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8. The members of the Board of Education of Unified School District No. 362, as of January 9, 1995, were Mr. Steve Haupt, Mr. Larry McIntosh, Mrs. Barbara Baird, Mr. Steve Stainbrook, Mr. Dennis Baker, Mr. Bruce Boydston, and Mr. David Kline. (Amended Prohibited Practice Petition, Attachment C.)
9. Board policy GAH - Staff Community Relations was adopted by a 4-3 vote. (Amended Prohibited Practice Petition, Attachment C.)
10. Mr. Steve Haupt, who voted YES on the new residency policy, works for Haupt Construction Co.
11. Mr. Larry McIntosh, who voted YES on the new residency policy, works for McIntosh Construction Co.
12. Mrs. Barbara Baird, who voted YES on the new residency policy, works for the Anderson County Co-op in LaCygne.
13. Mr. Steve Stainbrook, who voted YES on the new residency policy, works for the Anderson County Co-op in LaCygne.
14. Mr. Dennis Baker, who voted NO on the new residency policy, works as a meat cutter outside the district in Louisburg, Ks.
15. Mr. Bruce Boydston, who voted NO on the new residency policy, works outside the district in Gardner, Ks.
16. Mr. David Kline, who voted NO on the new residency policy, works as a construction worker.
17. Dr. Joe Smith, Superintendent of U.S.D. No. 362, is chairman of the La Cygne Area Chamber of Commerce committee which investigated the housing needs of the community. (Amended Prohibited Practice Petition, Attachment B.)
18. U.S.D. No. 362 Board of Education member Larry McIntosh is a member of the Chamber of Commerce committee referred to in stipulation No. 17. (Amended Prohibited Practice Petition, Attachment B.)
19. U.S.D. No. 362 Board of Education member Larry McIntosh moved for the adoption of Board policy GAH - Staff Community Relations at the January 9, 1995 board meeting. (Amended Prohibited Practice Petition, Attachment C.)

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20. The Board has hired several members of the professional bargaining unit since February 1, 1995, each of whom will be affected by the Board's residency policy.
21. Prairie View Teachers Association advised the Board, prior to its adoption of the residency policy, that a residence requirement is mandatorily negotiable.
22. On March 6, 1995, the Prairie View Teachers Association filed a petition with the Kansas Department of Human Resources, alleging a violation of the prohibited practice section of the Professional Negotiations Act.

Conclusions of Law

The Professional Negotiations Act (PNA), K.S.A. 72-5413 *et seq.*, governs labor relations between Kansas boards of education and their professional employees. K.S.A. 72-5423(a) places upon boards of education a duty to bargain with employee representatives, and states in pertinent part:

" . . .the board of education and the professional employees' organization shall enter into professional negotiations on request of either party at any time during the school year prior to issuance or renewal of the annual teachers' contracts. Notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party, such notices shall be in writing and delivered to the chief administrative officer of the board of education or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired."

It is a prohibited practice for a board of education to refuse to negotiate in good faith with representatives of recognized professional employees' organizations. K.S.A. 72-5430(b)(5).

The Respondent contends that its residency policy in this case is merely a precondition to employment of new employees before they become members of the bargaining unit. This contention is incorrect. The policy the Board adopted is not simply a precondition to employment, because it requires all employees hired after February 1, 1995 to continually reside within the boundaries of

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the school district. Employees must conform to this requisite qualification, not to apply or be hired, but to retain their jobs in good standing *after* they have been hired and the eighteen month grace period expires. During this eighteen month period, employees are members of the bargaining unit.

The Respondent also notes that other jurisdictions have generally upheld residency requirements as constitutionally valid and enforceable. However, a finding that the imposition of a residency policy is constitutional does not, by itself, relieve the school board from its obligation to bargain in good faith under the PNA. The constitutionality of the policy is not the relevant issue to be resolved in this case.

The Board is required to negotiate with the Association regarding terms and conditions of professional service. K.S.A 72-5413(l)(1) and (2) define "[t]erms and conditions of professional service" and provide a list of topics that are mandatorily negotiable. See NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, 518, (1983). The subject of residency is not expressly included in the statutory definition of mandatorily negotiable terms and conditions of professional service. However, in U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources, 235 Kan. 968 (1984), the Supreme Court of Kansas stated:

" . . . 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. at 969. This method by which KDHR determines the negotiability of any particular subject for the purposes of the PNA is known as the topic approach. In U.S.D. No. 501, the Supreme Court of Kansas determined that the topic approach is the method to be followed to determine whether certain

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proposals made during negotiations are mandatorily negotiable under K.S.A. 72-5413(l) of the PNA.

Kansas case law also recognizes that certain managerial decisions of school boards are not amenable to resolution through the bargaining process. Items that have been identified as managerial decisions or prerogatives which are not subject to negotiation pursuant to PNA include: class size, NEA-Topeka, Inc. v. U.S.D. No. 501, 225 Kan. 445 (1979); nondiscrimination, academic and personal freedom, assignment and transfer, reduction of personnel and recall of personnel, Chee-Craw Teachers Association v. U.S.D. 247, Crawford County, Kansas, 225 Kan. 561 (1979) see also, U.S.D. 501 v. Secretary of Kansas Dept. of Human Resources, 235 Kan. 968 (1984) (regarding the decision to reduce staff); days the school library will be kept open, Parsons-NEA v. U.S.D. 503, Parsons, Kansas, 225 Kan. 581 (1979); teacher evaluation criteria, U.S.D. No. 352 v. NEA-Goodland, 246 Kan. 137 (1990), and others. The concept of managerial prerogative creates a dichotomy between bargainable issues which fall within the purview of terms and conditions of professional service, and issues of policy which are reserved to school board discretion and cannot be made mandatory subjects of bargaining.

An analysis of the relatively brief history of the PNA offers valuable guidance in determining which items are mandatorily negotiable under the current law. The topic approach has not always been the proper test to be applied in determining negotiability. The initial version of the PNA was enacted by the Kansas legislature in the 1970 legislative session and became effective July 1, 1970. The original PNA contained no definition of "terms and conditions of professional service," nor did it list items the legislature regarded as negotiable. In National Education Association of Shawnee Mission, Inc. v. Board of Education of Shawnee Mission U.S.D. 512, 212 Kan. 741, (1973) the

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Supreme Court of Kansas addressed which subjects were proper for negotiation under the original PNA. The Court held that specific topics were included within the phrase "terms and conditions of professional service" and an "impact test" was adopted to determine, on a case by case basis, what those specific topics were. The Court stated:

"The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can."

Id. at 753. In response to this judicial determination the 1977 legislature amended K.S.A. 72-5413 to make the impact test statutory and define "terms and conditions of professional service" as:

" . . . salaries and wages, hours and amounts of work, vacation allowance, holiday sick and other leave, number of holidays, retirement, insurance benefits, wearing apparel, pay for overtime, jury duty, grievance procedure, disciplinary procedure, resignations, termination of contracts, matters which have a greater direct impact on the well-being of the individual professional employee than on the operation of the school system in the school district or of the community junior college and such other matters as the parties mutually agree upon as properly related to professional service . . ." (Emphasis added).

In 1980 the legislature again amended K.S.A. 72-5413(l), this time omitting the impact test and adding more items to the list of topics which are mandatorily negotiable. With the exception of minor modifications made during the 1989 and 1990 legislative sessions K.S.A. 72-5413(l) is the same today as it was after the 1980 changes. See L. 1989, ch. 216, § 1; L. 1990, ch. 255, §1 .

There is a difference between the impact test, which the legislature specifically omitted from the PNA in 1980, and the topic approach which has been utilized since that time. The residency policy at issue in this case might very well satisfy the impact test and qualify as a mandatorily negotiable term and condition of professional service because of its substantial impact on affected

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professional employees. The ability to choose where to live is a matter of fundamental interest to an individual. However, under the topic approach to negotiability, the test is whether the subject falls within the purview, or scope, of a statutorily listed item and not the impact on the employee.

The initial question that must be addressed in this case is whether the residency requirement adopted by the Board falls within the purview of the terms and conditions of professional service defined by K.S.A. 72-5413(l) to mean:

"(1) salaries and wages, including pay for duties under supplemental contracts; hours and amounts of work; vacation allowance, holiday, sick, extended, sabbatical and other leave, and number of holidays; retirement; insurance benefits; wearing apparel; pay for overtime; jury duty; grievance procedure; including binding arbitration of grievances; disciplinary procedure; resignations; termination and nonrenewal of contracts; reemployment of professional employees; terms and form of the individual professional employee contract; probationary period; professional employee appraisal procedures; each of the foregoing being a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; and (2) matters which relate to privileges to be granted the recognized professional employees' organization including, but not limited to, voluntary payroll deductions; use of school or college facilities for meetings; dissemination of information regarding the professional negotiation process and related matters to members of the bargaining unit on school or college premises through direct contact with members of the bargaining unit, the use of bulletin boards on or about the facility, and the use of the school or college mail system to the extent permitted by law; reasonable leaves of absence for members of the bargaining unit for organizational purposes such as engaging in professional negotiation and partaking of instructional programs properly related to the representation of the bargaining unit; any of the foregoing privileges which are granted the recognized professional employees' organization; and (3) such other matters as the parties mutually agree upon as properly related to professional service."

The Petitioner maintains that because the residency policy adopted by the board includes a discipline provision, it falls within the purview of the term and condition of professional service listed under part (1) as "disciplinary procedure." The residency policy the Board adopted could also

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be argued to fall under the topic of "termination and nonrenewal of contracts." Specifically, Policy GAH - Staff Community Relations expressly states that "[s]taff members failing to comply with the policy will be subject to non-renewal for non-compliance." Non-renewal of the employee's contract is the consequence the employee is subject to for failing to comply with the requirement that the employee reside within the boundaries of the district.

Respondent contends that its decision to require all teachers hired by U.S.D. 362 after February 1, 1995 to reside within the boundaries of the district is a managerial decision for the school board and thus not mandatorily negotiable. Apparently relying on U.S.D. 501 v. Secretary of Kansas Department of Human Resources, 235 Kan 968 (1984), Respondent argues that its residency policy does not preclude negotiation of the mechanics of or procedure for terminating the contract of an employee who violates the policy. In U.S.D. 501, the decision to reduce staff was determined to be a managerial decision for the school board and thus not mandatorily negotiable; however, the *mechanics* for termination or nonrenewal of teachers as a result of the managerial decision to reduce staff were determined to be mandatorily negotiable items. Id. at 972-73.

In light of the topic approach and U.S.D. 501, this argument is compelling. It is only the procedure for the discipline of teachers that is negotiable under the statutorily listed item "disciplinary procedure," not the policy the teacher has violated. In other words, in analyzing whether the residency policy at issue in the present case falls within the purview of "disciplinary procedure," it is necessary to distinguish the managerial policy from the mechanics of implementing that policy. Disciplinary procedures which will be utilized by the Board and employees in the event of a violation of the policy are mandatorily negotiable, while the residency policy itself does not fall

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within the purview of this topic, and is therefore not mandatorily negotiable under this topic.

Similar reasoning does not apply to the statutorily listed topic "termination and non-renewal of contracts." The residency policy adopted by the board in this case was not an outright policy to terminate or non-renew any contract. Instead, the policy provides that staff members to whom the policy applies who fail to comply with the policy will be *subject to* non-renewal. The method by which non-renewal, the ultimate punishment for violating the residency policy, will be effected must be negotiated. Put in the words of U.S.D. 501, the *mechanics* for termination or nonrenewal of teachers as a result of the managerial decision to require employees to reside within the district are mandatorily negotiable items. This does not, however, make the policy itself a topic which is mandatorily negotiable. The policy the Board adopted does not fall within the purview of any category listed in K.S.A. 72-5413(1), and therefore it is not a mandatorily negotiable condition of professional service which must be noticed by the Board and negotiated by the parties.

As such, the Board did not commit a prohibited practice within the meaning of K.S.A. 72-5430(b) when it implemented policy GAH - Staff Community Relations which requires employees hired by the Board after February 1, 1995 to reside within the boundaries of the school district. However, the parties are required to negotiate any disciplinary procedures to be utilized by the board to determine whether and to what extent a professional employee should be disciplined for failing to comply with the Board's residency requirement.

ORDER

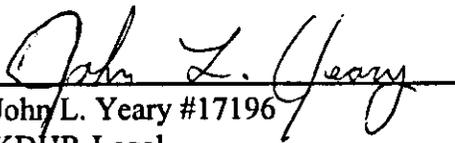
IT IS HEREBY ORDERED that the parties proceed with professional negotiations pursuant to the instructions set forth above.

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IT IS FURTHER ORDERED that the Board of Education of Unified School District No. 362 post a copy of this order in a conspicuous location at all facilities where members of the bargaining units are employed.

Dated this 15th day of February, 1996



John L. Yeary #17196

KDHR-Legal

401 S.W. Topeka Blvd.

Topeka, KS 66603-3182

(913) 296-4902

Presiding Officer

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Human Resources, 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. 77-531, and K.S.A. 77-612, To be considered timely, and original petition for review must be received no later than 5:00 p.m. on the 15th day of March, 1996 addressed to : Wayne L. Franklin, Secretary of Human Resources, 401 S.W. Topeka Boulevard, Topeka, Kansas 66603.

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CERTIFICATE OF SERVICE

The undersigned employee of the Kansas Department of Human Resources, hereby certifies that on the 26th day of February, 1996, true and correct copies of the above and foregoing Initial Order were served upon the attorneys representing each of the parties to this action, in accordance with K.S.A. 77-531, by depositing said copies in the U.S. Mail, first class, postage prepaid, addressed to:

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