

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

BREWSTER-NEA,)
)
 Petitioner,)
)
 vs.) Case No. 72-CAE-2-1991
)
 UNIFIED SCHOOL DISTRICT 314,)
 BREWSTER, KANSAS,)
)
 Respondent.)
 _____)

INITIAL ORDER

ON the 29th day of January, 1991, the above-captioned prohibited practice complaint came on for formal hearing pursuant to K.S.A. 72-5430a(a) and K.S.A. 77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appeared by Bruce Lindskog, Northwest Kansas Uniserv Director, P.O. Box 449, Colby, Kansas 67701, and counsel David M. Schauner, Kansas-National Education Association, 715 W. 10th Street, Topeka, Kansas 66612-1686.

Respondent: Appeared by counsel J. Ronald Vignery, 214 E. 10th, P.O. Box 767, Goodland, Kansas 67735.

ISSUE PRESENTED FOR REVIEW

DID THE UNIFIED SCHOOL DISTRICT 314, BREWSTER, KANSAS BOARD OF EDUCATION REFUSE TO NEGOTIATE IN GOOD FAITH WITH REPRESENTATIVES OF THE BREWSTER-NEA, THE RECOGNIZED PROFESSIONAL EMPLOYEE ORGANIZATION, IN VIOLATION OF K.S.A. 72-5430(B)(5) WHEN IT FAILED TO RESPOND TO THE AUGUST 31, 1990 REQUEST TO NEGOTIATE EVALUATION PROCEDURES.

72-CAE-2-1991

SYLLABUS

[1] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Tests.** Two standards have been developed to resolve the problem of overlap between managerial exclusivity and employee participation through bargaining; the significantly related test and the balancing test.

[2] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Balancing test adopted.** A three-step balancing test is adopted for determining negotiability of a subject under the Kansas Professional Negotiations Act. A subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.

[3] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Balancing test when applied.** The balancing test must be applied on a case-by-case and item-by-item basis.

[4] **PROHIBITED PRACTICES - Duty to Negotiate in Good Faith - Unilateral changes.** Unilateral changes by an employer in terms and conditions of employment are prima facie violations of its professional employees' collective negotiation rights.

[5] **PROHIBITED PRACTICES - Duty to Negotiate in Good Faith - Unilateral changes.** An employer may not be charged with an unfair labor practice in absence of a demand for negotiation following the certified professional employees' organization's receipt of information of a planned change in a term or condition of employment.

[6] **PROHIBITED PRACTICES - Duty to Negotiate in Good Faith - Unilateral changes.** A professional employees' organization's failure to demand negotiations regarding a change in a term or condition of employment will not constitute waiver of the right to

negotiate unless the record shows that the employer gave both adequate and timely notice of its intended action.

[7] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Evaluation criteria and procedure.** Under K.S.A. 72-5413(1), evaluation procedures are mandatorily negotiable; evaluation criteria are not.

[8] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Duty to negotiate.** A board of education may unilaterally adopt new evaluation criteria but if the criteria require procedures to implement, the evaluation criteria may not be implemented until the procedures have been noticed to the exclusive professional employee representative for negotiation.

[9] **PROFESSIONAL NEGOTIATIONS - Scope of Negotiations - Determination of negotiability - Duty to negotiate.** The duty to bargain does not cease with the signing of a professional agreement. It extends throughout the life of an agreement.

FINDINGS OF FACT¹

1. The Petitioner, Brewster - NEA, ("NEA"), is a "professional employees' organization" as defined by K.S.A. 72-5413(e) and the "recognized exclusive professional employees' organization", pursuant to K.S.A. 72-5416 through 73-5419, for professional employees of Unified School District 314 ("U.S.D. 314"), Brewster, Kansas.
2. The Respondent, Unified School District 314, Brewster, Kansas, is operated by a "board of education" as defined by K.S.A. 72-5413(b).
3. The Secretary of the Department of Human Resources has jurisdiction over the parties and the subject matter of the case, i.e. a prohibited practice complaint, K.S.A. 72-5430a.

¹ "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburg Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

4. Katie Fulwider is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for seven years. She is a member of the Brewster - NEA, and served on the association negotiating team for school years 1989-90 and 1990-91 (Tr.p. 8-9).
5. Regina Johnson is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for eight years. She has served on the association negotiating time for school years 1986-87 and 1987-88 (Tr.p. 50).
6. Rod Gilley is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for two years (Tr.p. 104).
7. David Evert is a "professional employee", as defined by K.S.A. 72-5413(c), employed by the Unified School District 314, Brewster, Kansas, for four years (Tr.p. 114).
8. David Norman is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for 6 months (Tr.p. 135).
9. Deanna Berry is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for ten years (Tr.p. 140-41).
10. Delores Marie Depe is a "professional employee", as defined by K.S.A. 72-5413(c), employed by Unified School District 314, Brewster, Kansas, for five years (Tr.p. 159).
11. Jean Lavid is an "administrative employee", as defined by K.S.A. 72-5413(d), employed by Unified School District 314, Brewster, Kansas, as Superintendent of Schools. She was entering her third year in that position. She was a member of the Evaluation Committee (Tr.p. 244, 246).
13. Pat Lehman is President of the Unified School District 314 Board of Education ("Board"), and served on the 1988-89, 1989-90 and 1990-91 Board negotiating teams (Tr.p. 65, 195).
14. Phil Knox is a member of the Unified School District 314 Board of Education ("Board"), and served on the 1988-89, 1989-90 and 1990-91 Board negotiating teams (Tr.p. 65).

15. In the fall of 1985, the Board of Education of U.S.D. 352, Goodland, created a committee to study evaluation procedures, and recommend a written policy of personnel evaluation as required by K.S.A. 72-9001 et seq. The Goodland Board and NEA-Goodland both noticed evaluation procedures with the items to be negotiated for the 1986-87 agreement. The Goodland Board refused to negotiate evaluation criteria but were willing to negotiate evaluation procedures. The parties were unable to reach agreement and the Goodland Board offered a unilateral contract which included the evaluation criteria.
NEA-Goodland filed a prohibited practice complaint with the Secretary of Human Resources whose representative issued an order against the Goodland Board finding "criteria" to be included in "employee appraisal procedures" and therefore mandatorily negotiable.
The Goodland Board appealed the Secretary's order to district court which reversed the Secretary concluding that the district was not required to negotiate teacher evaluation criteria. From the district court's order the Goodland-NEA appealed to the Kansas Supreme Court. No decision had been issued by the spring of 1988 when the parties in the instant case began negotiations.
16. In January of 1989 an Evaluation Committee was formed at the direction of the Board to comply with state law directing development of an evaluation instrument to be used in the district and sent to the Department of Education (K.S.A. 72-9001, Tr.p. 197).
17. Volunteers to serve on the Evaluation Committee were solicited from the U.S.D. 314 teachers and the community. Several teachers volunteered as did one community member. Superintendent Lavid also served on the committee (Ex. 2, 3, Tr.p. 148, 197, 245).
18. Negotiations between the NEA and the Board had not started at the time the evaluation committee began to meet in January, 1989 (Tr.p. 16).
19. At the first meeting of the Evaluation Committee the members received a copy of K.S.A. 72-9001, Evaluation of Certified Personnel Act, and were informed this was the law to be followed in developing the evaluation instrument (Tr.p. 16).
20. The first two meetings of the Evaluation Committee were devoted to how teachers would be evaluated. The discussion was directed more to the process of evaluation rather than

- what would be evaluated (Tr.p. 14, 21). At subsequent meetings both criteria and process for evaluation were discussed (Ex. 7; Tr.p. 144, 148).
21. By letter dated February 1, 1989, the Board provided notice to the NEA pursuant to K.S.A. 72-5423(a) of the items it wished to negotiate for the 1989-90 contract. The items did not include evaluation procedure (Ex. A).
 22. By letter dated January 31, 1989, NEA provided notice to the Board of education pursuant to 72-5423(a) of the items it wished to negotiate for the 1989-90 contract. The items for negotiation included "EVALUATION - The procedures and forms used for evaluation shall be included in the agreement. The Association proposes modifications to the evaluation to meet the changing needs of the unit members." (Exhibit B, Tr.p. 22, 151).
 23. "Forms" as used in the January 31, 1989 notice was intended to mean both the criteria to be used in evaluations and the physical make-up of the form (Ex.B, Tr.p. 36).
 24. "Procedures" as used in the January 31, 1989 notice was intended to mean the process undertaken to use the form and how the criteria on the form would be measured (Tr.p. 54).
 25. Evaluation procedures and forms were noticed for the 1989-90 contract because of the formation of the Evaluation Committee to deal with evaluation procedure. The NEA was concerned that items the committee intended to discuss were negotiable items more appropriate for professional negotiations. Additionally, the teachers feared their ideas would not be heard or considered, and they were concerned about some of the ideas being discussed. The inclusion of a community member on the committee was a matter of further concern (Tr.p. 52-53).
Included among the proposed changes discussed by the evaluation committee was the use of video taping and script taping of classroom activities to be used in the evaluation process. Script taping is a procedure whereby the evaluator sits in the classroom and writes down everything that is said and done in the classroom. This is then used as a reference when completing the valuation form (Tr.p. 14-15).
 26. At the February 9, 1989 meeting of the Evaluation Committee Lynn Zimmerman, then Brewster NEA President, asked the committee to cease work on professional employee evaluation so that it could be negotiated. At subsequent meetings the

committee discussion was directed toward evaluation of non-certified personnel (Ex. 8; Tr.p. 44-45, 148, 198).

27. The issues of evaluation procedure and form were brought up by the NEA negotiating team during the 1989-90 negotiations. The teachers proposed a form to be used as a checklist in evaluating teachers. NEA also presented a proposal for the process to be employed in conducting the evaluation. Dr. Knox, a member of the Board's negotiating team stated the Board intended to follow the state law on evaluations (Tr.p. 9,17-18, 30, 54, 56).
28. After submitting their proposals on evaluation form and procedure, NEA's negotiating team requested the items be set aside and nothing be done with evaluation until the court had the opportunity to render a decision in the Goodland case. According to the tape of the negotiating session at which this was discussed, The Board's negotiating team took the position that if the NEA desired to negotiate the issues of form and procedure then they should be negotiated at that time. The Board would not agree to take no action on evaluations until the court's decision was entered. As one member of the Board's negotiating team stated: "We agree to nothing." It was the Board's position that the school district would use some evaluation tool pending the court's decision, and that the Board had the right to change the evaluation instrument and would exercise the right until the court ruled otherwise. The NEA negotiating team felt they had reached a stalemate on the issues and requested return of their proposal documents on evaluation form and procedure. It decided not proceed to negotiate the items. While no definitive agreement was reached, from the statements of the negotiators for both sides and the actions taken, it appears if and when NEA wished to discuss these issues again during negotiations, NEA would have to bring the items back to the negotiation table (Tr.p. 16, 57-59, 63, 66, 93, 200-201).
29. No agreement was reached on evaluation form or procedure during the 1989-90 negotiations, and the items were not included in the negotiated agreement for 1989-90 signed May 23, 1989 (Tr.p. 66, 203). Also, the negotiated agreement contained no provision concerning reopening negotiations upon issuance of the Goodland decision (Tr.p. 203).
30. On April 18, 1989 the Board received a letter from the NEA requesting the Evaluation Committee cease work pending the Goodland decision. The committee ceased to meet in response

to the NEA request (Ex. 10; Tr.p. 33-34, 38-40, 43, 47, 246). The request was directed at the work of the Evaluation Committee, and not intended to end discussions by the negotiating teams (Tr.p. 41).

31. The Goodland decision was announced by the Kansas Supreme Court on January 19, 1990. Board of Education U.S.D. No. 352, Goodland, Kansas v. NEA-Goodland, 246 Kan. 137 (1990).
32. NEA was aware of the Goodland decision prior to the February 1, 1990 deadline for noticing items for negotiation for the 1990-91 agreement (Tr.p. 20-21).
33. On January 31, 1990 the Board and NEA submitted letters noticing the items each desired to negotiate for inclusion in the 1990-91 agreement. Neither of the notices included the items of evaluation form or procedure (Ex. C, D; Tr.p. 10, 12, 25, 151).
34. The items of evaluation form and procedure were not brought up by either party during the 1990-91 negotiations (Tr.p. 12, 19, 54).
35. Sometime in February, 1990 Patrick Lehman contacted Regina Johnson to discuss the possibility of reactivating the Evaluation Committee. Lehman was of the belief the NEA should take the initiative to restart the Evaluation Committee since its letters of February, 1989 and April, 1989 were the reasons the committee originally ceased its work. As he testified:

"I think its pretty well understood we [the Board] were not going to start it up unless they [the NEA] requested we would by letter again."

Johnson did not believe the teachers would be interested (Tr.p. 73, 146, 152, 204, 218).

36. The NEA did not participate in the 1990 reactivation of the Evaluation Committee was because it felt the committee was again being used to circumvent the negotiations process on the issue of evaluation procedure (Tr. p. 150).
37. When Superintendent Lavid assumed her position in 1988 she discovered the district had been using the same evaluation instrument for at least 18 years (Tr. p. 261-62).

38. There were no formal written procedures for evaluating a teacher at the time Superintendent Lavid assumed her position in 1988, and there remains no written procedures as of the date this prohibited practice complaint was filed (Tr.p. 48, 211, 255, 289).
39. When Superintendent Lavid assumed her position in 1988 and found there were no formally adopted written procedures for evaluation, she established procedures based on what she believed to be the Board's philosophy on evaluation. These procedures she then used for the first time on October 12, 1988 (Tr.p. 289-90).
40. Superintendent Lavid was uncertain whether the procedures she adopted in 1988 were different from the procedures used by her predecessor, except for the use of script taping (Tr.p. 290). She was aware that evaluation procedures were mandatory items for negotiation, but did not notice the NEA of the intent to adopt new procedures nor request to negotiate the adoption of new procedures prior to their establishment and use (Tr.p. 290-91).
41. Procedures for evaluations had never been negotiated prior to the 1989-90 negotiations (Tr.p. 44).
42. Professional employees in U.S.D. 413 have not been evaluated by means of video tape, peer coaching, administrative observation, student evaluation, community evaluations or parental input (Tr.p. 55). Only with the arrival of Superintendent Lavid had script taping been used in the evaluation process (Tr.p. 48, 182, 257, 271).
43. At its April 24, 1990 meeting, the Board instructed Superintendent Lavid and Mr. Francis to revise the current evaluation instrument (Tr.p. 72, 207).
44. After the April 24, 1990 Board meeting no announcements were made requesting teacher input on the evaluation instrument, nor were copies of the proposed form circulated for comment prior to the May Board meeting. On May 1, 1990 Superintendent Lavid did address the faculty meeting to request teacher input, and advise the faculty that any suggestions must be received that week. No input was received from the teachers (Ex. 6; Tr.p. 99).

45. The first reading of the proposed evaluation instrument took place at the May 21, 1990 Board meeting (Ex. 13; Tr.p. 75, 146, 208).
46. The Board adopted the new evaluation instrument which included criteria to be used at the June 11, 1990 Board meeting. The teachers did not raise an objection to the adoption of the evaluation instrument during the Board meeting (Ex. 14; Tr.p. 69-70, 76-77, 210).
47. The new evaluation instrument was placed in the teacher's handbook distributed in August, 1990 (Ex. 1; Tr.p. 70).
48. Although the teachers were aware of the adoption of the new evaluation instrument, and there was concern and discussion among the teachers about the instrument and the course of action the NEA should take, no objection was received by the Superintendent or the Board between June 11, 1990 and the August start of school (Tr.p. 77).
49. On August 31, 1990 by letter to the Board the NEA requested the new evaluation instrument not be used and use of the previous form be continued until a "successor form can be developed through the negotiations process." It was NEA's belief that before the new criteria set forth in the new evaluation instrument can be implemented, the procedures for evaluating those criteria had to be negotiated (Ex. 16; Tr.p. 83, 86, 147, 153).
50. No response to the August 31, 1990 request was received from the Superintendent. The NEA assumed the Board did not intend to negotiate the evaluation procedures prior to implementing the new evaluation instrument, so it filed this prohibited practice complaint.
51. The new evaluation instrument requires each lesson plan to include a daily objective, a purpose and a closure statement. According to Gilley, the new criteria requires approximately two additional hours of preparation each week because of the added detail required to be in the lesson plan. He did state that spending more time on the lesson plan makes for better lesson plans and better teachers (Ex. 5; Tr.p. 107-09, 112, 137).
52. The use of the computer in preparing lesson plans was cited by the teachers testifying as a reason why preparation time had increase. While Superintendent Lavid urged the teachers to

use the computers to prepare their lesson plans, they were not required to do so. "If it is easier for you to do it handwritten, you may continue that way." (Tr.p. 117, 126, 130, 137, 139, 162, 172, 191, 284).)

53. The negotiated agreement includes a paragraph entitled "Technological competency" which states: "These technologies may include computers and distance (sic) learning." According to Depe by the agreement the Board and the NEA recognized the need for increased and improved technology in the teacher's skills (Tr. p. 187-88).
54. By a letter dated January 22, 1991 from Superintendent Lavid to the teachers of the district, the teachers were informed they would be required to complete a self-evaluation. The self-evaluation would not be turned in to the principal or become a part of the teacher's file, but "is to serve as a portion of the basis for the formal evaluation conference." (Ex. 3; Tr.p. 166-67). In 1990 the self-evaluation was optional rather than being required (Tr.p. 183).
55. Lesson plans are part of the negotiated agreement, Article 2, sec. 2. The agreement provided that lesson plans will be submitted a week in advance. Superintendent Lavid based on her interpretation of the phrase "one week in advance" instructed the teachers to turn in their lesson plans in a manner that resulted in the plans being required two weeks in advance. The matter was grieved by the NEA, and upon being instructed by legal counsel of the error in her interpretation, the matter was corrected (Tr.p. 186, 293-94).
56. As of February 1, 1990 the same evaluation procedures were in effect that were used as of February 1, 1989. While new criteria were adopted by the Board on June 11, 1990, the procedures used under the new criteria were the same procedures employed under the old criteria. There were no changes, either through new procedures or amendments to old procedures (Tr.p. 292-93).

CONCLUSIONS OF LAW AND OPINION

DID THE UNIFIED SCHOOL DISTRICT 314, BREWSTER, KANSAS BOARD OF EDUCATION REFUSE TO NEGOTIATE IN GOOD FAITH WITH REPRESENTATIVES OF THE BREWSTER-NEA, THE RECOGNIZED PROFESSIONAL EMPLOYEE ORGANIZATION, IN VIOLATION OF K.S.A. 72-5430(B)(5) WHEN IT FAILED TO RESPOND TO THE AUGUST 31, 1990 REQUEST TO NEGOTIATE EVALUATION PROCEDURES.

Background on Public Sector Negotiations

The definition of scope in the Kansas Professional Negotiations Act, as in most state public sector statutes, is general. K.S.A. 72-5421(a) provides that:

"A board of education and an exclusive representative selected or designated under the provisions of this act . . . may enter into an agreement covering terms and conditions of professional service." (Emphasis added.)

K.S.A. 72-5413(1) defines "terms and conditions of professional service" 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; re-employment of professional employees; terms and form of the individual professional employee contract; probationary period; professional employee appraisal procedures; each of the foregoing is 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; reasonably leaves or 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 through the professional negotiation process shall not be granted to any other professional employees' organization; and (3) such other matters as the parties mutually agree upon as properly related to professional service. Nothing in this act, or acts amendatory thereof or supplemental thereto, shall authorize the diminution of any right, duty or obligation of either the professional employee or the board of education which have been fixed by statute or by the constitution of this state. Except as otherwise expressly provided in this subsection, the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiated proposal would not prevent the fulfillment of the statutory or constitutional objective. Matters which relate to the duration of the school term, and specifically to consideration and determination by a board of education of the questions of the development and adoption of a policy to provide for a school term

consisting of school hours, are not included within the meaning of terms and conditions of professional service and are not subject to professional negotiations."

Scope of negotiations is the area of labor relations in which the most vital interests of the parties and their constituencies are continually engaged. The subjects of collective bargaining have received considerable attention by the Kansas appellate courts but the scope in many areas remains vague and ambiguous, due at least in part to the unique nature of public sector collective bargaining. It is in these areas the conflict between the public employer and employee is greatest as public employees drive for "real" (i.e. effective) collective bargaining, meaning an equality in decision making by public employees, and the resistance of governing bodies as they strive to protect their decision making power.

The history of employer-employee relations in the public sector reveals an overriding concern that collective bargaining as it exists in the private sector is irreconcilable with the nature of government. The right to associate and bargain collectively about wages and working conditions did not exist at common law or in equity. Public Employee Labor Law, Section 11.2 at p. 58. Early thought on the subject concluded the transplantation of traditional collective bargaining into the governmental process would impair the decision-making power of the elected officials as

they seek to represent the public interest. This position is exemplified in the language of the New York court in Railway Mail Association v. Murphy, 44 N.Y.Supp.2d at 607 (1943):

"To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen."

It is clear the state court shared the prevailing federal attitude that labor organizations were an anathema to the sound functioning of the governmental process. In 1937 President Roosevelt said:

"A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable." Vogel, What About the Rights of the Public Employee?, 1 Lab.L.J. 604, 612 (1950).

The Kansas Supreme Court shared this view as late as 1964. In Wichita Public Schools Employees Union v. Smith, 194 Kan. 2 (1964) the court stated:

"The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or

through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining or contract.

"The objects of a political subdivision are governmental - not commercial. It is created for public purposes and has none of the peculiar characteristics of enterprises maintained for private gain. It has no authority to enter into negotiations with labor unions concerning wages and make such negotiations the basis for final appropriations. Strikes against a political subdivision to enforce collective bargaining would in effect amount to strikes against the government.

"The statutes pertaining to employer and employee relations must be construed to apply only to private industry, at least until such time as the legislature shows a definite intent to include political subdivisions. . ."

"It appears to be a uniform rule that wages, hours and working conditions of governmental employees are to be fixed by statutes, ordinances or regulations and that state laws which in general terms secure the rights to employees to enter into collective bargaining agreements with respect to such matters are not intended to apply to public employees." Id. at 5.

Public employees have the constitutional right to promote, associate with and be represented by a union. The First Amendment to the U.S. Constitution has been held to protect these rights. However, it does not afford public employees the right to bargain or impose an obligation on the public employer to recognize or bargain with their organizations. Smith v. Arkansas State Highway Comm'n Employees Local 1315, 441 U.S. 461 (1979). The right of

public employees to associate may be constitutionally protected, but such right could not supersede the public interest.

In the absence of laws specific to the subject, governments were successful in claiming in the courts that collective bargaining would amount to an abrogation of governmental discretion, that organization of personnel and determination of pay conditions were governmental functions, and that governmental functions might not be delegated. Bargaining, agreements, and/or strikes would be intolerable invasions on the sovereign's absolute authority to act in the public interest.

While a few individual states began to grant public employees the right to organize and negotiate by statute, general acceptance of the concept of a legal duty on the part of the employer to bargain in good faith was facilitated by two events in 1962 - President Kennedy's Executive Order 10988 covering federal service and a new law in Wisconsin. By 1987 thirty-four states had enacted collective bargaining statutes covering all or some occupational groups. Public Sector Bargaining, Public Sector Labor Legislation - An Evolutionary Analysis, p. 189.

This shift has transformed the earlier concept of the government solely as sovereign into government as a dual entity; employer and sovereign. In the first, government as employer is delegating authority to bargain and reach agreement. In the second, as sovereign, the government retains ultimate right to act

and therefore the responsibility to resolve conflicts over issues which may be seen to fall within the scope of bargaining, yet which also concern wider political/public interest. It is with this understanding of public sector labor relations that interpretations of the Kansas Professional Negotiations Act must be drawn.

The Balancing of Interests

[1] The phrase "terms and conditions of professional service" has caused the most difficulty in resolving negotiability disputes. This difficulty is further complicated by the statutorily specified management prerogatives found in K.S.A. 72-5423(a):

"Nothing in this act, . . . shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education . . ."

This reservation creates, in some instances, an overlap problem. By this is meant a given subject is arguably both a term and condition of employment and a prerogative which should be reserved to management. As the Illinois court noted in Decatur Bd. of Ed. v. Ed. Labor Bd., 536 N.E.2d 743 (Ill.App. 4 Dist. 1989):

"Too many factors in school operations overlap, requiring a method for deciding between managerial exclusivity and employee participation through bargaining."

The difficulty of making bright-line distinctions between mandatory and nonmandatory subjects of negotiation was acknowledged

by the Florida Public Employee Relations Commission in Duval Teachers United v. Duval County School Board, (quoted in 19 Stetson L.Rev., The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, p. 511 (1990)):

"Conceptually, the scope of bargaining can be viewed as a continuum. The management rights of a public employer . . . are at one pole; the bargaining rights of the employees . . . are at the other. Each proposed provision for the collective bargaining agreement falls somewhere along that continuum. At some point in the negotiating process it will be determined that the employer has an absolute obligation to negotiate regarding certain proposals. By the same standard, at some point in the negotiating process it will be determined that the employer's discretion in respect to certain proposals is beyond question."

Two standards have been developed to resolve this conflict. The overlap problem has been attacked by classifying a subject as mandatory if it is significantly related to wages, hours, and other terms and conditions of employment. Fibreboard Paper Prods. Corp v. NLRB, 379 U.S. 223 (1964). As stated by the Florida court in City of Orlando v. Florida PERC, 435 So.2d 275 (5th DCA Fla. 1983):

"[I]n determining whether a matter should be deemed a mandatory bargaining subject, the courts . . . have recognized a legal distinction between those subjects which have a material or significant impact upon wages, hours, or other conditions of employment, and those which are only indirectly, incidentally, or remotely related to those subjects. . . . [S]ince practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of

which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment." Id. at 278-79.

Under the "significantly related" test the focus of the inquiry is upon the conditions of employment and the extent to which changes to a disputed subject affect a mandatory term and condition of employment. This standard has been criticized because it does not properly recognize the competing interests of the public employer and employee, while giving undue weight to conditions of employment. As the court observed in Decatur Bd. of Ed. v. Ed. Labor Bd., 536 N.E.2d 743 (Ill.App. 4th Dist. 1989):

"Almost every policy decision made by a school district could be said to have a direct effect or, at a minimum, an 'impact' on conditions of employment." Id. at 745.

The second test to emerge that addresses the overlap problem is the balancing test which measures the interests of the public employer and employees. This is the approach favored by most courts and labor boards. See e.g. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); see generally Annot. Bargainable or Negotiable Issues in State Public Employment Labor Relations, 84 A.L.R.3d 242 (1978). On the one side of the balance is the relationship the subject bears to wages, hours and working conditions (employee interest). On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or

is a management prerogative. Spokan Educ. Ass'n v. Barnes, 517 P.2d 1362 (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222-23 (1964)). Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. Local 1052 v. Public Emp. Rel. Com'n, 778 P.2d 32, 35 (Wash. 1989).

The Pennsylvania court in Dept. of Transp. v. Labor Relations Bd., 543 A.2d 1255 (Pa. 1988) explained the balancing test in this manner:

"[W]here an item of dispute is a matter of fundamental concern to employees' interest in wages, hours and other items and conditions of employment, it is not removed as a matter subject to good faith bargaining . . . simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole." Id. at 1256-57.

The court concluded:

"In striking this balance the paramount concern must be the public interest in providing for effective and efficient performance of the public service in question." Id. at 1256.

This approach was specifically adopted by the U.S. Court of Appeals for the District of Columbia in Newspaper Build of Greater Philadelphia, Local 10 v. NLRB, 636 F.2d 550 (D.C. Cir. 1980), and appears to be the appropriate test to give proper interpretation to

the statutory provisions of the Kansas Professional Negotiations Act. Such determination is consistent with the philosophy adopted by the Kansas appellate courts. In determining what areas are proper subjects for negotiation and agreement under the Professional Negotiations Act, the Kansas Supreme Court in National Education Association v. Board of Education, 212 Kan. 741 (1973) 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." Id. at 753.

The court similarly adopted a balancing test to determine the negotiability of subjects under the Kansas Public Employer-Employee Relations Act. Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, Syl. #7 (1983).

[2] The three-step balancing test adopted by the court in San Mateo City School Dist. v. PERB, 663 P.2d 523 (Cal. 1983) appears to be the reasonable test for application under the Kansas Professional Negotiations Act:

"[A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to

exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission." Id. at 528.

[3] The balancing test must be applied on a case-by case and item-by-item basis. Dept. of Transpor. v. Labor Relations Bd., 543 A.2d 1255, 1257 (Pa. 1988).

Unilateral Changes

The Professional Negotiations Act places an obligation upon boards of education to meet and negotiate in good faith with their professional employees' exclusive representative regarding the terms and conditions of their employment, K.S.A. 72-5423(a). Under K.S.A. 72-5430(b)(1) and (5) it is a prohibited practice for a board of education to interfere with or restrain its employees in the exercise of their rights set forth in K.S.A. 72-5414, or to refuse to negotiate in good faith with its professional employees' chosen bargaining representative.

[4] 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."

The underlying rationale for this position appears to be two-fold. 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. & Akali Workers v. Pittsburg Plate Glass Co., 404 U.S. 159 (1971). Secondly, 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, Kinsley-Offerle-NEA v. U.S.D. #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).

Whether the unilateral change is viewed as beneficial or detrimental is irrelevant to the determination of whether there was a unilateral change in terms and conditions of employment. In School Bd. of Indian River County v. Indian River County Education Ass'n, Local 3617, 373 So.2d 412, 414 (Fla. App. 1979) the court reasoned:

"A unilateral increase in benefits could foreseeable do more to undermine the bargaining representative's status than would a decrease. As to this last sentence it is quite important that the bargaining representative maintain the confidence and respect of its members in order to adequately represent them. If it is best to have bargaining representatives then they should be as effective as possible to promote the good of the membership."

Additionally, the United States Supreme Court explained in Katz, supra, 369 U.S. at 743, even in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively with the chosen representatives of his employees in much the same manner as a flat refusal to bargain.

The reason that unilateral action is prima facie unlawful is in the high degree of probability that it may frustrate a bargaining opportunity. Even if there has actually been a

unilateral change in a term and condition of employment, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain. As the court noted in Foley Educ. Ass'n v. Ind. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984):

"The crucial inquiry in such event is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining. Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith."

[5] An employer may not be charged with an unfair labor practice in absence of a demand for negotiation following the certified employees' organization's receipt of information of a planned change in a term or condition of employment. See Ogilvie v. Ind. Sch. Dist. No. 341, 329 N.W.2d 555 (Minn. 1983); NLRB v. Alva Allen Industries, Inc., 369 F.2d 310, 321 (8th Cir. 1966) The presumption that an employer's unilateral change in a term and condition of employment deprived the union of its right to bargain is rebutted when the union fails to request negotiation on the proposed change. Cone Mills, supra.

[6] A corollary to this rule is that a certified employees' organization's failure to demand negotiations regarding a change in a term or condition of employment will not constitute waiver of the

right to negotiate unless the record shows that the employer gave both adequate and timely notice of its intended action. See Cone Mills, supra. (One month is a sufficient amount of time for the union to have an opportunity to request bargaining on a proposed unilateral change). And, while the notice given need not be formal, it must be sufficient under the circumstances to inform the union a decision has been made, or that one is imminent, and the specifics of the change, before that decision is implemented.

In summary, where a board of education seeks to unilaterally change the terms and conditions of employment, either those included within a memorandum of agreement or new items not noticed or discussed during negotiations or included in the memorandum of agreement, the board must alternatively notice the changes and seek negotiation with the employees' exclusive representative, or provide such adequate and timely notice of the intended change as to provide the exclusive representative an opportunity to request negotiations prior to implementation. A failure to do either constitutes a refusal to bargain in good faith and a violation of K.S.A. 72-5430(b)(5).

DISCUSSION

[7] Actions by the legislature and the Kansas Supreme Court have narrowed the factors to be considered in the instant case.

The Kansas Supreme Court in U.S.D. No. 352 v. NEA-Goodland, 246 Kan. 142 (1990) unquestionably found evaluation criteria not mandatorily negotiable. The legislature included in the K.S.A. 72-5413(1) definition of "terms and conditions of professional service" "disciplinary procedure; resignation; termination and nonrenewal of contracts; reemployment of professional employees, terms and form of individual professional employee contract; probationary period; [and] professional employee appraisal procedures." If a topic is by statute made a part of the terms and conditions of professional service, then a topic is by statute made mandatorily negotiable. NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, Syl. #5 (1983). Under K.S.A. 72-5413(1) evaluation procedures are mandatorily negotiable.

Here, the Board was free to develop and adopt the evaluation criteria to be used to evaluate U.S.D. 314 professional employees without the necessity of noticing the subject and negotiating with the NEA. This it did at the June 11, 1990 Board meeting, and no prohibited practice was thereby committed.

The difficulty arises when the Board, by including the criteria in the August teacher's handbook, seeks to implement the criteria. As Board President Lehman testified criteria by itself is only one of the elements required to develop a meaningful evaluation program for professional employees. The other essential element is the procedures to be followed in applying and assessing

those criteria. Evaluation procedures are mandatorily negotiable. Can a board of education then implement its criteria without first submitting the procedures to negotiation?

In addressing this issue the Florida Public Employee Relations Commission in Duval Teachers United v. School Board, (quoted in 19 Stetson L.Rev., The Good Faith Obligation in Public Sector Bargaining - Uses and Limits of the Private Sector Model, p. 511 (1990)) correctly concluded:

"In order to determine an employer's duty to bargain regarding a particular policy decision it desires to make, the subject matter of the decision must be categorized in one of two ways. The subject matter may itself be a wage, hour, term or condition of employment; alternatively, the subject matter may be a matter within the managerial prerogative to set standards of service, although its implementation will cause a change in wages, hours, terms or conditions of employment. If the subject matter of the decision is a term or condition of employment, it is a required subject of bargaining and the public employer must notify the certified bargaining representative of its proposed decision and afford the certified representative an opportunity to negotiate before the employer takes any action to adopt or implement the change. If the subject matter is within the managerial prerogative to set standards of service, the employer may adopt the change in policy but may not implement its decision until it has afforded the certified representative notice and an opportunity to bargain . . ."

[8] As applied to the Kansas Professional Negotiations Act, the Board in this case could unilaterally adopt the new evaluation

criteria [management prerogative] but if the criteria required procedures [fundamental interest to employees] to implement, the evaluation criteria could not be implemented until the procedures have been noticed to the exclusive professional employee representative for negotiation.

The Board argues that no new evaluation procedures were required to implement the new evaluation criteria. The same evaluation procedures were in effect February 1, 1990 that were used as of February 1, 1989, and in fact were the same procedures used under the old criteria. Accordingly, no duty to negotiate evaluation procedures existed before implementation.

The Board's reliance upon differentiating between new and old procedures is misplaced. The inquiry must be whether procedures are required to implement the new criteria, not whether existing procedures exist which can be used to implement the new criteria. While in some cases existing procedures may be used to implement new criteria, the question is whether such procedures result in the most accurate evaluation of the criteria. It is that question which significantly impacts upon the interest of the professional employee and outweighs the Board's managerial prerogatives, and it is that question which the professional employees' exclusive representative must have the opportunity to address in professional negotiations.

With the adoption of the new criteria the Board, as discussed above, had two alternatives available to satisfy its duty to negotiate in good faith; to notice the procedures and request negotiations, or to provide the exclusive employee representative timely and adequate notice of the intended procedures to allow it to determine if negotiation is required. Clearly the Board did not seek to negotiate procedures and intended to implement the new criteria using the existing procedures. The Board did, through the teacher's handbook distributed in August, provide notice to the professional employees and their exclusive representative of the criteria to be used. No notice of the procedures to be employed to implement the criteria were disclosed at that time. This takes on added importance since no written evaluation procedures existed, and even Superintendent Lavid was uncertain whether the procedures she instituted after assuming her position were the same as used by her predecessor.

With this background it is not unreasonable for the professional employees of the district to be concerned about future evaluations. Despite the lack to adequate notice on procedures to be used to implement the evaluation criteria, the NEA on August 31, 1990 wrote to Superintendent Lavid indicating "[t]he procedures for evaluation are subject to the negotiation process" and requesting she "continue the form used last year, until a successor document can be developed through the negotiations process." While

admittedly the request to negotiate procedures to implement the evaluation criteria could have been more artfully drafted, the letter taken as a whole sufficiently provides information sufficient for a person to reasonably understand the intent of the letter and the desires of the NEA. The Board did not respond to the letter or indicate in any manner a willingness to proceed to negotiations. The fact that the Board had a good-faith belief that it did not have to negotiate procedures where no new procedures were adopted does not serve as a defense to a charge of failing to bargain in good faith. Accordingly, the Board's failure to enter into professional negotiations concerning the procedures employed to implement the new evaluation criteria when requested by the NEA constitutes a failure to negotiate in good faith and a prohibited practice as set forth in K.S.A. 72-5430(b)(5).

Failure To Notice Procedures As Part Of 1990 Negotiations

[9] The Board asserts that since neither party noticed the issue of evaluation procedure for professional negotiations in their 1990 notices, it is not required later to negotiate procedures when the new criteria were adopted. Such argument is without merit. As stated in Kinsley-Offerle-NEA, 72-CAE-5-1990:

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

'Collective bargaining is a continuing process involving among other things day to day adjustment in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract.' Conley v. Gibson, 355 U.S. 41, 46 (1957). See also City of Livingston v. Mont. Council No. 9, 571 P.2d 374 (1977)." Id. at 17.

As noted above, the evaluation procedures, like the evaluation criteria, are an integral part of the evaluation process, and a mandatorily negotiable subject. The mid-contract adoption of new criteria places a duty on the part of the Board to negotiate procedures prior to implementation if it seeks to implement the new criteria during the current contract period. That negotiation may proceed at anytime.

The Evaluation Committee

Finally, the Board appears to argue that the NEA had the opportunity to have input to the evaluation process through the Evaluation Committee but by its actions caused the work of the committee to cease and further refused an attempt to reinstate it. The Board confuses the nature of work performed by a committee and that performed by negotiating teams during professional negotiations. A thorough discussion of the difference was set forth in Butler County Community College Education Association v. Butler County Community College, 72-CAE-13-1989. In concluding

that committee study and professional negotiations are independent activities, even though both are addressing the same issue and the same parties are represented, the presiding officer stated:

"In summary, professional negotiation is premised on the existence of two parties which are essentially in adversarial roles with each representing and looking out for its own interests. As the U.S. Supreme Court has observed, 'The parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.' NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1968). Here the Committee worked in a collegial fashion where members engaged in open, honest, and free flowing communication in an attempt to develop potential solutions to the inequities issue. However, as the Supreme Court has noted collective bargaining 'cannot be equated with an academic collective search for truth.' Id. at 488"

It is possible for a committee to be studying, and professional negotiations to be considering, the same mandatorily negotiable subject simultaneously without any violation of the Professional Negotiations Act. It is to be understood, however, that before any recommendation from the committee can be implemented, the opportunity for professional negotiations on the subject must occur.

Here, there was no need for the Evaluation Committee to cease its discussions simply because it was studying subjects that were, or may be, mandatorily negotiable. As stated above, since the committee consideration did not constitute "professional

negotiations," the duty to negotiate in good faith terms and conditions of professional employment placed upon the Board by K.S.A. 72-5423 is not satisfied by committee action. Likewise, the Board cannot satisfy its duty by pointing to the NEA's failure to participate in discussions on the new criteria during their formulation by Superintendent Lavid or adoption by the Board.

ORDER

IT IS HEREBY DETERMINED that Respondent, Unified School District 314, Brewster, has refused to negotiate in good faith with representatives of the Brewster-NEA, the recognized employee organization for the professional employees of the district, in violation of K.S.A. 72-5430(b)(5).

IT IS THEREFORE ORDERED that Unified School District 314 shall cease and desist from the use of the new evaluation criteria as set forth in the August 1990 teacher's handbook until such time as the procedures required to implement the evaluation criteria have been submitted to professional negotiations as requested by the Brewster-NEA.

IT IS FURTHER ORDERED that Unified School District 314 shall cease and desist from refusing to negotiate in good faith with Brewster NEA over the procedures accompanying the implementation of the evaluation criteria.

IT IS FURTHER ORDERED that any professional employee of Unified School District 314 who was evaluated using the new evaluation criteria implemented without submitting the procedures to professional negotiations shall have the option of having the evaluation expunged from their personal record and a new evaluation conducted using the old evaluation criteria.

IT IS FURTHER ORDERED that a copy of this order shall be posted in a conspicuous location in all facilities where members of the professional employee unit are employed for a period of 30 days.

DATED this 30th day of September, 1991.



Monty R. bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Secretary, Department of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Supervisor for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 30th day of September, 1991, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

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