

2. The Board of Education of Unified School District No. 278 is a school district duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated. (Pet. post-hearing brief p. 1)

3. On or about January 28, 1995, MAPE presented notice to the Board that it wished to negotiate ten items to be included in the Master Collective Bargaining Agreement for 1995-96. Those ten items consisted of salary schedule, billable hours, supplemental salary schedule, substitute pay for teachers who cover other teachers' classes, payroll dates, incentive plan for leave conservation, contract duty year, obligatory meetings, teacher evaluation procedures, and association leave. (Resp. Ex. 2)

4. On or about February 1, 1995, the Board presented notice to MAPE that it wished to negotiate Article Three, Holidays and Vacations, of the Master Collective Bargaining Agreement for Teachers to be included in the agreement for 1995-96. (Resp. Ex. 1)

5. On March 30, 1995, the first meeting for the 1995-1996 school year negotiations was held between the Board and MAPE. The parties discussed, for approximately two and a half hours, the scheduling of contract days. Neither party made a formal, written proposal, although MAPE made a verbal proposal regarding contract days. (Trans. 27-29)

6. The parties met again on May 18, 1995, for negotiations. The parties discussed, for approximately three hours, several items which included contract days, pay for unused sick leave, substitute pay, and an incentive leave plan. Neither party made a formal, written proposal, although MAPE made some verbal proposals. (Trans. 31-33)

7. The parties met again on June 8, 1995, for negotiations. The parties discussed, for

approximately two and a half hours, several items which included billable hours, payroll date, and association leave. Neither party made a formal, written proposal, although MAPE made some verbal proposals. (Trans. 34-35)

8. On July 18, 1995, the parties met for negotiations for approximately two and a half hours. (Trans. 35) At this time, the Board presented a formal, written proposal which included the following:

- increases in the supplemental salary contract schedule at a cost of \$5,330;
- \$9,430 in pay for five positions for obligatory meetings -- this was a counter proposal to MAPE's proposal of pay for obligatory meetings at \$11 per hour;
- decrease in the number of teacher/student contact days to 183 -- this was a counter proposal to MAPE's proposal of 180 days;
- a decrease in number of non-teaching contract vacation days from "not more than eleven" to "a minimum of eight to ten" with winter break to be 4 to 6 week days;
- agreed to include evaluation procedures -- this was a counter proposal to MAPE's proposal to include evaluation procedures and the evaluation form;
- \$300 increase in base salary to \$20,800 for a total cost to the school district of \$16,747;
- make-up days would be scheduled by the Board. (Trans. 36; Resp. Ex. 3; Pet. Ex. A-89)

The Board's package proposal did not include the following: a counter proposal to MAPE's proposal that billable hours should be compensated at the rate of \$11 per hour; a counter proposal to MAPE's proposal for substitute pay for teachers at the rate of \$12 per period; a counter proposal to MAPE's proposal that the payroll date be changed to the 8th of the month; a counter proposal to MAPE's proposal of an incentive leave plan, or buy-back of unused sick leave; a counter proposal to MAPE's proposal of two days of association leave; and a counter proposal to MAPE's proposal for compensation for planning period, stating that since MAPE did not notice this item they would discuss it, but it should not be part of the negotiations. The Board's package

proposal would increase the total cost to the school district to \$31,507, or 3.7%. (Pet. Ex. A-89)

9. On July 26, 1995, the parties met for negotiations for approximately six hours. (Trans. 88) At this time, MAPE presented a formal, written counter proposal to the Board's package proposal of July 18, which included the following: a reference to the "proposal under 'Contract Duty Year' for preparation period;" tentative agreement on supplemental salary schedule and appraisal procedure; the salary schedule base would either (a) increase to \$21,800 with no increment increases, or (b) increase to \$21,400 with \$50 increment increases, or (c) increase to \$21,400 with percentage increment increases; instead of buy-back of unused sick leave, increase accumulative leave to 100 days; require 6 vacation days at Christmas; the school year would start on August 21 and end on May 24 with May 24 as a teacher work day; make-up days would be scheduled by agreement between the Board and MAPE; two positions for obligatory meetings for a cost of \$1,640; inclusion of evaluation instrument in the contract; and add association leave as professional leave. (Resp. Ex. 4)

11. On July 26, 1995, the Board presented a second formal, written package proposal which included the following:

- increasing the salary schedule base to \$21,050 for a total cost of \$24,216 -- this was a counter proposal to MAPE's proposal of three options;
- increasing accumulative sick leave from 45 to 60 days -- this was a counter proposal to MAPE's proposal of 100 days, and their original proposal of an incentive leave plan, or buy-back of unused sick leave;
- a minimum of 10 holidays including 6 vacation days at Christmas -- this was a tentative agreement to MAPE's proposal;
- make-up days would be rescheduled by the Board -- no change in Board's position;
- three positions for obligatory meetings for a cost of \$2,050 -- this was a counter proposal to MAPE's proposal of two positions; and

- exclusion of the evaluation form in the contract -- no change in Board's position.

The Board's package proposal would increase the total cost to the school district to \$31,586, or 3.7%. (Resp. Ex. 5; Pet. Ex. A-89)

12. On July 26, 1995, MAPE presented a formal, written counter proposal to the Board's second package proposal, which included the following: a reference to the "proposal under 'Contract Duty Year' for preparation period;" tentative agreement on supplemental salary schedule and obligatory meetings; inclusion of the evaluation form in the contract; the salary schedule base would either (a) increase to \$21,350 with \$50 increment increases, or (b) increase to \$21,350 with percentage increment increases; increase amount of accumulative leave to 75 days; add association leave as professional leave; make-up days would be rescheduled by agreement between MAPE and the Board; and keep compensation proposal for planning period. (Resp. Ex. 6)

13. After the July 26, 1995 meeting, the parties were in tentative agreement in regard to contract days, vacation days, supplemental contract salary schedule, and obligatory meetings. (Pet. Ex. A-89)

14. The parties agree that all items raised by the parties were discussed during negotiations and that the Board provided reasons for its positions on those items. (Trans. 168, 170)

15. On September 6, 1995, the parties met for negotiations, for approximately two hours. No formal written proposals were presented by either party at this time; however, the Board suggested that MAPE join it in declaring impasse. (Trans. 69-70)

16. On or about September 6, 1995, MAPE informed the board it did not wish to participate with the Board in declaring impasse. (Trans. 70)

17. According to the agency file, on September 14, 1995, the Board filed a petition for impasse with the Kansas Department of Human Resources ("Department"), which was received by the Department on September 15, 1995.

18. According to the agency file, in a letter dated September 21, 1995, the UniServ Director of the KNEA Post Rock UniServ District formally opposed the Board's petition for impasse.

19. According to the agency file, in a letter dated October 9, 1995, the Department informed the above-described UniServ Director that MAPE and the Board were at impasse since the June 1 statutory declaration of impasse date had passed.

ISSUES PRESENTED

I. HAS THE RESPONDENT REFUSED TO MAKE ANY COUNTER PROPOSALS OR CONCESSIONS ON THE TOPICS OF PAYROLL DATES, CERTIFIED EMPLOYEE APPRAISAL PROCEDURES, ASSOCIATION LEAVE, OBLIGATORY MEETINGS, AND BILLABLE HOURS AND, IF SO, DOES SUCH REFUSAL CONSTITUTE A PROHIBITED PRACTICE PURSUANT TO K.S.A. 72-5430(b)(5)?

II. HAS THE RESPONDENT COMMITTED A PROHIBITED PRACTICE PURSUANT TO K.S.A. 72-5430(b)(5) BY FAILING TO REACH AN AGREEMENT WITH THE PETITIONER?

CONCLUSIONS OF LAW

The Petitioner, MAPE, contends that the Board has committed a prohibited practice by

refusing to negotiate in good faith. MAPE argues that the Board did not make concessions and counter proposals on several items and, therefore, did not come to the bargaining table with the good faith intent of reaching an agreement. The Board, on the other hand, argues that its negotiating team met with MAPE, discussed all items noticed by both parties for negotiations, discussed all proposals and counter proposals made by MAPE, made two different package proposals to MAPE, and simply could not reach an agreement. The Board filed a petition for impasse declaration with the Kansas Department of Human Resources, which the Secretary is holding in abeyance until the prohibited practice complaint is resolved and dismissed.

MAPE and the Board are obligated to negotiate with each other pursuant to Kansas Statutes Annotated (K.S.A.) 72-5423(a), which provides, in part:

Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education, except that boards of education are required to comply with this act, and the act of which this section is amendatory, in recognizing professional employees' organizations, and when such an organization is recognized, the board of education and the professional employees' organization shall enter into professional negotiations on request of either at any time during the school year prior to issuance or renewal of the annual teachers' contracts. ...

"Professional negotiation" is defined, for the purposes of the Professional Negotiations Act (PNA), in K.S.A. 1995 Supp. 5413(g) as "meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service." Furthermore, K.S.A. 1995 Supp. 72-5430(b)(5) prohibits a board of education or its designated representative willfully to "refuse to negotiate in good faith with the representatives of recognized professional employees' organizations as required by K.S.A. 72-

5423 and amendments thereto."

I. *Failure to make counter proposals and concessions.*

The parties in this matter do not dispute the fact that they met for negotiations and that negotiations did take place. The parties do not, furthermore, dispute that all of the items noticed for negotiations are mandatorily negotiable items. (Resp. prehearing brief, p. 2) Rather, the question in this matter is, essentially, what standard of conduct is applicable to the determination of whether the parties met and conferred, consulted and discussed, in a good faith effort to reach an agreement. As the Kansas Supreme Court has recently cautioned "against the use of federal decisions in public employment labor disputes," Kansas law must first be examined for the applicable standard of conduct in good faith negotiations. See *City of Wichita, Kansas v. Public Employee Relations Board and Teamsters Union Local 795*, ___ Kan. ___ (1996), citing *National Education Association v. Board of Education*, 212 Kan. 741, 512 P.2d 426 (1973).

In one of its earliest PNA cases, the Kansas Supreme Court affirmed the district court's findings and quoted its definition of "good faith effort" as used in K.S.A. 72-5413(g) as "an effort actuated by honest intention. It follows, therefore, that said statute imposes a duty on parties engaged in professional negotiations to confer and discuss the terms and conditions of professional service with an honest intention of reaching agreement." *Seaman Dist. Teachers' Ass'n v. Board of Education*, 217 Kan. 233, 236 (1975). The district court went even further and stated that

A party does not bargain in good faith if it adopts an adamant or unyielding position on an issue which would fall within that category of issues reasonably subject to negotiation under the statute. Any intention on the part of one party to

totally dominate the other party engaged in negotiations or to impose substantially all of its own terms on the other party without a fair consideration of such other party's terms is inconsistent with the good faith requirement. Similarly, a party which refuses to negotiate at all or which engages in conduct calculated to obstruct negotiations, fails to satisfy the statutory duty to engage in professional negotiations prior to the issuance of contracts. Finally, a party which assumes a position characterized by excessive demands, unreasonable proposals or terms clearly beyond the capability of the other negotiating party is also acting in violation of the letter and the spirit of the act. *Id.*

In another early PNA case, the Court examined the new act and stated that

there are a variety of unilateral actions which may conclusively demonstrate an employer's lack of good faith, in the sense that his conduct is utterly inconsistent with a sincere desire to reach an agreement. Where such conduct occurs no amount of protestations of good faith will avail the employer, his actions belie his words. *National Education Association of Shawnee Mission, Inc. v. Board of Education*, 212 Kan. 741, 756 (1973).

The Petitioner's allegations of bad faith bargaining by the Board are based, first, on the association's belief that the Board made no concessions or counter proposals on the items of payroll dates, appraisal procedures, association leave, obligatory meetings and billable hours and, secondly, that they did not enter negotiations with the goal of reaching an agreement. In 1984, the Kansas Supreme Court examined the amended and current Professional Negotiations Act and emphasized that

the fact that a particular proposal is mandatorily negotiable does not *require* a school board to accept the proposal or to reach an agreement thereon. The statute simply requires the school board to discuss the proposal and to attempt to arrive at a fair result which will benefit both the teachers and the school board. Professional negotiation in the field of public education is obviously a difficult area both for a school board and a teachers' professional organization. There is great public interest involved and the parties to the professional negotiations must conduct them with that public interest in mind. *U.S.D. No. 501 v. Secretary of Kansas Department of Human Resources*, 235 Kan. 968, 976 (1984).

It is evident from the facts that MAPE noticed far more items for change and negotiation than did the Board, thus, possibly creating the anticipation of more movement by the Board than by the association. Throughout the negotiation process, the parties met and conferred and discussed all ten of the items noticed by MAPE and the one item noticed by the Board. MAPE made a few concessions, and the Board made several concessions. For example, the Board made proposals, counter proposals, or concessions to six of the ten items MAPE noticed for negotiation, such as, added pay for supplemental duties; new positions for obligatory meetings; decrease in the number of contract days; inclusion of the evaluation procedure in the contract; an increase in salary ; an increase in accumulative sick leave. In addition, the Board ended up conceding to MAPE's proposal to the item noticed for negotiations by the Board, vacation and holiday days. The parties ultimately reached tentative agreements on four of those items, contract days, vacation and holidays, supplemental duty pay, and obligatory meetings. There remained four noticed items on which the Board did not make a written counter proposal, or agree with MAPE -- billable hours, association leave, payroll dates, and substitute pay for teachers who cover other teachers' classes.

MAPE contends that the Board did not make counter proposals or concessions in regard to the topics of payroll dates, certified employee appraisal procedures, association leave, obligatory meetings, and billable hours, and regardless of any other concessions the Board made, failure to do so on these items constitutes a prohibited practice. As discussed above, the facts presented support the Board's contention that they did make counter proposals in regard to obligatory meetings, to which MAPE agreed. (Pet. post-hearing brief p. 5) Even though it is

evident that the Board did not make a written counter proposal on substitute pay for teachers who cover other teachers' classes, the association is apparently satisfied that the parties discussed this issue and has not raised it in its Petition in this matter.

The facts also support the argument that the Board did agree with MAPE to include the changes in the evaluation procedures in the master contract. However, MAPE argues that the Board "refused to memorialize changes in the evaluation tool in the written agreement" and that "the evaluation mechanics, including the form, had been historically included in the agreement." MAPE further argues that the Board did not notice a change in evaluation, but attempted "to carry out a unilateral change in the instrument, removing it from the contract and changing the procedure." (Pet. post-hearing brief, p. 6)

The 1994-1995 master contract contained both certified employee appraisal procedures and the "form" or "instrument" containing the criteria for the appraisals. By agreement of the parties, that instrument was sent to a joint study committee. (Trans. p. 112, 156) The 1994-1995 master contract did not contain a provision that the instrument setting out the criteria would always be in every future master contract. (Trans. p. 113, 156) MAPE noticed appraisal *procedures* for negotiation. Neither party noticed appraisal *criteria* for negotiations. (Trans. p. 114, 156, 157)

In *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137 (1990), the Supreme Court made a distinction between managerial decisions and policies, which are not mandatorily negotiable, and the mechanics of implementing such policies, which *are* mandatorily negotiable. That Court held that evaluation or appraisal *procedures* are mandatorily negotiable under K.S.A. 72-5413(l)

and that evaluation *criteria* is not.

It is unclear in the record of this matter exactly what the "form" or "instrument" is, other than a document that sets out the criteria that the Board will use in evaluating the certified employees. Even though the Board agreed to include this form in previous contracts, it is not a mandatorily negotiable topic and, therefore, their decision to remove it from the proposed contract at issue is not a unilateral change in a mandatorily negotiable item. They are not obligated to negotiate evaluation criteria. If a change in the criteria is made which affects the procedures or mechanics of evaluation, then the new procedures would have to be negotiated. MAPE recognizes this distinction in its cite to *Unified School District No. 314, v. Kansas Department of Human Resources*, 18 Kan.App.2d 596 (1993). Aside from the conclusion that the Board did not make a unilateral change in a mandatorily negotiable item, the primary issue brought by MAPE in this matter is whether or not the Board made any counter proposals or concessions in regard to certified employee appraisal *procedures*. The Board did, in fact, respond to MAPE's proposal to include the certified employee appraisal procedures in the master contract by agreeing to do so.

Finally, did the Board make any counter proposals or concessions in regard to the topics of billable hours, payroll dates, and association leave? As noted above, the Board did not make any formal, written counter proposals on these topics; however, the parties are in agreement that they discussed these items and that the Board gave them reasons for their positions on each of the items. In regard to billable hours, the Board explained that the school district uses community volunteers for the relevant duties and would like to continue to do so, and rather than pay

teachers for those duties, the Board would rather increase the teachers' base salary. (Trans. 97-98) In regard to payroll dates, the Board expressed its concern that moving up the date might result in paying teachers for work not yet performed, and that the current date is consistent with that for other classes of employees within the district. (Trans. 100-101) In regard to association leave, MAPE first proposed two days of association leave, and then made a second proposal that association leave be treated as professional leave, which is already provided. The Board explained to MAPE that its position was that they would treat association leave as professional leave if the reasons for the association leave fell within the criteria for professional leave. (Trans. 53, 167) MAPE admits that the Board has never denied any teacher from going to association activities, the teachers just simply had to take personal leave or not get paid for that time. (Trans. 176, 177) Whether or not the Board's positions are right or wrong, they are not unreasonable or "utterly inconsistent with the sincere desire to reach agreement." See *National Education Association of Shawnee Mission, Inc. v. Board of Education* at 756. In *Shawnee Mission*, the Court held that it was not utterly inconsistent with the sincere desire to reach agreement when the Board, while negotiations were being carried on with respect to Board policies and proposed changes, was in the process of preparing a new policy handbook which was distributed to all certificated personnel of the district. The Court found that the Board had "no intent to subvert the negotiations." *Id.*

The Petitioner argues, as evidence that the Board did not make concessions or "move" in its positions, that the Board's first package proposal only increased the total cost to the school district by 3.7% and the Board's second package proposal reflected basically the same increase.

Nevertheless, the evidence is convincing that the Board did make several counter proposals and concessions within each package proposal. The Petitioner has not presented any evidence or legal authority that a party cannot make package proposals.

As noted above in the *Seaman* case, the Supreme Court stated early on that a party was not making a good faith effort in negotiations if it adopts an adamant or unyielding position on an issue. This might appear to be saying that the standard applies to how a party acts in regard to each separate issue, or topic of negotiation, and that "unyielding" means not moving on a position. However, the very next sentence in that decision stated that, "Any intention on the part of one party to totally dominate the other party engaged in negotiations or to impose substantially *all of its own terms* on the other party without a fair consideration of such other party's terms is inconsistent with the good faith requirement." [Emphasis added] *Seaman Dist. Teachers' Ass'n v. Board of Education* at 236. The language in that decision must, of course, be read together and in its entirety and when it is, it appears to be taking all of the issues and terms together as proposed by each party into consideration. The Court then appears to have been consistent with *Seaman* in its decision in the *U.S.D. No. 501* case which held that a party is not required to accept a proposal, but is simply required to discuss the proposal and to attempt to arrive at a fair result which will benefit both the teachers and the school board. *U.S.D. No. 501 v. Secretary of Kansas Department of Human Resources* at 976. The Board in this matter has "attempted to arrive at a fair result" by making accommodations or agreeing with the association on some proposals, discussing and explaining its rationale as to why it did not want to accept certain association proposals, and making two different package proposals. Furthermore, there is simply

no evidence that the Board refused to negotiate at all or engaged in conduct calculated to obstruct negotiations. Similarly, there is insufficient evidence that the Board assumed a position characterized by excessive demands, unreasonable proposals or terms clearly beyond the capability of the other negotiating party. See *Seaman Dist. Teachers' Ass'n v. Board of Education* at 236.

II. *Failure to reach an agreement*

The Kansas Supreme Court has also addressed the issue of whether or not failure to reach an agreement in negotiations is evidence that a party has not negotiated in good faith.

As previously stated above, the *Shawnee Mission* case prohibits parties from using conduct which is "utterly inconsistent with a sincere desire to reach an agreement." *National Education Association of Shawnee Mission, Inc. v. Board of Education* at 756. The Court reaffirmed that position by stating in *Riley County Education Association v. Unified School District No. 378*, 225 Kan. 385, 391 (1979) that "While neither the board nor the employees organization is compelled to agree to any particular term or condition, their mutual goal in negotiating is to seek areas of accord with a view to entering into a binding agreement."

It is clear that the parties are not *required* nor obligated to reach an agreement, which the Petitioner has acknowledged. (Pet. post-hearing brief, p. 7) According to the Court in *Riley County*, neither are the parties obligated to agree to any *particular term or condition*. The parties are obligated, however, to seek *areas* of accord with an honest intention and a view to reaching an agreement. The parties spent several meetings and many hours in negotiations discussing each and every item noticed by both parties for negotiations. Both sides made proposals and

counter proposals. MAPE chose to make individual item proposals, and the Board chose to make two package proposals. As the Court in the *U.S.D. 501* case pointed out, "professional negotiation in the field of public education is obviously a difficult area both for a school board and a teachers' professional organization. There is great public interest involved and the parties to the professional negotiations must conduct them with that public interest in mind." *U.S.D. No. 501 v. Secretary of Kansas Department of Human Resources* at 976. The Association did not get everything it asked for, but agreement on some items was reached and several counter proposals and concessions were made. Both parties appeared to be committed to the attempt at reaching some sort of an agreement. In the interest of public policy, both parties have to be willing to compromise.

ORDER

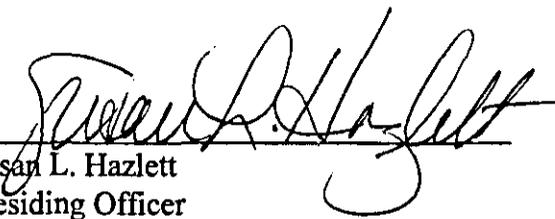
IT IS HEREBY ADJUDGED AND DECREED that based upon the facts presented in this case, the Respondent Unified School District 278, Mankato, Kansas, for the reasons set forth above, has not committed a prohibited practice pursuant to K.S.A. 72-5430(b)(5) relative to the parties' negotiations for the 1994-1995 school year master contract.

FURTHER, it is adjudged and decreed that the Respondent Unified School District 278, Mankato, Kansas, has not violated the previous Order of the Secretary of the Kansas Department of Human Resources, Case No. 72-CAE-10-1992, as the issue in such previous case was distinguishable.

IT IS THEREFORE ORDERED that Petitioner's request for attorney's fees and punitive

damages is denied and this case is hereby dismissed.

IT IS SO ORDERED this 29th day of April, 1996.


Susan L. Hazlett
Presiding Officer

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The Initial Order may be reviewed by the Secretary, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. The Order will become final fifteen (15) days from the date of service, plus three (3) days for mailing, unless a petition for review is filed pursuant to K.S.A. 77-526 within that time with the Secretary, addressed to: Labor Relations Section, 1430 Topeka Blvd., Topeka, Kansas 66612.

Certificate of Service

I hereby certify that on the 30th day of April, 1996, a true and correct copy of the above and foregoing Initial Order was placed in the U.S. mail, first class, postage prepaid to:

David M. Schauner
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715 S.W. 10th Street
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and in the building mail to:

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