

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

NEA-Topeka,

Complainant,

vs.

Unified School District 501,
Topeka, Kansas

Respondent.

CASE NOS: 72-CAE-6-1982
72-CAE-6a-1982

Comes now on this 29th day of September the above captioned case for consideration by the Secretary of the Department of Human Resources. The case comes on petition of National Education Association of Topeka alleging violations by USD 501 of K.S.A. 72-5430 (b) (1) and (5).

A P P E A R A N C E S

Appearances are as follows:

William G. Haynes, Attorney at Law; Edison, Lewis, Porter and Haynes; 1300 Merchants National Bank Building, Topeka, Kansas 66612, on behalf of respondent USD 501.

David Schauner, Attorney, National Education Association, 715 West Tenth Street, Topeka, Kansas 66612, on behalf of complainant NEA-Topeka.

The basic question addressed by the Secretary in this order is in regard to the negotiability of eight (8) issues now in dispute. A preliminary matter is that of the Secretary's jurisdiction to speak to the above issue in light of the late filing of the complaint. Respondent challenges the timeliness of the petition based upon his belief that the NEA-Topeka was aware of his position on these issues some eight (8) months prior to the filing of the complaint.

PROCEEDINGS BEFORE THE SECRETARY

1. 72-CAE-6-1982 filed by Donald A. Larschied on behalf of NEA-Topeka on September 4, 1981.
2. Charge served on respondent, Dr. James Gray for USD 501 on September 4, 1981. Respondent given twenty-four (24) hours to answer based upon the provisions of K.A.R. 49-23-3a(c).
3. Answer received September 8, 1981.
4. The parties met and agreed to provide video tapes and minutes of the negotiations sessions to the Secretary to assist him in determining the issue of

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timeliness of the complaint. The parties also agreed to file briefs on the timeliness question and the negotiability of the eight (8) issues on or before September 24, 1981.

5. Amended complaint received from NEA-Topeka on September 11, 1981.
6. Amended complaint filed with respondent on September 16, 1981. Respondent asked to respond to amended complaint by September 24, 1981.
7. Brief of respondent and amended answer received on September 23, 1981.
8. Brief of complainant received on September 24, 1981.

FINDINGS OF FACT

1. That USD 501 is the appropriate employer (Board of Education) within the meaning of K.S.A. 72-5413(b).
2. That NEA-Topeka is the recognized professional employee organization within the meaning of K.S.A. 72-5413(e).
3. That the eight (8) subjects over which the dispute exists are:
 1. Student Teacher Program
 2. Assignment and Transfer
 3. Reduction in Staff
 4. Promotions
 5. Student Discipline
 6. Employee's Files
 7. Academic Freedom
 8. Physical Facilities.
4. That USD 501 admits its refusal to negotiate the above listed eight (8) subjects. (See answer to complaint)
5. That findings in regard to the timeliness of the petition are incorporated into the discussion/conclusion section of this order.

CONCLUSION - DISCUSSION

The instant case raises the question of scope of negotiations. A preliminary question to be addressed by the Secretary is that of his jurisdiction to rule in the case. Respondent has argued a jurisdiction problem based upon the time frame in which the case was filed. That is, was 72-CAE-6-1982 filed within the statute of limitations prescribed by statute. The secretary will first address this jurisdiction question.

Complainant, NEA-Topeka, has alleged that respondent USD 501 Board of Education has violated K.S.A. 72-5430 (b) (1) and (5) by its;

"insistence that eight (8) items, which the complaining party alleges are mandatory subjects of bargaining, be removed from the present contract and their refusal to bargain over the removal of these items from the contract", and by "refusing to negotiate with the teacher's exclusive bargaining representative USD 501 has interfered and continues to interfere with the teachers' exercise of rights granted under K.S.A. 72-5414."

Respondent states in its answer, "USD 501 alleges and states that it did maintain from February 1, 1981, throughout negotiations, that the subjects are not required subjects of bargaining pursuant to K.S.A. 1979 Supp. 72-5413 (1) of the Professional Negotiations Act".

Further respondent states in its answer; "USD 501 has continuously since February 1, 1981, maintained that NEA-Topeka's proposals are not required subjects of bargaining pursuant to K.S.A. 1979 Supp. 72-5413 (1), and therefore the allegations contained within paragraph two of the complaint in this case are untimely in that it has not been filed within six (6) months of the date of the alleged prohibited practice pursuant to K.S.A. 1979 Supp. 72-5430 (a)."

Pursuant to the parties agreement, the Secretary designee has reviewed the minutes and video tapes of the negotiations sessions between NEA-Topeka and USD 501. In particular the minutes and video tapes of the sessions held between February 5, 1981 and March 4, 1981 are important in making a determination concerning the timeliness of 72-CAE-6-1982 which was filed September 4, 1981.

K.S.A. 72-5430 (a) states in part:

"Any controversy concerning prohibited practices may be submitted to the Secretary. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six (6) months of the date of the alleged practice by service upon it by the Secretary of a written notice, together with a copy of the charges."

In order for the allegations to be timely filed, the alleged violations must have occurred on or after March 4, 1981. The designee's review reveals that USD 501's chief spokesperson did, indeed, inform NEA-Topeka that the eight (8) subjects in question were in his opinion, "items which are not specified as mandatory subjects of bargaining within K.S.A. 72-5413". (See minutes of negotiations sessions, page nine (9) of February 5, 1981) Respondent also noticed NEA-Topeka regarding its perception on negotiability in its letter dated January 30, 1981. Mr. Haynes states in that letter: "Items which are not specified as mandatory subjects of bargaining within K.S.A. 72-5413, as amended, are not included".

In turn, the chief spokesperson for NEA-Topeka stated, at the February 5, 1981 negotiations session: "All the issues we have proposed are either mandatorily negotiable

or permissively negotiable". (See page ten (10) of minutes) It appears, then, that a dispute existed, at that time, concerning the negotiability of several subjects. Mr. Haynes states during the February 5, 1981 session, "if you had the, (the subjects question) there would be a question as to whether the board will view those as items they agree to negotiate. Until we come to those items, I cannot give you a response". Mr. Haynes further states, "With reference to those items that may ultimately be considered by the board to be not included in the mandatory enumeration in the statute --- and I do not see how there could be much question about it; they are pretty clear in the statute, when we reach those items, and if the association chooses to pursue them it may be that the board will not respond to them because of the fear of it they respond it might be determined that they have waived the question of whether they are mandatory subjects to bargain. I would like to emphasize at this time the fact that they have not been included as proposals by the board, cannot be viewed as an indication of the board's position".

Minutes and video tapes of the negotiations sessions had prior to March 4, 1981 substantiated respondent's position that the district viewed many subjects as other than mandatorily negotiable. During the February 28, 1981 negotiations session Mr. Kuhns refers to the NEA-Topeka proposal on academic freedom. Page three (3) of the minutes states Mr. Haynes' response as: "We have not let you know our position on any of these items. We are just going through them and allowing you to discuss them and explain your proposals. There is no question about this proposal, it is in the agreement". In response to Mr. Kuhns' question concerning the board's position on this (academic freedom) proposal, Mr. Haynes states: "we do not have a position on it yet". Mr. Kuhns asks when the board will have a position and Mr. Haynes responds, "Can't tell you". Mr. Haynes further states: "You may have to assume that the board does not desire to include any of your proposals that you have proposed at this time until it responds to it".

NEA-Topeka explained its proposals on Student Teacher Programs, Assignment and Transfer, Reduction in Staff and Promotion during the February 28, 1981 session. To each of these proposals Mr. Haynes replied that he had no questions.

During the March 2, 1981 negotiations session NEA-Topeka proposed an article on Employee's Files. Mr. Haynes' response to that proposal was that he had no questions because such subject was not listed as a mandatorily negotiable subject. Mr. Haynes then proceeded to explain that in his opinion many of the articles contained in past agreements were made other than mandatorily negotiable by action of the legislature. He states, "Much as a result of the association's efforts so what may be required now may be much less than when there was no specific direction in the statute. I don't know what the board's attitude will be". Mr. Kuhns then moved on to the NEA-Topeka's

proposal that Student Discipline be maintained in a successor agreement. Mr. Haynes states, "I don't have any comment".

The Secretary designee finds no discussion of the proposal on Physical Facilities prior to the March 4, 1981 meeting.

The minutes and video tapes of the negotiations sessions clearly substantiate Mr. Haynes' argument concerning the Board of Education's position on negotiability of the eight (8) issues. However, the records also clearly reflect that the Board of Education had no position or had not determined whether they would negotiate the issues. Mr. Haynes' statements lead one to believe that while he considers the items to be permissive, there is a possibility that the Board of Education may choose to negotiate. Further, that such a determination to negotiate or not to negotiate hinges on the content of the NEA-Topeka proposals. His position of "no position" is explained as a fear that the Board of Education might waive future rights to claim some issue to be permissively negotiable.

K.S.A. 72-5430 (b) (1) provides:

"Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414".

K.S.A. 72-5414 then gives the right to professional employees to form, join, or assist professional employee organizations and to participate in professional negotiations with Boards of Education.

K.S.A. 72-5430 (b) (5) states:

"refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto".

The above cited statutes refer to a refusal to negotiate in good faith. Let us assume for a moment that NEA-Topeka had filed this allegation immediately after the February 5th meeting. Respondent then could have legitimately argued that he had not refused to bargain thus no bad faith refusal had occurred. Respondent could have argued that a mere difference of opinion occurred and requested the Secretary to dismiss the complaint. The basis for the complaint of this type, then, must be the action of refusal and timeliness of the complaint must be calculated from the date of that action. The Secretary designee finds no refusal by respondent to negotiate prior to the March 4, 1981 negotiating session. Quite the contrary, respondent has led complainant to believe that the Board of Education might choose to negotiate. Respondent has repeatedly stated his opinion that the eight (8) subjects are other than mandatorily negotiable but has not refused to negotiate. Complainant has agreed that some of the issues may be permissive but has requested to negotiate such permissive subjects. Respondent has taken a "wait and see" attitude.

The Secretary designee finds nothing in the prohibited practice section of the Professional Negotiations Act to indicate that a disagreement over negotiability could constitute bad faith bargaining. An employer might, and often does, choose to label a subject permissive and then chooses to negotiate such subject. Certainly there comes a time when an employer's "wait and see" attitude becomes a stalling tactic thus showing bad faith. In the instant case, however, respondent's attitude, at least up until the March 4, 1981 meeting, was reasonable inasmuch as complainant was explaining its proposals. Had respondent placed complainant on notice that not only did he consider such proposals permissive but that he also did not intend to negotiate such proposals, the act of alleged bad faith would have occurred at that time. If then any of the issues had later been found to be mandatorily negotiable, complainant's charges could be upheld. In this case, however, since respondent took no position, prior to March 4, 1981 to negotiate or not to negotiate, no good or bad faith action of refusal have taken place. Contrast the respondent's attitude concerning the board's position previously stated with the following statements taken from the May 2, 1981 negotiating session.

Les Kuhns: An article that we would like to continue in any future agreement as it is now in the current agreement and an article which the board presently has no position on. Is that correct?

Bill Haynes: No, we don't think it's a mandatory subject of bargaining and therefore anything that was not included in our counter that was covered in our current agreement - let me see if I phrased that right - anything included in the current agreement that we did not counter on, our opinion is that it is not a mandatory subject of bargaining and therefore we're not prepared to negotiate.

Les Kuhns: O.K., so your position is that you would delete it from any successor agreement?

Bill Haynes: We wouldn't include something in the agreement that we weren't willing to negotiate.

(Les goes on to indicate it is a priority)

Les Kuhns: So, why is it that the board does not wish to bargain this item?

Bill Haynes: Because it is not a mandatory subject of bargaining.

Les Kuhn: Why does the board not wish to negotiate anything which is not a mandatory subject of bargaining?

Bill Haynes: Because there is enough covered in the statute that's mandatory and must be negotiated and we should spend time at the table discussing those items which are mandatory rather than those items which are not.

These statements, unlike previous statements, clearly indicate the board's position. That is, that the subjects are not mandatorily negotiable and, therefore, the board chose not to negotiate.

Therefore, if the allegations in the complaint are true, the act of refusal to negotiate must have taken place on or after March 4, 1981. Therefore, the complaint must be considered timely by the Secretary designee and further proceedings are in order.

Respondent admits its refusal to negotiate and states that the eight (8) subjects are permissively negotiable thus not required subjects of bargaining. This case is unique in at least two (2) respects. It is unique in that it is the first case to raise the question of negotiability under the 1980 amendments which direct the Secretary of Human Resources to resolve such questions. Secondly, the case is unique because of the time frame in which it and related cases were filed. Complainant originally raised the question on negotiability of these eight (8) issues in 72-CAE-1-1982 filed with the Secretary on July 10, 1981. In light of the statutory impasse date of June 1 in the school year the statute now necessitates a much earlier filing of such questions by an association or employer if such association or employer desires to require negotiations on any subject in question.

There are two (2) approaches in which various jurisdictions have attempted to rule on the scope of negotiations. That is, some take a broad subject matter approach while others attempt to strictly analyze each proposal made by the parties. Those who embrace the strict language of a proposal approach have found themselves placed in a never ending process of analyzing proposals containing insignificant changes from contract period to contract period. At some point, then, the jurisdiction normally finds some proposal which they feel meets the letter of the law. An example of such an approach is the case in which an employer alleged a proposal on taking lie detector tests to be a permissive subject. The union had proposed language to exempt all employees from taking lie detector tests for any reason. Management argued that statutes required certain police employees to take lie detector tests under certain circumstances. The Public Employee Relations Commission held such a proposal to be illegal thus not subject to required bargaining. In following contract years the union proposed language less restrictive until such time as the Commission believed the proposal to fall within statutory constraints. The proposal then became the union's position and an arbitrator later adopted the position as his award due in large part to the finding by the Commission. Had the Commission simply found the subject of "taking lie detector tests" to be mandatorily negotiable, the employer could have argued statutory constraints to the arbitrator who could have ruled on the proposals before him.

A Kansas case of a similar nature was the case in which the court was asked to rule on the negotiability of binding arbitration of grievances. The court ruled binding arbitration of grievances to be other than mandatorily negotiable. Thus, the dispute over binding arbitration of grievances was "arbitrated" by the court.

Had the "subject matter" approach been taken, the court could have ruled the subject of "grievance procedure" to be mandatorily negotiable and the parties would have been at impasse over the positions of arbitration of grievances. Each party could then have stated their case to the fact-finder and the fact-finder could have made his/her recommendation for resolving the impasse.

There are, of course, inherent problems with ruling on negotiability utilizing the subject approach. One example is that of mislabeling subjects. Inexperienced parties in collective bargaining often make such mistakes. Respondent in this case has stated mislabeling has occurred, in part, with at least two (2) NEA-Topeka proposals. Additionally, the subject approach causes more prohibited practice cases to be filed by employers alleging that the union has forced impasse over permissive or illegal subject matters. That is, the union has included permissive or illegal language within a proposal on a mandatory subject. It should be obvious, however, that this approach forces the parties to bargain, thus many more of the disputes are worked out by the parties at the table than if one party simply refused at the outset to bargain a certain subject. It certainly appears to the Secretary that the legislature contemplated the bargaining process between the parties to be the most reasonable procedure for problem solving. Therefore, the Secretary intends to approach negotiability questions from a subject approach and admonishes the parties in all negotiations to carefully consider the labeling of negotiable proposals. The Secretary recognizes, however, that the parties in this case have not previously been apprised of this approach, therefore a closer look at proposed language will be taken.

ASSIGNMENT AND TRANSFER

Respondent states in his brief: "The association's proposal on 'assignment and transfer' included a proposed list of extra duties to be recognized for 'extra pay' and the Board has recognized all pay and salary matters to be negotiable". NEA-Topeka argues that assignment and transfer fall under the heading of appraisal procedures and hours and amounts of work. The Secretary, however, finds nothing in NEA-Topeka's proposal relating to hours or amounts of work. Nor can the Secretary equate any portion of the NEA-Topeka proposal to appraisal procedures. Quite the contrary, the proposal speaks to assignments and transfers made on a basis of seniority and certification.

It has long been an accepted principle of labor/management relations that management must retain its rights to manage. One of those management rights is to assign employees to a work station. Transfers are, to say the least, closely tied to the ability to assign. Most labor contracts do provide a procedure for an employee to seek a transfer. It is difficult to imagine a sophisticated labor/

management relationship which did not make such a provision. The choice, however, to include such a provision within the labor agreement, under the provisions of the Professional Negotiations Act, rests with the employer and is, therefore, labeled a permissively negotiable subject.

The subjects of assignment and transfer are found by the Secretary to be other than mandatorily negotiable. Those extra duties to be recognized for extra pay should appropriately be negotiated under the heading of salaries and wages.

The Secretary finds no violation of the prohibitive practice section of the act by respondent's refusal to bargain assignment and transfer.

STUDENT DISCIPLINE

This subject "title" is misleading regarding the content of the NEA-Topeka proposal. Paragraph one of the proposal mandates the board to establish rules and regulations. The second paragraph provides that bargaining unit members will adhere to such rules and regulations. Paragraph three is not clear in its intent. The Secretary assumes paragraph three allows grievances of a disciplinary action against a teacher because such teacher had failed to carry out the student disciplinary rule and regulation.

Management has a right, not subject to negotiation, to establish rules and regulations. Unit members have the obligation, subject to contractual provisions, to carry out board policy. Disciplinary actions taken against teachers for failure to follow board policy are grievable pursuant to the provisions of the grievance procedure and any contractual provision concerning the mandatorily negotiable subject of disciplinary procedures.

The Secretary finds paragraph one and two of the proposal to fall within management's rights and paragraph three to be unclear to the extent that he is unable to properly rule on its placement under other topics.

Respondent has not violated the provisions of K.S.A. 72-5430 (b), (1) and (5) by its act of refusal to negotiate the permissive subject of student discipline.

ACADEMIC FREEDOM

The proposal put forth by NEA-Topeka concerning academic freedom (Article XIII joint exhibits) is so vague and seemingly without substance that the Secretary is unable to determine which, if any, section of the proposal fits within the scope of any subjects listed within K.S.A. 72-5413 (1) as mandatorily negotiable. Language such as is proposed is of the type normally discouraged from use in a labor contract since such vague language can only lead to disputed interpretation and arbitrations. The Secretary does not mean to imply that "academic freedom" is not important to teachers or school boards. Nor does he imply that reasonable and

concise language relating to such "freedoms" could not properly be negotiated under the specific subject headings such as grievance procedure, disciplinary procedures, termination, non-renewal of contracts, probationary period, or professional employee appraisal procedures. The Secretary finds nothing within K.S.A. 72-5413 (1) to substantiate a finding that the broad heading of a subject "academic freedom" is a mandatory subject of bargaining.

Therefore, the Secretary must rule that the "subject" of "academic freedom" is other than mandatorily negotiable and that respondent is within its rights to refuse to negotiate the subject.

PROMOTIONS

NEA-Topeka argues that its proposal on promotions relates to salaries and wages, thus it should be considered a mandatorily negotiable subject. The proposal defines promotion as a change to an administrative or supervisory position. The Secretary recognizes that a promotion to an administrative position would undoubtedly lead to the person so promoted earning a larger salary. The amount of the administrator's salary would not be subject to negotiations since the person promoted would be exempt from the bargaining unit. The decision to make the promotion would fall within management's rights. The decision to accept the promotion would fall to the individual teacher offered the position.

The Secretary is unaware of the definition of supervisory position as utilized by the NEA-Topeka proposal. However, if such language contemplates a position other than an administrative position, the decision to make such a promotion would also be retained by management. Any additional duties incurred by a bargaining unit member so promoted would be subject to the same provisions as the extra duty/extra pay argument used in the discussion of the negotiability of "assignment and transfer". The Secretary finds nothing of the extra duty/extra pay nature in the NEA-Topeka proposal on promotion. Rather, the proposal speaks to the "posting" or notification of vacancies. Certainly, one would expect an employer to inform his employees of promotional opportunities; however, K.S.A. 72-5413(1) makes no such requirement of an employer.

The subject of promotions is found by the Secretary to be other than a mandatorily negotiable subject. Respondent's refusal to negotiate promotions does not constitute a violation of K.S.A. 72-5430 (b) (1) or (5).

STUDENT TEACHER PROGRAM

This subject "title" is at best misleading when one considers the content of the NEA-Topeka proposal. The proposal (See Article XIII joint exhibit) speaks solely

to the requirement of a teacher to work with a student teacher. There is no mention of the decision to establish or maintain such a program. The Secretary believes the decision to enter into a student teacher program and all working conditions of the student teacher to fall within the scope of management's rights. Recognizing, however, that a teacher is employed for the purpose of educating students of the district, it seems reasonable to assume that the additional responsibility of instructing and, perhaps, evaluating student teachers creates additional work for the teacher. The Secretary believes that the legislature intended for school boards to negotiate duties which impacts upon the hours and amounts of work required of the teacher.

The Secretary must rule the subject matter contained in the proposal is mandatorily negotiable under the headings of hours and amounts of work or, perhaps, non-teaching duty assignments which the district has proposed to negotiate. The general subject of Student Teacher Program is a subject not contemplated by the legislature to be mandatorily negotiable. The district, by its refusal to negotiate the included subject matter in the NEA-Topeka proposal, has refused to negotiate in good faith with teachers' representatives.

REDUCTION IN STAFF

It appears that the NEA-Topeka proposal on Reduction in Staff consists of basically three (3) areas of concern: How staff is to be reduced in the event of a lay off -- A plan for affirmative retention during lay off -- A plan for the reemployment of teachers who have been laid off because of a reduction in staff. Respondent argues that only the provision relating to reemployment is mandatorily negotiable. Complainant argues that resignation, termination, non renewal, and reemployment fall within the general heading of reduction in staff. The Secretary is inclined to agree with complainant that the legislature attempted to define all conditions under which employees job status might be effected.

A reduction in staff or the decision to reduce staff is retained by management, thus only permissively negotiable at best. Procedures for terminations or non renewals in the event of a reduction of staff, are mandatorily negotiable under the headings of termination or non renewal. Reduction in staff or lay off, if you will, must be accomplished through terminations or non renewals thus the subject matter contained in paragraph one of the NEA-Topeka proposal is mandatorily negotiable.

The provision for affirmative retention may fall within the scope of illegal subjects depending upon federal and state plans for affirmative action.

Respondent agrees that certain subject matter contained within this proposal falls within the mandatorily negotiable subject of reemployment. Additionally, respondent has counter proposed in this area.

The Secretary finds paragraph one of complainant's proposal to fall within mandatory subjects specified at K.S.A. 72-5413 (1) and finds respondent to have violated the provisions of K.S.A. 72-5430 (b) (1) and (5) by its refusal to negotiate the subject matter.

PHYSICAL FACILITIES

This proposal relates to unsafe conditions of the facilities in which unit members work. The proposal also seeks a secure area for employees' valuables to be stored.

Unsafe conditions in the employer's facilities are governed by both federal and state statute and local ordinances. As such, they are matters to be addressed by the employer and the appropriate federal, state or local authorities. Employees are expected to call such unsafe conditions to the employer's attention. However, the procedures for notification and correction of unsafe conditions are not mandatory subjects of negotiation.

It is difficult to imagine that an employer would refuse to provide a secure area for employee's valuables. However, the Secretary finds nothing with K.S.A. 72-5413(1) to require an employer to negotiate such a provision.

The subject of physical facilities is at best permissively negotiable and the district was within its rights to refuse to negotiate the subject.

EMPLOYEE'S FILES

Logic dictates that any employer employing a significant number of employees would, out of necessity, make and keep personnel files on each employee. Such a file would logically contain evaluations of the employees' work and records of any disciplinary action taken against the employee. Such files would no doubt be utilized by the employer in determining salaries and wages, termination, non renewal of contracts, or reemployment of employees. Further, an employee would need access to his/her personal file in the event a grievance was filed relating to any of the above listed terms and conditions of employment. Certainly, access to the personnel files for the above reason would be mandatorily negotiable under the specific headings listed above.

It appears that the NEA-Topeka proposal relating to employee files is designed to keep the employee informed of his/her standing within the district. The Secretary finds the subject matter contained in this proposal to be mandatorily negotiable

under any or all of the mandatorily negotiable subject headings listed above. Further the Secretary finds the school board's act of refusal to negotiate the subject matter included under the title, "Employee's Files," to be a violation of K.S.A. 72-5413 (b) (1) and (5).

It is unfortunate that the only vehicle, other than a joint request for negotiability rulings, is the vehicle provided by the prohibited practice section of the Professional Negotiation Act. It is distasteful for the Secretary to enter an order of bad faith when one party has refused to negotiate because of his belief that a subject is other than mandatorily negotiable. One must remember, however, that this negotiations law provides an orderly process for resolving problems. The law was not enacted to create problems. The negotiations process belongs to the parties and was intended to be utilized by the parties in any manner specified by law or manner agreed upon by the parties so long as such agreed upon procedure is not in violation of this or other statutes. The parties could have, on suggestion of either party and with the agreement of the other, come to the Secretary for a ruling on negotiability outside the framework established for resolving prohibited practice charges. The parties chose not to seek the opinion of the Secretary thus the only vehicle for a determination was the prohibited practice section of the act.

It is incumbent upon the party contending subjects to be mandatory or required subjects of bargaining to raise such questions early in the negotiations process. In the event the party contending such subjects to be permissive refuses to jointly seek a ruling from the Secretary, the opposing party should file a prohibited practice alleging a violation of K.S.A. 72-5430 (b) (5) or K.S.A. 72-5430 (c) (3) based on the other party's refusal to jointly file or state a position concerning their agreement to negotiate.

In sum the Secretary has found the subject matter contained in complainants proposals on 1) Reduction in Staff, 2) Student Teacher Program, 3) Employee's Files, to be mandatorily negotiable as specified at K.S.A. 72-5413 (1). The Secretary finds the subjects, and subject matter contained therein, of 1) Physical Facilities, 2) Assignment and Transfers, 3) Promotions, 4) Student Discipline, 5) Academic Freedom to fall within management's rights and as such to be either permissive or illegal subjects of negotiations. Complainant's refusal to bargain the above listed subjects is not within the meaning of failure to negotiate in good faith as specified at K.S.A. 72-5430 (b) (1) and (5).

Therefore, the Secretary finds USD 501 in violation of K.S.A. 72-5430 (b) (1) and (5) by its act of refusal to negotiate the substance of the proposals listed by the NEA-Topeka as:

- 1) Reduction in Staff (Properly Labeled - Terminations - Non renewal - Reemployment)
- 2) Employee's Files (Properly Labeled - Terminations - Non renewal - Reemployment - Grievance Procedure)
- 3) Student Teacher's Program (Properly Labeled Amounts of Work)

The Secretary hereby orders USD 501 to cease such unlawful acts and to enter into good faith negotiations concerning the three (3) above listed mandatory subjects of negotiations.

IT IS SO ORDERED. THIS 29th DAY OF September, 1981.


Jerry Powell, Employment Relations
Administrator (Designee for the
Secretary of Human Resources)
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