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No. 13-109308-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Ottawa Education Association
Petitioner-Appellant,
v.
Secretary of the Kansas Department of Labor

And

Board of Education of U.S.D. No. 290,
Franklin County, Kansas
Respondent-Appellees

BRIEF OF APPELLANT

Appeal from the District Court of Franklin County, Kansas
Honorable Eric W. Godderz, Judge
District Court Case No. 12CV136

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I. NATURE OF THE CASE

The Petitioner filed a prohibited practice complaint against the Respondent on April 19, 2010, alleging that the Respondent Board of Education of U.S.D. No. 290 had made a unilateral change in the mandatory topic of "salary and wages" when it implemented, without negotiating, a Key Return Policy with a monetary penalty that penalized teachers by charging them an amount of up to $500 for lost building and room keys. The case was submitted for resolution to the Secretary of the Kansas Department of Labor pursuant to Motions for Summary Judgment based on facts stipulated by the parties. The Secretary's designee issued his Initial Order on April 10, 2012, finding that no prohibited practice had been committed, and dismissing Petitioner's complaint. Petitioner requested Secretary's Review of the Initial Order. The Secretary's representative denied review of the Initial Order in his Agency Final Order Denying Review.

Petitioner appealed the Secretary's Order to the District Court of Franklin County. On December 7, 2012, Judge Eric W. Godderz of the Franklin County District Court filed his Order denying the Petition and affirming the findings and ruling of the Presiding Officer in his Initial Order. The Appeal to this court is from that judgment.

II. ISSUES ON APPEAL

1. **WHETHER THE MONETARY PENALTY IN THE BOARD OF EDUCATION'S "KEY RETURN POLICY" IS MANDATORILY NEGOTIABLE UNDER THE PROFESSIONAL NEGOTIATIONS ACT?**

2. **WHETHER THE BOARD COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 72-5430(b)(5) WHEN IT FAILED TO NEGOTIATE THE $500 MONETARY PENALTY PORTION OF ITS KEY RETURN POLICY?**

STATEMENT OF FACTS

This prohibited practice case was submitted for a decision by the Kansas Department of Labor based on facts stipulated by the parties. On review of the agency decision by the district court, the court made no factual findings of its own. The facts, as stipulated by the parties, are the following:

1. The Ottawa Unified School District No. 290, Franklin County, Kansas (Board or District) is a school district duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated. (R. I, 13.)

2. The Ottawa Education Association (Association) has been duly recognized as the exclusive bargaining representative of the professional employees of the Board under the Professional Negotiations Act, K.S.A. 72-5413 *et seq.* (R. I, 13.)

3. The Board and the Association have entered into a Negotiated Agreement that contains the parties' agreement with regard to "terms and conditions of professional service" for the Board's professional employees for the 2009-2010 school year. (R. I, 13.)

4. A true and accurate copy of the Negotiated Agreement for the 2009-2010 school year is attached to the parties' Stipulations of Fact as Exhibit A. (R. I, 13.)

5. During negotiations for the 2009-2010 Negotiated Agreement, the Board and the Association neither noticed for negotiation nor negotiated any provision concerning keys to school district buildings or the costs of replacing lost or stolen keys. (R. I, 13.)

6. The parties' 2009-2010 Negotiated Agreement does not contain a provision that addresses the issuance of keys to school buildings or the costs of replacing lost or stolen keys. (R. I, 13.)

7. At its regular meeting on Monday, December 14, 2009, the Board adopted a policy regarding Key Request Procedures. (R. I, 13.)

8. As initially drafted, the policy stated, "The employee will be charged $350.00 - $500.00 per key to allow district to re-key facility and reissue staff keys." (R. I, 13.)

9. On December 22, 2009, Chuck Tilman filed a level 3 grievance on behalf of the Ottawa Education Association with Superintendent Dean Katt pursuant to the parties' negotiated grievance procedure. (R. I, 14.)

10. The Association's level 3 grievance alleged that the Board's key request policy was a violation of the parties' 2009-2010 Negotiated Agreement, specifically, ARTICLE TWO – GENERAL PROVISIONS, Section A: Maintenance of Standards. (R. I, 14.)

11. ARTICLE TWO – GENERAL PROVISIONS, Section A: Maintenance of Standards, of the parties' 2009-2010 Negotiated Agreement provides as follows:

> "Except as the Agreement shall otherwise provide, all terms and conditions of employment applicable on the signing date of this Agreement to employees covered by this Agreement, as established by the rules, regulations and/or policies of the Board in force on said date, shall continue to be so applicable during the terms of this Agreement, nothing contained herein shall be interpreted and/or applied to

deprive teachers of professional advantages enjoyed prior to the effective date of this Agreement."

(R. I, 14.)

12. The phrase "professional advantages" is not defined in the Negotiated Agreement to include the possession of keys or particular access to District buildings. (R. I, 14.)

13. In a decision dated January 26, 2010, Superintendent Katt denied the Association grievance and the relief sought therein, finding that the 2009-2010 Negotiated Agreement had not been violated when the Board adopted its Key Policy. (R. I, 14.)

14. In his grievance decision, Superintendent Katt stated that the Board agreed to modify the language of the policy as follows:

> Each employee with possession of USD 290 keys is responsible for their keys and must report lost or stolen keys immediately. ~~The employee will be charged $350.00 – $500.00 per key to allow district to re-key facility and reissue staff keys.~~ ***The employee will be charged the cost of replacing applicable locks and keys up to $500 per key.***

(R. I, 14-15.)

15. In his grievance decision, Superintendent Katt stated that the Board further agreed to "install a keyless entry system at one location in the high school and middle school." (R. I, 15.)

16. In his grievance decision, Superintendent Katt further stated that the keyless entry system would allow teachers to swipe a card to enter the building instead of using a key, and that if a swipe card were lost, the replacement cost for the card would be minimal and the entry code could be reprogrammed at no cost. (R. I, 15.)

17. In his grievance decision, Superintendent Katt further stated that "the Board felt legitimate safety reasons existed for re-keying the facilities and putting a policy in place that would require more conscientious use of district keys by its employees." (R. I, 15.)

18. The Association appealed Superintendent Katt's decision denying their grievance to the Board at level 4 of the grievance procedure. (R. I, 15.)

19. In a decision dated February 10, 2010, Board president Brian Kane, on behalf of the Board, denied the Association's grievance and the relief sought therein. (R. I, 15.)

20. In the Board's grievance decision, Brian Kane, on behalf of the Board, stated "[w]e believe that the board acted within the rights granted to it in K.S.A. 72-8205(c) to adopt rules and regulations for teaching in the school district and subsection (e) of the same statute which provides, '[t]he board may transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop, and operate local public schools.' " (R. I, 15.)

21. In the Board's grievance decision, the Board found that:

- The Board acted within its rights in making its key policy;
- The 2009-2010 USD 290 Negotiated Agreement had not been violated;
- The Board's Key Policy did not create a change in the terms or conditions of employment of the teachers in the District;
- The Key Policy was not a mandatorily negotiable item.

(R. I, 15-16.)

22. Under the Board's Key Policy, no employee will be given building keys unless that employee fills out and signs a Key Request Form. (R. I, 16.)

23. By signing the Key Request Form, bargaining unit members must assert that "I have received the key(s) listed above and I agree that if I lose the key(s) I must pay the cost of replacing applicable locks and keys up to $500.00 for each key for the district to re-key the facility." (R. I, 16.)

24. Employees who want keys must agree to pay up to $500 for lost or stolen keys before receiving any key(s). (R. I, 16.)

25. A true and accurate copy of the Key Policy is attached to the parties' Stipulations of Fact as Exhibit B. (R. I, 16.)

26. ARTICLE TWO – GENERAL PROVISIONS, Section B: Management Rights, of the parties' 2009-2010 Negotiated Agreement provides as follows:

> "It is understood and agreed that the Board retains those powers expressly granted to it by statute, including those necessarily implied, and that the statutes are to be strictly construed, including the right to make unilateral changes except as specifically limited by the provisions contained within this agreement. It is agreed that these provisions do not supersede the provisions of the agreement and are specifically limited by such agreement. The only limitation on any right of the board shall be by law or by the express limitation by specified provision contained within this agreement."

(R. I, 16.)

27. ARTICLE TWO – GENERAL PROVISIONS, Section E: Re-Opening Clause, of the parties' 2009-2010 Negotiated Agreement provides as follows:

> "The Board and the Association agree to reopen negotiations over any mandatory negotiable topic upon the request of either the Board or the Association."

(R. I, 16.)

28. The Association noticed the Board's Key Policy for negotiation for the 2010-2011 school year. (R. I, 17.)

29. During 2010-2011 negotiations, the Board advised the Association that it did not want to discuss the Key Policy until the Complaint the Association filed with the Kansas Department of Labor was resolved. (R. I, 17.)

30. The Board and the Association continue to discuss the Key Policy during their interest based bargaining sessions. (R. I, 17.)

31. For the 2009-10 school year, the District spent $734,215.80 on office supplies, furnishings, equipment, library supplies, and textbooks. (R. I, 17.)

32. As of the 2009-10 school year, the total replacement cost of the District's fixed assets in technology is $1,407,109. (R. I, 17.)

ARGUMENTS AND AUTHORITIES

1. THE MONETARY PENALTY IN THE BOARD OF EDUCATION'S "KEY RETURN POLICY" IS MANDATORILY NEGOTIABLE UNDER THE PROFESSIONAL NEGOTIATIONS ACT, K.S.A. 72-5413 *et seq.*

Standard of Appellate Review

The issue of negotiability under the PNA is one of statutory interpretation. An appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's interpretation of its authorizing statutes. *Ft. Hays St. Univ. v. University Ch., Am Ass'n of Univ. Profs*, 290 Kan. 446, Syl. ¶ 2, 228 P.3d 403 (2010). Furthermore, this prohibited practice case was submitted for decision by the Kansas Department of Labor on Motions for Summary Judgment based on Stipulated Facts. The district court's review of the agency's decision, likewise, was based exclusively on the record before the Secretary. Appellate courts have de novo review of a district court's decision based upon stipulated facts and documents. *Shirley v. Kansas Dept. of Revenue*, 45 Kan.App.2d 44, 46, 243 P.3d 708 (2010).

ANALYSIS

The method for determining whether a topic is mandatorily negotiable under the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, is well-settled. If a topic for negotiation is specifically listed among "terms and conditions of professional service" in K.S.A. 72-5413(*l*) of the PNA, then that topic is by statute made mandatorily negotiable. *U.S.D. No. 352 v. NEA-*

Goodland, 246 Kan. 137, 141, 785 P.2d 993 (1990), (citing *NEA-Wichita v. U.S.D. No. 259*, 234 Kan. 512, Syl. ¶ 5, 674 P.2d 478 [1983]).

A topic need not be specifically listed in K.S.A. 72-5413(*l*), however, to be mandatorily negotiable as a term and condition of employment. *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 969, 685 P.2d 874 (1984). In its decision in *U.S.D. No. 501*, the Court held that the "topic approach" is the proper method to be used by the Secretary and the district court in interpreting K.S.A. 72-5413(*l*):

> "We have no hesitancy in holding that the topic approach is the method to be followed by the Secretary of the Kansas Department of Human Resources [now Department of Labor] and the district courts in determining whether certain items are mandatorily negotiable under K.S.A. 72-5413(*l*)."

U.S.D. No. 501, 235 Kan. at 969-71; accord, *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. at 141. To determine whether a topic is mandatorily negotiable under the topic approach "[a]ll that is required is that the subject matter of the specific proposal be within the purview of one of the categories listed under 'terms and conditions of professional service' in K.S.A. 72-5413(*l*)." *U.S.D. No. 501*, at 969.

Finally, under the topic approach, a board of education will be required to negotiate those aspects of a topic that come within the purview of one or more of the categories listed in K.S.A. 72-5413(*l*), even if the topic itself is within the managerial prerogative of the board. *Id.*, at 974-975.

a.) The Penalty Provision of the Board's Key Return Policy
Comes Within the Purview of the Statutory Topic of "Salary and Wages"

One example of the application of the topic approach was considered by the Court in *U.S.D. No. 501*, whether the board of education was required to negotiate with the teachers'

association regarding the board's "Student Teacher Program." *Id.* The Court held that the Secretary and the district court had correctly found that, while the general subject of "Student Teacher Program" was not a mandatorily negotiable topic, under the topic approach, the mechanics of selecting teachers to participate in the student teacher program was within the purview of the mandatorily negotiable topic of "hours and amounts of work" under K.S.A. 72-5413(*l*). *Id.* at 975. Requiring the board to negotiate the mechanics of the student teacher program did not interfere with the board's managerial decision whether to participate in the student teacher program in the first place. *Id.*

The monetary penalty under the Board's Key Return Policy in this case is precisely the same type of issue as the mechanics of the Student Teacher Program considered by the Court in *U.S.D. No. 501*. Like the general subject of "Student Teacher Program," the Board's Key Return Policy was not a mandatorily negotiable topic; in both cases, the board's decision is a managerial one. But like the mechanics of the student teacher program in *U.S.D. No. 501*, because the salary and wages of any teacher who loses her keys or has her keys stolen will be decreased by up to $500 per key, the monetary penalty under the Board's Key Policy is within the purview of one of the enumerated topics in K.S.A. 72-5413(*l*), *i.e.*, "salary and wages." Like the mechanics of the student teacher program in *U.S.D. No. 501*, therefore, the monetary penalty under the Board's Key Return Policy is mandatorily negotiable under the Court's topic approach.

b.) The Kansas Wage Payment Act

The Kansas Wage Payment Act, K.S.A. 44-313 *et seq.*, controls many important aspects of the payment of wages and benefits to Kansas employees. "See Dick and Jane Work - A Kansas Wage Payment Act Primer," 72 J. Kan. Bar Assn. 9, 14-29 (2003). The monetary penalty in the Board's Key Return Policy is subject to the Wage Payment Act; consequently, it

necessarily comes within the purview of "salary and wages" under the PNA, and is mandatorily negotiable under the topic approach.

School districts are covered employers under the Kansas Wage Payment Act. K.S.A. 2012 Supp. 44-313(a).

Under the Kansas Wage Payment Act,

> "No employer may withhold, deduct or divert any portion of an employee's wages unless: . . . (3) the employer has a signed authorization by the employee for deductions for a lawful purpose <u>accruing to the benefit of the employee</u>; . . . ." K.S.A. 44-319(a) (emphasis added).

The Secretary of Labor has the authority to adopt rules and regulations necessary for administering and enforcing the provisions of the Wage Payment Act. K.S.A. 44-325. Among the regulations that the Secretary has adopted for enforcing the provisions of the Wage Payment Act is the following:

> Authorized deductions, "accruing to the benefit of the employee" as used in K.S.A. 44-319(a)(3), shall mean deductions from an employee's pay for which the employer has received a signed authorization from the employee for lawful deductions that do not in any way waive, set aside or contravene any rights created in K.S.A. 44-313 *et seq.*, as amended.

K.A.R. 49-20-1(a). Furthermore,

> The following deductions shall not be considered authorized deductions "accruing to the benefit of the employee" within the meaning of K.S.A. 44-319(a)(3):
>
> (A) Deductions made for cash and inventory shortages; breakage; returned checks or bad credit card sales; losses to employers resulting from burglaries, robberies, or alleged negligent acts.
>
> . . .

K.A.R. 49-20-1(a)(2).

The monetary penalty of up to $500 per key for lost or stolen keys under the Board's Key Return Policy is exactly the type of deduction from a employee's wages addressed by K.S.A. 44-319(a) and K.A.R. 49-20-1(a)(2)(A). During the last two sessions of the Kansas legislature, bills to amend K.S.A. 44-319 have been introduced that would specifically allow the Board to deduct a portion of a teacher's final wages to recover keys or access cards for buildings in the district. H.B. 2022 (2013) (as introduced)[1]; H.B. 2627 (2012) (as amended by House Committee of the Whole)[2].

The monetary penalty in the Board's policy results in a decrease in the teacher's wages, a decrease that has been unilaterally imposed by the Board to cover losses to the District that result from the teacher's alleged negligence in allowing her keys to be lost or stolen. Furthermore, the Board's monetary penalty is subject to the Kansas Wage Payment Act. The monetary penalty portion of the Board's Policy plainly comes within purview of the statutory topic of "salary and wages" in K.S.A. 72-5413(*l*)(1); consequently, it is mandatorily negotiable under the topic approach.

Although the Secretary's Designee pays lip service to applying the topic approach, in the end, he abandons it. The Secretary's Designee accepted the argument that there are limits to the applicability of the topic approach, goes beyond what the legislature intended when it identified "salary and wages" as a mandatory topic of negotiations: finding that:

> "As suggested and acknowledged, there are limits to the topic approach. This instance represents such limits." (R. I, 22, 24.)

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[1] http://www.kslegislature.org/li/b2013_14/measures/documents/hb2022_00_0000.pdf (accessed 3/5/13)

[2] http://kslegislature.org/li_2012/b2011_12/measures/documents/hb2627_03_0000.pdf (accessed 3/5/13)

The agency decision in this case, and the district court in affirming that decision, directly conflicts with that of the Supreme Court, which has held that the "topic approach" specifically is in accord with the intent of the Kansas legislature, and is consistent with Kansas decisions. *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137, 141, 785 P.2d 993 (1990), (quoting *U.S.D. No. 501*, 235 Kan. at 970.) Indeed, the only support cited by the Secretary's Designee for his decision in this case is the dissenting opinion *U.S.D. No. 501*:

> To conclude that Respondent's Key Policy is within the purview of "salaries and wages", one of "the legislature's detailed specific designation of matters subject to negotiation" under the PNA, would "by construction engraft [another] not enumerated by the legislature", an unreasonable reading of the statute. *See Unified School District No. 501 v. Secretary of Kansas Department of Human Resources*, 235 Kan. 968, 976, 685 P.2d 874 (1984)(Schroeder, Chief Justice, dissenting).

(R. I., 25.)

Thus, the only support in the law or the cases that the Secretary cites for his holding in this case, is an argument that the Supreme Court necessarily considered, and specifically rejected, in its decision in *U.S.D. No. 501.* The Supreme Court has not overturned its *U.S.D. No. 501* decision; rather, it has reaffirmed it. *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137, 785 P.2d 993 (1990). The Secretary's interpretation that the Association's insistence on negotiating the Board's monetary penalty goes beyond the intent of the legislature, directly contradicts the Court's holding in *U.S.D. No. 501*, and is entitled to no judicial deference. *Ft. Hays St. Univ. v. University Ch., Am Ass'n of Univ. Profs*, 290 Kan. 446, Syl. ¶ 2, 228 P.3d 403 (2010) ("An appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's or board's interpretation of its authorizing statutes."). Consequently, contrary to the Secretary's Final Order, the agency decision in this case is plainly

erroneous and, it cannot contain a correct statement of the law. (R. I., 8.) The decision of the Kansas Department of Labor, and of the district court, should be reversed.

2. THE BOARD COMMITTED A PROHIBITED PRACTICE IN VIOLATION OF K.S.A. 72-5430(b)(5) WHEN IT DID NOT NEGOTIATE THE $500 MONETARY PENALTY PORTION OF ITS KEY RETURN POLICY.

Standard of Appellate Review

Whether an action constitutes a prohibited practice must be determined in each case based upon the facts and their effect on the negotiation process. *Garden City Educators' Ass'n v. U.S.D. No. 457*, 15 Kan.App.2d 187, 195, 805 P.2d 511 (1991). This prohibited practice case was submitted for decision by the Kansas Department of Labor on Motions for Summary Judgment based on Stipulated Facts; and the district court's review of the agency's decision was based exclusively on the record before the Secretary. Appellate courts have de novo review of a district court's decision based upon stipulated facts and documents. *Shirley v. Kansas Dept. of Revenue*, 45 Kan.App.2d 44, 46, 243 P.3d 708 (2010).

ANALYSIS

In the Initial Agency Order in this prohibited practice case, the Secretary's Designee stated the well-settled law that a board of education commits a prohibited practice in violation of K.S.A. 72-5430(b)(5) when it makes a change in a mandatory topic for negotiation without first negotiating that change with the teachers' exclusive bargaining representative. (R. I, 19-20.) (citing, *U.S.D. No. 314 v. Kansas Dept. of Human Resources*, 18 Kan. App. 2d 596, Syl. ¶ 2, 856 P.2d 1343 [1993]). Likewise:

> After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 *et seq.*, then during the time that agreement is in force, the board, acting unilaterally, may not make 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 within the resulting agreement.

NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, Syl. ¶ 4, 674 P.2d 478 (1983) (quoting, *Dodge City Nat'l Education Ass'n v. U.S.D. No. 443*, 6 Kan. App. 2d 810, Syl., 635 P.2d 1263, *rev. denied* 230 Kan. 817 [1981]); (R. I, 20.) .

The Secretary's Designee recognized that the resolution of this issue is determined by resolution of Issue I, *i.e.*, whether the monetary penalty of the Board's Key Policy unilaterally implemented by Respondent was a mandatorily negotiable term or condition of professional service. (R. I, 20.) Because the agency incorrectly concluded that the monetary penalty under the Board's Key Policy was not mandatorily negotiable, it necessarily concluded incorrectly that the Board had not committed a prohibited practice when the Board implemented the policy without negotiating the monetary penalty with the Association.

a.) K.S.A. 72-8205

As a defense to the prohibited practice charge, the Board asserts the authority to adopt its Key Policy without negotiating mandatory provisions of that policy pursuant to its general grant of power to govern the school district pursuant to K.S.A. 72-8205, and its authority to adopt rules and regulations for the governance of school districts under K.S.A. 72-8205(c). The Board also cites Article 2, Section B - Management Rights of the parties' Negotiated Agreement as recognizing and acquiescing in this authority.

In *NEA-Wichita v. U.S.D. No. 259*, 234 Kan. 512, 674 P.2d 478 (1983), the board of education similarly argued that it could make unilateral changes mandatorily negotiable topics

based on the general grant of authority to school boards under K.S.A. 72-8205(c), and under the management rights and closure clauses in the parties' negotiated agreement. *NEA-Wichita*, 234 Kan. at 516-17. In holding that the board had committed a prohibited practice in violation of K.S.A. 72-5430(b)(5), the Supreme Court held that a board of education's general authority under K.S.A. 72-8205 is limited by K.S.A. 72-5413(*l*), which provides that certain topics shall be mandatorily negotiable. *Id.*, at 518. Thus, the Board's authority under K.S.A. 72-8205(c) to govern the school district does not relieve the Board of its duty under the PNA to negotiate in good faith with the Association regarding mandatorily negotiable topics.

With regard to the Wichita board's claim that the combination of a Management Rights Clause and a Closure Clause justified the board's unilateral change to the mandatory topic of negotiation, the Court noted that school districts in Kansas have only the power and authority that has been delegated to them:

> "A school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state. A school district has only such power and authority as is granted by the legislature and its power to contract, including contracts for employment, is only such as is conferred either expressly or by necessary implication." *Id.*, at 517 (quoting *Gragg v. U.S.D. No. 287*, 6 Kan. App. 2d 152, Syl. ¶ 3, 627 P.2d 335 [1981]).

The Court noted that the essential function of the management rights clause was to preserve in the board the authority which has been granted to it by statute, *i.e.*, K.S.A. 72-8205(c). Because a board of education's general authority under K.S.A. 72-8205 is limited by K.S.A. 72-5413(*l*), the Court found that the management rights clause did not justify the Wichita board's unilateral change in a mandatorily negotiable topic.

With regard to the board's claim that the inclusion of the closure clause in the parties' agreement justified the board's unilateral change, the Court noted that a closure clause is nothing

but a diluted form of waiver, and that the general rule is that a waiver of a union's right to bargain must be clear and unmistakable. *NEA-Wichita*, 234 Kan. at 517 (citing, *N.L.R.B. v. R. L. Sweet Lumber Company*, 515 F.2d 785, 795 [10th Cir. 1975]). In this case, there is no closure clause for the Board to use to justify its unilateral change in a mandatorily negotiable topic. There is, however, a "Maintenance of Standards" clause in the parties' Negotiated Agreement. Taken together, as in *NEA-Wichita*, it is apparent that the Association did not clearly and unmistakably waive its right to bargain unilateral changes to mandatorily negotiable topics.

b.) K.S.A. 72-8205(e)

Since the Court's decision in *NEA-Wichita*, K.S.A. 72-8205 has been amended by the addition of K.S.A. 72-8205(e). 2003 Kan. Sess. Laws, Ch. 40, § 1. K.S.A. 72-8205(e) authorizes boards to "adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools." K.S.A. 72-8205(e)(1). K.S.A. 72-8205(e), however, does not expand the Board's authority to make unilateral changes to mandatory topics under the PNA, because it requires that "The power granted by this subsection shall not be construed to relieve a board from compliance with state law." K.S.A. 72-8205(e)(2).

No reported court cases have interpreted this new provision since its enactment; however, the new subsection of K.S.A. 72-8205 has been the subject of scholarly comment:

> "Senate Bill 57 [adding K.S.A. 72-8205(e)] gives school district boards of education the authority to transact business and adopt policies that they deem appropriate to operate local public schools. . . . The expanded authority also does not allow school boards to circumvent existing law, such as, for example, taking action that is contrary to laws pertaining to teacher due process and continuing contracts." Damron, *What Should Lawyers Know from the 2003 Kansas Legislative Session?*, 72 J.K.B.A. 7, 16 (Aug. 2003).

and

> "Briefly, it would appear that a school board can legislate on school district business compatible with its constitutional duties where there is no state law on the subject or where there is a state law but the local school board desires to supplement it. However, the additional or supplemental provisions cannot conflict with state law. There is no provision for school boards to pass a charter resolution to exempt themselves from provisions of nonuniform state laws as there is with cities and counties." Heim, *Home Rule: A Primer*, 74 J.K.B.A. 26, 30 (Jan. 2005) (internal citations omitted).

It is important to distinguish between a) the Board's managerial prerogative to adopt policies for the governance of the school district, which is controlled by K.S.A. 72-8205, and b) the mechanics and procedures for implementing the Board's policies, which must be negotiated under the PNA if those procedures come within the purview of an enumerated topic in K.S.A. 72-5413(*l*). *U.S.D. No. 501*, at 969. The general grant of statutory power to school boards found in K.S.A. 72-8205(c) is limited by the requirements of K.S.A. 72-5430(b). *NEA-Wichita*, 234 Kan. at 518. K.S.A. 72-8205(c) cannot justify unilateral changes in mandatorily negotiable topics by the Board, and the enactment of K.S.A. 72-8205(e) did not remove that constraint on the Board's authority.

Requiring the Board to negotiate its monetary penalty imposes no substantial burden on the Board's authority under K.S.A. 72-8205 to adopt policies for the governance of the district. As the Supreme Court stated:

> "[W]e wish to emphasize 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." *U.S.D. No. 501*, at 975-76.

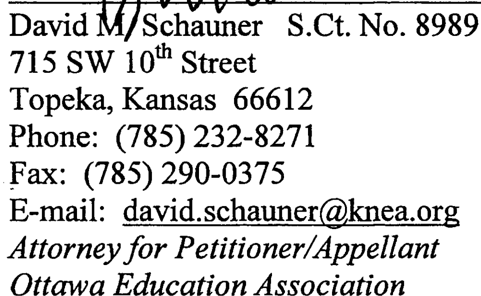
NEA-Wichita continues to be good law, and K.S.A. 72-8205(e) requires the Board to comply with state law, including the PNA. It does not authorize the Board to implement its Key Policy without first negotiating its monetary penalty with the Ottawa Education Association. Because neither state law nor the parties' Negotiated Agreement can justify the Board's unilateral change in a mandatory subject for negotiation, the Board committed a prohibited practice in violation of K.S.A. 72-5430(b)(5) when it adopted its Key Policy without first negotiating the Policy's penalty provision with the Association.

Conclusion

In its Order, the Kansas Department of Labor erred by abandoning the topic approach, instead substituting its own judgment to place limits on the topic approach, in opposition to the dictates of the Supreme Court in its decision in *U.S.D. No. 501*. Likewise, the district court erred in upholding the Secretary's Order.

The Ottawa Education Association respectfully requests that the Court reverse the Orders of the district court and of the Secretary of the Kansas Department of Labor, and grant the relief requested from the Secretary in its original petition.

Respectfully submitted,
KANSAS NATIONAL EDUCATION ASSOCIATION



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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the above and foregoing BRIEF OF PETITIONER/APPELLANT OTTAWA EDUCATION ASSOCIATION was placed in the United States mail, postage prepaid, this 8th day of March, 2013, addressed to each of the following:

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