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 USD 290,
Franklin County, Kansas
Respondent-Appellees

BRIEF OF APPELLEE

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

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I. ISSUES ON APPEAL

Respondent concurs with Petitioner's statement of the issues as set forth in the Brief of Appellant, Issues on Appeal, pg. 2.

II. STATEMENT OF FACTS

Respondent concurs with Petitioner's factual statements of the case as set forth in the Brief of Appellant, Statement of Facts, pgs. 2 – 7.

III. ARGUMENTS AND AUTHORITIES

The Kansas Department of Labor ("KDOL") correctly determined that the Key Policy at issue is not mandatorily negotiable under the Professional Negotiations Act ("PNA"), and therefore, the Board of Education did not commit a prohibited practice when it adopted the Key Policy without first engaging in negotiations with the OEA. Petitioner OEA has failed to meet its burden under the Kansas Judicial Review Act to prove that the KDOL's determination is invalid. Therefore, the agency determination, which was affirmed by the district court, must be upheld on appeal.

A. The Monetary Penalty In the Board of Education's "Key Return Policy" Is Not Mandatorily Negotiable Under the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*

The OEA incorrectly argues that because the Key Policy imposes a replacement fee for lost or stolen keys, it falls within the purview of "salaries and wages," which are mandatorily negotiable topics under K.S.A. 72-5413(l)(1). However, neither the facts nor the law support Petitioner's argument. Therefore, the determination of the KDOL, as affirmed by the district court, must be upheld.

Standard of Appellate Review

KDOL actions are reviewable under the Kansas Judicial Review Act ("KJRA"), K.S.A. 77-601 et. seq. See K.S.A. 44-322a(c). Appellate review is statutorily defined by the KJRA. See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger,* 276 Kan. 232, 245, 75 P.3d 226 (2003). The appellate court exercises the same statutorily limited reviews of the KDOL's action as does the district court, *i.e.,* "as though the appeal had been made directly to this court." 276 Kan. at 245.

The KJRA defines the scope of judicial review of state agency actions unless the agency is specifically exempt by statute. *In the Matter of the Appeal of Lafarge Midwest/Martin Tractor Co., Inc.,* 293 Kan. 1039, 1043, 271 P. 3d 732 (2012). Under the KJRA, the burden of proving the invalidity of the agency action is on the party asserting invalidity. *Id.;* 276 Kan. at 245; K.S.A. 77-621(a)(1). The KJRA articulates eight circumstances in which a court may grant relief. *Fort Hays State University v. Fort Hays State University Chapter, et al.,* 290 Kan. 446, 456. 228 P. 3d 403 (2010)(citing K.S.A. 2009 Supp. 77-621(c)). The provision most applicable to the threshold issue on appeal in this case is whether the agency erroneously interpreted or applied the law.

To the extent resolution of the issues necessitates statutory interpretation, the appellate court's review is unlimited. *Schmidtlien Electric, Inc. v. Greathouse,* 278 Kan. 810, 819, 104 P. 3d. 378 (2005). Special rules apply, however, when considering whether an administrative agency erroneously interpreted or applied the law. *Id.* The interpretation of a statute by an administrative agency charged with the responsibility of enforcing that statute is entitled to judicial deference. *Id.* This deference is sometimes called the doctrine of operative construction. If there is a rational basis for the agency's

interpretation, it should be upheld on judicial review. *Id.* However, the determination of an administrative body as to questions of law is not conclusive and, while persuasive, is not binding on the courts. *Id.*

Deference to an agency's interpretation is especially appropriate when the agency is one of special competence and experience. *Id.* However, the final construction of a statute always rests with the courts. *Id.*

The KDOL is an agency of special competence and experience. See *Coma Corporation d/b/a/ Burrito Express, et al. v. Kansas Department of Labor, et al.*, 283 Kan. 625, 629, 154 P. 3d 1080 (2007). Accordingly, the doctrine of operative construction applies to its interpretation of the PNA. *Id.*

Legal Analysis

1. The penalty provision of the Board's key return policy does not come within the purview of the statutory topic of "Salary and Wages."

The PNA, K.S.A. 72-5413 *et seq.*, was enacted by the Kansas Legislature in 1970. Kansas Session Laws, 190, Ch. 284, § 1. The statute's "underlying purpose . . . is to encourage good relationships between a board of education and its professional employees." *Liberal-NEA v. Board of Education*, 211 Kan. 219, 232 (1973). To promote these ends, the statute authorizes that a school district's professional employees may form and join professional employee organizations in order to conduct negotiations with their employer school boards. Such negotiations are conducted "for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service." K.S.A. 72-5414. "Terms and conditions of professional service" is statutorily defined and includes specific subject matter. *See* K.S.A. 72-5413(l).

K.S.A. 72-5413(l) of the PNA contains the express list of mandatorily negotiable terms and conditions of employment. The list of mandatorily negotiable topics includes "salaries and wages, including pay for duties under supplemental contracts." K.S.A. 72-5413(l)(1)(A).

In *U.S.D. 501 v. Secretary of Kansas Dept. of Human Resources,* 235 Kan. 968, 971, 685 P.2d 874 (1984), the Kansas Supreme Court adopted the "topic approach" as the method to be used by the KDOL and the district courts in determining whether proposals are mandatorily negotiable under K.S.A. 72-5413(l). Under this approach, a proposal does not need to be specifically listed in the statute to be considered mandatorily negotiable, but the subject matter of the proposal must be "within the purview of one of the categories listed under 'terms and conditions of professional service'" in K.S.A. 72-5413(l). 235 Kan. at 969.

The topic approach adopted by the Court in *U.S.D. 501,* was first suggested in *Chee-Craw Teachers Ass'n v. U.S.D. 247,* 225 Kan. 561, 593 P.2d 406 (1979). The Court in *U.S.D. 501* noted *Chee-Craw* established certain guidelines to be followed by the Court in determining whether a particular item is mandatorily negotiable. In discussing the application of the topic approach, the *Chee-Craw* Court stated:

> Further, the district court may, where appropriate, conclude that a proposal which literally comes within a statutorily negotiable item is not included within the item because it goes beyond what was intended by the legislature to be included with the item. An example of this would be a proposal to require the Board to pay all teachers' wages in a lump sum to the Association and the Association would pay the teachers. This is technically a 'wages' item, but goes far beyond what is intended for the item.

Id. at 568.

In *NEA-Topeka v. U.S.D. 501, Topeka, Kansas,* 72-CAE-6-1982, the Secretary of the Department of Human Resources (now the KDOL) was presented with a complaint by the National Education Association of Topeka ("NEA-Topeka") alleging, among other things, that U.S.D. 501 committed a prohibited practice by failing to negotiate with NEA-Topeka regarding the safety of district facilities. In determining that building safety was not a mandatorily negotiable item, the Secretary's designee stated:

> 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.
>
> ...[T]he Secretary finds nothing with K.S.A. 72-5413(l) to require an employer to negotiate [regarding the safety of District facilities].
>
> The subject of physical facilities is at best permissively negotiable and the district was within its rights to refuse to negotiate the subject.

NEA-Topeka v. U.S.D. 501, Topeka, Kansas, 72-CAE-6-1982, p. 12.

The OEA alleges that because a provision in the Board's Key Policy requires employees who lose building keys to reimburse the Board, the policy is within the purview of "salary and wages." This broad interpretation of "within the purview" goes well beyond what the legislature intended when it identified "salary and wages" as a mandatory topic of negotiations and is unreasonable.

The reasoning by the Court in *Chee-Craw* illustrates the point that there are limits to the applicability of the topic approach. "Access to District facilities," "access to keys to District facilities," and "safety and security of District staff, students and property" are

the "topics" or subject matter addressed by the Key Policy. To infer that the payment of a replacement fee for lost keys somehow equates to salary and wages goes far beyond what was intended by the legislature in providing a list of mandatorily negotiable topics.

In reviewing K.S.A 72-5413(l)(1), the definition of "terms and conditions of professional service" does not include any reference to "access to District facilities," "access to keys to District facilities" or "safety and security of District staff, students and property." Moreover, there do not appear to be any Kansas state or federal court cases interpreting any of the topics listed within the definition of "terms and conditions of professional service" to include access to District facilities or keys to District facilities or security of District facilities. Whether an employee chooses to request a District building key is purely optional, it is not a compulsory term of employment. Thus, under any approach, including the topic approach, the Key Policy is not a term or condition of professional service subject to mandatory negotiation.

K.S.A. 72-5413(l)(1)(A) includes "salaries and wages" in the definition of "terms and conditions of professional service." The OEA erroneously argues that the Key Policy falls within the "topic" of "salaries and wages" because the Policy imposes a replacement fee if employees lose their keys. The OEA's theory is that a replacement fee affects teachers' "salaries and wages" and thus is within the purview of one of the topics listed under "terms and conditions of professional service." Again, no Kansas court, state or federal, has stretched the topic of "salaries and wages" to include something akin to the Key Policy. Further, no Kansas court, state or federal, has ever held some action or proposal to be mandatorily negotiable under the purview or topic of "salaries and wages" simply because the proposed action imposed a replacement fee.

The Board of Education's purpose in adopting the Key Policy was to protect the safety and security of students and staff. A finding that the Key Replacement Policy is a mandatory topic of negotiation would have the effect of undermining the Board's ability to enact policies for safety and security, topics that clearly fall outside those listed as mandatory topics in K.S.A. 72-5413(l). As determined in *NEA-Topeka v. U.S.D. 501, Topeka, Kansas,* a policy intended to protect the safety and security of students and staff is not mandatorily negotiable under the PNA.

Under applicable Kansas law, the Key Policy is not a mandatorily negotiable topic under the PNA. The Petitioner has failed to meet its burden under the KJRA. Therefore, the appellate court must uphold the agency's determination.

2. Kansas Wage Payment Act

The OEA's arguments concerning the Kansas Wage Payment Act ("KWPA") fail. First, the OEA failed to preserve this issue for appeal. Even had the OEA properly preserved this issue for appeal, the OEA's arguments are misplaced because the KWPA does not apply to the Key Policy.

a. The OEA failed to preserve for appellate review its KWPA arguments.

The OEA's arguments first fail because the OEA failed to raise the KWPA in either its Complaint or its prehearing questionnaire with the KDOL. Therefore, the issue has not been properly preserved for appellate review.

While no specific Kansas statute, rule or regulation addresses the role of administrative complaints and prehearing questionnaires for appellate review, the prehearing questionnaire in the administrative hearing is clearly analogous to the pre-trial order in a civil district court proceeding. With respect to pre-trial orders, Kansas courts

have held that issues not raised in a pre-trial order are deemed waived. *Dold v. Sherow,* 220 Kan. 350, 353 (1976). The purpose for such a rule is to alleviate surprise, and to allow the parties to prepare for only those items that are at issue in a case. See *State ex rel. Robert T. Stephan v. GAF Corporation, et al.,* 242 Kan. 152, 161, 747 P. 2d 1326 (1987)(relying upon *Dold* to determine that an issue not raised in the pretrial order is not properly preserved for appellate review).

On April 19, 2010, the OEA filed its Complaint with the KDOL. (R. II, 1) In its Complaint, the OEA alleged that the Board of Education violated the PNA, but made no mention of any purported violation of the KWPA. (Id.)

On or about June 23, 2010, the OEA filed its prehearing questionnaire. (R. II, 20) As with its Complaint, OEA made no mention of any purported violation of the KWPA. In fact, under the heading "Issues," the OEA stated that the only issue involved in this case was "[w]hether the Board of Education of Unified School District No. 290, Ottawa, Kansas committed a prohibited practice in violation of K.S.A. 72-5430(b)(5) by making a unilateral change in the mandatorily negotiable topic of "salary and wages" when it unilaterally instituted the new key policy which requires teachers to pay for lost or stolen keys." (R. II, 126).[1] The first time the OEA mentioned a purported violation of the KWPA by the Board of Eduction was when the OEA filed its brief with the KDOL (which was filed simultaneously with the Respondent's brief).

An issue or claim for relief that is not contained in the pretrial order should not be entertained by the trial court, and is therefore, also not properly preserved for review by

[1] This page is out of numerical sequence in the record on appeal because it was inadvertently omitted from the initial KDOL Agency Record, but was subsequently added by the KDOL when the error was discovered.

the appellate court. See *State ex rel. Robert T. Stephan v. GAF Corporation, et al.*, 242 Kan. at 161. Similarly, issues or theories not raised in a prehearing questionnaire in an agency action should be deemed waived and not properly preserved for appellate review.

b. Even if the KWPA arguments were properly preserved for appellate review, the KWPA does not apply to the issues raised in OEA's Complaint.

Even if the OEA had properly preserved its KWPA arguments for appellate review, it cannot show that the KWPA applies to the issues in this case. In its brief, the OEA erroneously argues that enforcement of the Key Policy would violate the KWPA and the rules and regulations adopted to enforce it. Specifically, the OEA argues that the District's Key Policy violates K.A.R. 49-20-1(a)(2), which states:

> 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 OEA's argument is misguided for a number of reasons.

First, the Key Policy is not properly considered a "deduction" under the KWPA. The District's Key Policy does not impose or implement a direct withdrawal from an employee's paycheck. Instead, the Key Policy simply assesses a replacement fee for lost or stolen keys. This fee is used to not only replace the key, but also to re-key District facilities (as needed). If a staff member loses a key, the School District does not automatically withdraw the replacement fee from the employee's paycheck. Rather, the

employee must separately pay the School District whatever fees are incurred for replacing the key and re-keying any facilities (up to $500).

Second, even if the payment of a fee for replacing keys and re-keying facilities can be deemed a "deduction" from a teacher's salary, the regulations do not support the OEA's argument that the key policy constitutes a deduction for "losses to employers resulting from burglaries, robberies, or alleged negligent acts." Clearly, the intent of the regulation is to prevent employers from shifting to their employees, costs associated with intentional or negligent conduct by third parties. The fee provisions of the District's Key Policy, on the other hand, are geared towards encouraging more conscientious use of School District property (i.e., keys) by employees.

While a tangential benefit of the Key Policy may in part promote protection of District property from third parties, the replacement fee component of the Policy, which is at issue here, is not specifically intended to reimburse the District for the intentional or negligent acts of third parties. The OEA's interpretation and application of the KWPA to the Key Policy is misplaced.

The Key Policy does not implicate the KWPA. The OEA's arguments concerning the KWPA first fail because it did not properly preserve the issue for appeal. The argument also fails on the merits.

B. The Board of Education Did Not Commit a Prohibited Practice In Violation of K.S.A. 72-5430(b)(5) When It Did Not Negotiate the Monetary Penalty Portion Of Its Key Policy.

The OEA incorrectly argues that because the Key Policy is mandatorily negotiable, the Board of Education committed a prohibited practice when it adopted the Key Policy without first engaging in negotiations with the OEA. However, the OEA's

arguments fail because, as established above, the Key Policy is not mandatorily negotiable. Therefore, the determination of the KDOL, as affirmed by the district court, must be upheld.

Standard of Appellate Review

Judicial review concerning an agency decision on a prohibited practice complaint is governed by the KJRA. *Pittsburg State University/Kansas Education Association v. Kansas Board of Regents/Pittsburg State University, et al.,* 280 Kan. 408, 413, 122 P. 3d 336 (2005). Appellate review is statutorily defined by the KJRA. See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger,* 276 Kan. 232, 245, 75 P.3d 226 (2003). The appellate court exercises the same statutorily limited review of the KDOL's action as does the district court, *i.e.,* "as though the appeal had been made directly to this court." 276 Kan. at 245.

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Deference to an agency's interpretation is especially appropriate when the agency is one of special competence and experience. *Id.* However, the final construction of a statute always rests with the courts. *Id.*

The KDOL is an agency of special competence and experience. See *Coma Corporation d/b/a/ Burrito Express, et al. v. Kansas Department of Labor, et al.,* 283 Kan. 625, 629, 154 P. 3d 1080 (2007). Accordingly, the doctrine of operative construction applies to its interpretation of the Professional Negotiations Act ("PNA"). *Id.*

Legal Analysis

The KDOL correctly determined that because the Key Policy was not mandatorily negotiable under the PNA, the Board of Education did not commit a prohibited practice when it implemented the Key Policy without first engaging in negotiations with the OEA. The OEA has failed to satisfy its burden to prove the invalidity of the agency's determination. Therefore, the decision must be upheld.

1. Respondent did not commit a prohibited practice under the PNA.

As correctly stated by the OEA in its brief, "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 representative." (Appellant's Brief, pg. 13)(emphasis added) The OEA further acknowledged in its brief 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 service." (Appellant's Brief, pg. 14) However, the OEA erroneously argues that the agency incorrectly concluded that the monetary penalty under the Board's Key Policy was not mandatorily negotiable, [and therefore], concluded incorrectly that the Board had not committed a prohibited practice. . . ."

For all of the reasons stated above, the Key Policy was not mandatorily negotiable under the PNA. Therefore, the Board of Education's implementation of the Key Policy absent negotiations was not a prohibited practice under K.S.A. 72-5430(b)(5).

2. K.S.A. 72-8205 confirms that Respondent did not commit a prohibited practice.

While Respondent does not assert that the authority granted to the Board of Education by K.S.A. 72-8205 trumps or preempts the PNA, it does argue that this statutory authority is further proof that the Key Policy is not mandatorily negotiable. Kansas law specifically gives the Board of Education the power and right to adopt the Key Policy at issue in this case.

Pursuant to K.S.A. 72-8205(c), "[t]he board shall have authority...to adopt rules and regulations for teaching in the school district and general government thereof...." Further, K.S.A. 72-8205(e)(1) states, "[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." The Key Policy at issue was adopted, in part, pursuant to this express authority.

In addition, K.S.A. 72-1033, which deals with control of school property, states in relevant part:

> The school board shall have control of the school-district property, including the school building or buildings, school grounds and all buildings and structures erected thereon, all furniture, fittings, and equipment, such as books, maps, charts, and instructional apparatus....

See K.S.A. 72-1033.

Clearly, by the plain language of these statutes, the Kansas legislature vested local school boards with the right and power to control district property and facilities. Equally clear is that in order to fulfill this mandate from the legislature, the Board of Education had the right to adopt a Key Policy, which not only protects the health, safety, and welfare of District students and staff, but also protects school property.

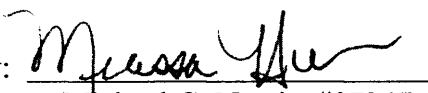
Under Kansas law, the Key Policy is not mandatorily negotiable, and the Board of Education did not commit a prohibited practice by adopting the Policy. The OEA has failed to meet its burden under the KJRA to prove that KDOL's determination is invalid.

IV. CONCLUSION

The Key Policy is not mandatorily negotiable under the PNA. Therefore, the Board of Education did not commit a prohibited practice when it adopted the Key Policy. In fact, Kansas law specifically authorizes the Board of Education to adopt policies that promote safety and security such as the Key Policy at issue. The OEA has not met its burden of proof under the KJRA, and therefore, the underlying agency determination, as affirmed by the district court, must be upheld.

Respectfully submitted,

NORRIS & KEPLINGER, L.L.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing BRIEF OF RESPONDENT/APPELLEE were placed in the United States mail, postage prepaid, this 8TH day of April, 2013, addressed to:

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