

**BEFORE THE SECRETARY OF THE DEPARTMENT OF LABOR  
OF THE STATE OF KANSAS**

National Education Association )  
of Shawnee Mission, )  
 )  
Petitioner, )  
v. )  
 )  
Unified School District No. 512, )  
Shawnee Mission, Johnson County, Kansas, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. 72-CAE-4-2020

**DETERMINATION AND FINAL ORDER OF THE SECRETARY**

NOW ON this 14th day of February, 2020, the above-captioned matter comes on for decision pursuant to the Kansas Professional Negotiations Act, K.S.A. 72-2218 *et seq.*, before Justin Whitten, Designee of the Secretary of the Kansas Department of Labor, pursuant to K.S.A. 72-2236(b) and K.S.A. 72-2218(m).

**APPEARANCES**

The Petitioner appeared through counsel, Marjorie A. Blaufuss, General Counsel, Kansas National Education Association. Respondent appeared through counsel, Gregory P. Goheen, Attorney at Law, McAnany, Van Cleave & Phillips, P.A.

**ISSUE**

At issue is whether Respondent is committing a prohibited practice under the Kansas Professional Negotiations Act, K.S.A. 72-2218 *et seq.*, (hereinafter "PNA" or the "Act"), by seeking to unilaterally impose a contract covering terms and conditions of professional service for school years 2019-2020, 2020-2021, and 2021-2022 on Petitioner. The material facts

necessary for the Secretary of Labor to determine whether a prohibited practice has been or is being committed under the Act are not in dispute.<sup>1</sup> The parties have agreed this matter is a question of law for the Secretary to determine at this stage, and they have waived their right to hearing on the matter under K.S.A. 72-2236(a) and K.S.A. 77-536.

For the reasons set forth below, the Secretary finds Respondent is committing a prohibited practice under the PNA because its attempt *at this point* to unilaterally impose a contract covering terms and conditions of professional service for school years 2020-2021 and 2021-2022 on Petitioner evidences Respondent's intent to not negotiate the terms and conditions of professional service for those years. Petitioner's complaint does not allege that the unilateral imposition of contract terms covering the school year 2019-2020 is a prohibited practice. Accordingly, the Secretary's Order is limited to ordering Respondent to cease and desist from imposing terms and conditions of professional service of its proposed unilateral contract on Petitioner for school years 2020-2021 and 2021-2022.

### **BACKGROUND**

Respondent is a unified school district and governmental subdivision of the State of Kansas, subject to the Professional Negotiations Act, K.S.A. 72-2218 *et seq.*<sup>2</sup> Petitioner is the recognized bargaining representative for teachers and other non-administrative professional employees as defined by the bargaining agreement, such as registered nurses, therapists, speech

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<sup>1</sup> During the February 7, 2020 conference call between legal counsel for the parties and the department's labor relations staff, the parties conceded that this dispute over a question of law was susceptible of resolution following the submission of written legal arguments that would be completed on February 10, 2020. *See also*, Respondent's Response to Complaint Against Employer, Case No. 72-CAE-4-2020, February 3, 2020, p. 3, fn. 4 (noting that "except as otherwise set forth in this Response, [Respondent] does not contest NEA-SM's generalized factual statements as contained in [its Complaint Against Employer], pp. 1-2 ¶¶ 2.a-h.").

<sup>2</sup> Unless otherwise noted, these findings of fact are drawn from the extensive Fact Finding Report issued January 15, 2020 by Fact Finder Henry R. Cox in the impasse proceedings between these parties. *See* Respondent's Response to Complaint Against Employer, Case No. 72-CAE-4-2020, February 3, 2020, Exhibit F.

pathologists, occupational therapists, counselors, librarians, social workers and resource teachers. The last bargaining agreement between the parties expired on June 30, 2019. The parties timely exchanged Notices of Intent to Negotiate on March 29, 2019, in accordance with K.S.A. 72-2228. The parties met in negotiations sessions, May 22nd, May 29-30th, June 24th, and July 16th, 2019. Thereafter, the parties engaged in numerous attempts to resolve their disputes concerning the bargaining agreement, including mediation and appointment of a fact-finder. The details of these efforts are well-known to the parties.

After the parties failed to agree upon a new bargaining agreement on January 30, 2020, Respondent adopted a resolution approving a single unilateral agreement for professional employees covering a three-year time period. See Respondent's Response to Complaint Against Employer, 72-CAE-4-2020, February 3, 2020, Exhibit A. The unilateral agreement issued by Respondent on January 30, 2020, purports to establish terms and conditions of professional service for the parties for the entire time period from July 1, 2019, through June 30, 2022.

Petitioner filed a prohibited practice complaint against Respondent on January 31, 2020, pursuant to K.S.A. 72-2235. Petitioner's complaint alleges that Respondent's January 30, 2020, issuance of unilateral contract covering not only school year 2019-2020, but also school years 2020-2021 and 2021-2022 following unsuccessful contract negotiations constitutes a prohibited practice in violation of K.S.A. 72-2235(b)(1) and (b)(5). Petitioner's prohibited practice charge sought treatment of this matter as an emergency pursuant to K.S.A. 72-2236(a) in order "to give professional employees the information needed to make an informed decision regarding their working conditions for the next three [years'] options." Respondent received a copy of Petitioner's Prohibited Practice Complaint concurrent, or nearly so, with its filing and filed an Answer to the Complaint on the following business day, February 3, 2020. Petitioner filed its

reply to Respondent's response on February 6, and following February 7 discussions between the parties and labor relations staff of the Department of Labor, Respondent filed a sur-reply on February 10.

### **PARTIES' ARGUMENTS**

Petitioner's January 31, 2020, prohibited practice charge alleges at page 2 that "[o]n January 30, 2020, [Respondent] issued unilateral contracts for the 2019-2020, 2020-2021 and 2021-2022 school years." Respondent counters that it "adopted a single Unilateral agreement . . . covering a 3-year time period," Respondent's Response to Complaint Against Employer, p. 2 (emphasis in original), and that because the parties had, at times,<sup>3</sup> negotiated toward a three-year agreement, Respondent cannot be found to have willfully committed a prohibited practice when it unilaterally imposed a contract establishing terms and conditions of professional service extending beyond the school year for which it has completed the mandatory statutory impasse procedures. *Id.* The parties' further arguments will be incorporated, where necessary, in the conclusions of law that follow.

### **CONCLUSIONS OF LAW/DISCUSSION**

Kansas' Professional Negotiations Act, K.S.A. 72-2218 *et seq.*, was enacted by the Kansas Legislature with an "underlying purpose . . . 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 "[p]rofessional employees shall have the right to form, join or assist professional employees'

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<sup>3</sup> *See, e.g.*, Respondent's Response to Complaint Against Employer, February 3, 2020, Exhibit F, pp. 12-13 (Fact Finding Report noted that "NEA-SM proposed a three-year contract . . . [while] USD 512 proposed a two-year contract . . ."); Respondent's Response to Complaint Against Employer, 72-CAE-4-2020, February 3, 2020, pp. 4-5 (noting that Respondent began negotiations for school year 2019-2020 seeking a 1 year agreement and countered Petitioner's 3-year proposal with a proposal for a two-year agreement).

organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service.” K.S.A. 72-2219.

Under Kansas law, once a representative is designated or selected for the purposes of professional negotiation by the majority of the professional employees in an appropriate negotiating unit, such representative shall be the exclusive representative of all the professional employees in the unit for participating in professional negotiation with boards of education regarding terms and conditions of professional service. K.S.A. 72-2220(a). Kansas law further mandates that “when such an organization is recognized, the board of education and the professional employees’ organization shall enter into professional negotiations on request of either party at any time during the school year prior to issuance or renewal of the annual teachers’ contracts.” K.S.A. 72-2228(a). To initiate professional negotiations, “[n]otices to negotiate on new items or to amend an existing contract must be filed on or before March 31 in any school year by either party, such notices shall be in writing and delivered to the chief administrative officer of the board of education or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired.” *Id.*

Respondent argued it could impose the three-year contract in the public interest, after negotiations failed, pursuant to K.S.A. 72-2233(f), which provides that the “board of education shall take such action as it deems in the public interest, including the interest of the professional employees involved,” when there is no resolution or agreement reached. “Such action” however, must be consistent with the other provisions of the PNA, including K.S.A. 72-2228(a), providing for yearly contract negotiations pursuant to “[n]otices to negotiate on new items or to amend an

existing contract . . . filed on or before March 31 in any school year by either party.” To the extent statutes are in conflict, the more specific statute governs. See *In re mental Health Ass’n of Heartland*, 289 Kan. 1209, 1215, 221 P.3d 580 (2009). Absent agreement, the Secretary finds K.S.A. 72-2228(a) controls in this instance; Respondent may not unilaterally impose a three-year contract in the “public interest.”<sup>4</sup>

The Professional Negotiations Act deems it a prohibited practice for a board of education willfully to refuse to negotiate in good faith with representatives of a recognized professional employees’ organization. K.S.A. 72-2235(b)(5). The Secretary notes that the term “willfully” as used in the Act is not defined and to the Secretary’s knowledge, there is no Kansas case law defining the term as it is used in the Act. However, there are numerous administrative decisions under the Act’s public sector labor relations counterpart, the Public Employer-Employee Relations Act (PEERA), K.S.A. 75-4321 *et seq.*, construing the term “willfully” as it is used in PEERA’s nearly identical prohibited practice provisions. In the final agency action taken by the Kansas Public Employee Relations Board in prohibited practice case no. 75-CAE-8-2013, *Fraternal Order of Police, Lodge No. 37 v. University of Kansas Medical Center*,<sup>5</sup> the Kansas PERB concluded “that ‘willfully’ is to be construed in accordance with the ordinary meanings

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<sup>4</sup> Other jurisdictions confronted with this scenario under their public sector labor relations counterparts have reached the same conclusion. See, e.g., *Dickinson Education Association v. Dickinson Public School District*, 499 N.W.2d 120, 125-126 (N.D. 1993) (concluding that when school district unilaterally issues contracts after failure to reach a bargained agreement, that unilateral contract “is limited to contractual provisions for the school year which is the subject of negotiations and no others.”); *Dickinson Education Association v. Dickinson Public School District*, 849 N.W.2d 615, Syl. ¶ 4, (N.D. 2014) (under facts analogous to those present in the instant controversy, North Dakota Supreme Court affirmed trial court’s decision that the parties’ attempt to negotiate a two-year agreement during the negotiation process and throughout the [fact finding] process does not allow the school district to unilaterally issue contracts for two school years, holding that “[a]fter an education fact-finding commission makes public its findings and good-faith negotiations remain at an impasse, a school district may unilaterally issue a last-offer contract, but the last-offer contract is limited to contractual provisions for only the one school year under negotiation and may not contain provisions applicable to a future school year, so as to preserve a representative organization’s ability to negotiate in future years.”)

<sup>5</sup> [https://www.dol.ks.gov/docs/default-source/labor-relations-documents/db\\_add1/75-cae-8-20134c36e52e01dd6d5aaffeff00009f456b.pdf?sfvrsn=d9eb881f\\_4](https://www.dol.ks.gov/docs/default-source/labor-relations-documents/db_add1/75-cae-8-20134c36e52e01dd6d5aaffeff00009f456b.pdf?sfvrsn=d9eb881f_4)

which the term is commonly understood to represent, i.e., that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, that it was undertaken in an unreasonably obstinate manner or with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent.” See Order of the Public Employee Relations Board Setting Aside the Hearing Officer’s Initial Order Dismissing Petitioner’s Consolidated Prohibited Practice Complaints and Granting Petitioner’s Motion for Summary Judgment, *Fraternal Order of Police, Lodge No. 37 v. University of Kansas Medical Center*, Case No. 75-CAE-8-2013, November 7, 2019, p. 38. Given the similarity of purpose and language between the Professional Negotiations Act and the Public Employer-Employee Relations Act generally, and specifically regarding prohibited practices, the Secretary herein adopts the reasoning of the PERB in the aforementioned determination for application under the PNA. *Id.*, pp. 28-39.

Commentary made by members of the Respondent evidence that one of the underlying reasons in imposing the unilateral contract covering three successive years was to foreclose subsequent contract negotiations:

“The other reason I voted for the 3-year contract is because we already lost a year when we should have and could have been focused on students. . . . We have wasted precious time and energy on ongoing negotiations. . . . It’s time to get our focus back on our students.”

“My hope is that when the dust settles and the contract is read and understood, we as a school district community can begin to heal by...focusing on the priorities outlined for us in the community’s strategic plan for our school district.” See Petitioner’s Reply to Respondents Response to the Complaint, 72-CAE-4-2020, February 6, 2020, p. 7-8.

Missing is any explanation as to why successful execution of the “strategic plan” cannot include subsequent annual contract negotiations.

The comments of the school board members show they considered the contract negotiations an impediment to more important efforts. Accordingly, the Secretary finds Respondent's attempt to unilaterally impose the three-year contract was a deliberate attempt to remove the perceived impediment of subsequent annual contract negotiations. It was, therefore, an act done intentionally—that is, willfully to: 1) interfere with, restrain, or coerce professional employees in the exercise of rights granted in K.S.A. 72-2219, which is a prohibited practice under K.S.A. 72-2235(b)(1); and 2) refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-2228 over terms and conditions of professional service for school years 2020-2021 and 2021-2022, which is a prohibited practice under K.S.A. 72-2235(b)(5).

**IT IS THEREFORE DETERMINED** that Respondent is committing a prohibited practice under the PNA by attempting to unilaterally impose a contract covering terms and conditions of professional service for school years 2020-2021 and 2021-2022.

Under K.S.A. 72-2236(b), when the Secretary has determined that a prohibited practice has been or is being committed, the Secretary shall enter a final order granting or denying in whole or in part the relief sought.

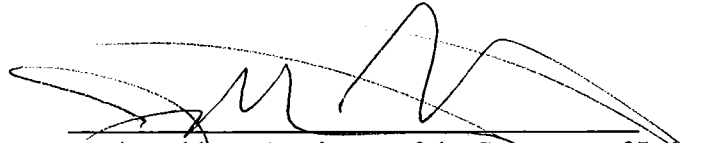
**IT IS THEREFORE ORDERED** that Respondent cease and desist from imposing terms and conditions of professional service of its proposed unilateral contract on Petitioner for school years 2020-2021 and 2021-2022.

**IT IS FURTHER ORDERED** that this Determination and Final Order of the Secretary be posted for not less than thirty days in customary posting areas for Respondent's professional employees in such school district buildings in which said employees work.

**IT IS SO ORDERED.**



DATED, this fourteenth day of February, 2020.



Justin Whitten, Designee of the Secretary of Labor  
Kansas Department of Labor  
401 SW Topeka Blvd.  
Topeka, Kansas 66603

**NOTICE OF RIGHT TO REVIEW**

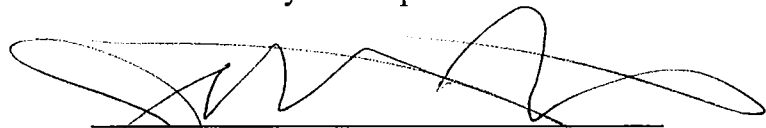
Pursuant to K.S.A. 72-2236(b), this Determination and Final Order of the Secretary is subject to review and enforcement in accordance with the Kansas judicial review act. To obtain district court review of the agency's decision in this case, an aggrieved party must file a petition for judicial review with the clerk of the appropriate district court within 30 days after service of this Notice. *See* K.S.A. 77-601 *et seq.* You must also serve a copy of your petition for judicial review on the Kansas Department of Labor. The officer to receive service of a copy of your petition for judicial review on behalf of the agency is: Eunice Peters, Deputy Chief Counsel, 401 SW Topeka Blvd., Topeka, KS 66603.

**CERTIFICATE OF SERVICE**

I, Justin Whitten, Office of Legal Services, Kansas Department of Labor, hereby certify that on the 14th day of February, 2020, a true and correct copy of the above and foregoing Determination and Final Order of the Secretary was served electronically to the following:

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