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

REPLY BRIEF OF APPELLANT

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

David M. Schauner S.Ct. No. 8989
Kansas National Education Association
715 SW 10th Street
Topeka, Kansas 66612
Phone: (785) 232-8271
Fax: (785) 290-0375
Attorney for Appellant Ottawa Education Association

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THE SECRETARY CANNOT REFUSE TO FOLLOW THE TOPIC APPROACH

For the first time in its Brief to the Court, the Kansas Department of Labor explicitly announced its intent not to be bound by the Court's "topic approach" for determining negotiability under the Professional Negotiations Act (PNA). (Brief of Appellee, Secretary of the Kansas Department of Labor, p. 5)

Instead, the Secretary has reinterpreted the PNA to conclude that the legislature intended only those items specifically listed among the "terms and conditions of professional service" in K.S.A. 72-5413(*l*) to be mandatorily negotiable:

> "There is no support for a construction of K.S.A. 72-5413(l) holding the legislature intended all subjects *within the purview* of terms and conditions of professional service to be mandatorily negotiable." (Brief of Appellee, Secretary of the Kansas Department of Labor, p. 5) (emphasis in the original)

Because the Secretary's decision to reject the "topic approach" is directly contrary to the holding of the Supreme Court in its decision in *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 685 P.2d 874 (1984), and because application of the "topic approach" to the penalty provision of the Key Policy at issue in this case requires reversal of the Order of the Department of Labor, the Court should reverse the Department of Labor and district court's decision in this case.

Statutory Interpretation Does Not Support the Department of Labor's New Position

The Secretary employs statutory interpretation to conclude that the Supreme Court, the lower courts, and the Department of Labor have gotten it wrong for nearly 30 years, and that the

legislature intended all along that only the topics specifically enumerated in K.S.A. 72-5413(*l*) were to be mandatorily negotiable:

> "Simply put, it is impossible to discern a legislative intent that the subjects of mandatory negotiation under K.S.A. 72-5413(l) extend beyond those specifically enumerated in the definition of terms and conditions of professional service. See, *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of KNEA*, 233 Kan. 801, 667 P. 2d 306 (1983) (Schroeder, C.J. dissenting)."

(Brief of Appellee, Secretary of the Kansas Department of Labor, p. 5)

But the Secretary's brand new reinterpretation of the PNA directly contradicts the findings of the Supreme Court in *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 685 P.2d 874 (1984). In its *U.S.D. No. 501* decision, the Court reviewed the history of the PNA, and the concept of negotiability thereunder, and concluded that the "topic approach" for determining whether non-statutory topics were mandatorily negotiable under the PNA "is in accord with the intent of the Kansas legislature." *U.S.D. No. 501*, at 970 (emphasis added).

Perhaps the Secretary's reliance on the dissent in *Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of KNEA*, 233 Kan. 801, 667 P. 2d 306 (1983) has led her astray. *Pittsburg State* is wholly inapplicable here. First, *Pittsburg State* was decided pursuant to Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.*, not the Professional Negotiations Act. As the Court in *Pittsburg State* itself cautioned,

> "There is nothing to indicate that the legislature intended its actions with regard to the PN Act to have controlling significance in interpreting the PEER Act or vice versa." *Pittsburg State*, 233 Kan. at 818 (emphasis added).

Both a panel of this court and the Supreme Court have recently reiterated this:

> "as the Court of Appeals noted in this case, this court has cautioned that there is no indication the legislature intended the PNA to have controlling significance with regard to PEERA or vice versa. *Kansas Bd. of Regents v. Pittsburg State*

> *Univ. Chap. of K-NEA*, 233 Kan. 801, 818, 667 P.2d 306 (1983); *Ft. Hays*, 40 Kan. App. 2d at 731."

Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs, 290 Kan. 446, 469, 228 P.3d 403 (2010).

Moreover, the Secretary does not cite the Court's opinion in *Pittsburg State*; the Secretary instead cites a dissenting opinion. By definition, the conclusions in a dissenting opinion cannot be a correct statement of the law.

The Secretary, again citing the dissenting opinions in *Pittsburg State*, speculates that the reason the Court reached its decision in *U.S.D. No. 501* is because the Court abdicated it role in statutory interpretation and deferred to the Secretary's, apparently incorrect, interpretation of the PNA at the time. (Brief of Appellee, Secretary of the Kansas Department of Labor, p. 8) The Secretary further speculates that under the current system whereby little or no deference is given to the Department of Labor's interpretation of the PNA, the Court would reach the result that the Secretary proposes. *Id.* A close look at the Court's U.S.D. No. 501 decision shows that this speculation is false.

First, unlike in *Pittsburg State*, the Court nowhere references deference to the Secretary's interpretation of the PNA. To the contrary, the Court noted that both the Secretary and the district court "properly followed" the topic approach in resolving the issues of negotiability in *U.S.D. No. 501*. *U.S.D. No. 501*, at 971. This is language of approval, not of deference. Similarly approving is the Court's statement,

> "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 and the district courts in determining whether certain items are mandatorily negotiable under K.S.A. 72-5413(*l*)." *Id.* (emphasis added).

Furthermore, while the Secretary relies on the dissents in *Pittsburg State*, consideration the dissent in *U.S.D. No. 501* is more enlightening. In *Pittsburg State*, both Chief Justice Schroeder and Justice McFarland dissented from the Court's opinion. In *U.S.D. No. 501*, Justice McFarland joined the Court's opinion. In fact, as Court points out there, the "topic approach" was suggested in an opinion by Justice McFarland in *Chee-Craw Teachers Ass'n v. U.S.D. No. 247*, 225 Kan. 561, 593 P.2d 406 (1979). *Id.*

Although Chief Justice Schroeder dissented from the Court's decision in *U.S.D. No. 501* as he had in *Pittsburg State* under PEERA, he did not dissent from the Court's adoption of the topic approach for use under the PNA, nor did he dissent from application of the topic approach to find that the non-statutory topic "access to employee files" to be mandatorily negotiable. *U.S.D. No. 501*, at Syl. ¶¶ 1, 3, and p. 976. The Secretary inappropriately relies on dissenting opinions interpreting a completely different statutory scheme to interpret the PNA.

The Secretary states that the *U.S.D. No. 501* case presented an issue of first impression for the Supreme Court. (Brief of Appellee, Secretary of the Kansas Department of Labor, p. 7) The Court's own review of the history of the PNA in *U.S.D. No. 501* shows this is false. The Supreme Court has always taken the lead in interpreting "negotiability" under the PNA, long before the Secretary was given any authority to do so. *U.S.D. No. 501*, at 970-971. The Court has always interpreted the issue of negotiability to encompass more than just the topics enumerated in K.S.A. 72-5413(*l*), from the adoption of the "impact test" for determining negotiability in its decision in *National Education Association v. Board of Education*, 212 Kan. 741, 512 P.2d 426 (1973), to suggesting the "topic approach" and establishing guidelines to be followed by the courts in determining whether a particular item is mandatorily negotiable in the Court's opinion in *Chee-Craw* to determining the negotiability of a variety of non-statutory

topics in any number of cases. The Secretary's speculation that the Supreme Court abdicated its preeminent role interpreting the PNA in deference to the interpretation of the Secretary is patently false. The Secretary's newfound interpretation of the PNA is entitled to no deference by the Court and should be rejected. *Ft. Hays St. Univ.*, 290 Kan. at Syl. ¶ 2.

The Doctrine of *Stare Decisis*

The Secretary further justifies reinterpreting the PNA by arguing that, because the doctrine of *stare decisis* is not generally applicable to decisions of administrative tribunals, the Department is free to depart from the "topic approach" used in previous rulings of the Department:

> "nor is there any rule that an administrative agency must explain its actions in refusing to follow a ruling of a predecessor board in a different case or that it must articulate in detail why the earlier ruling is not being followed lest the Board's actions be deemed arbitrary and capricious." (Brief of Appellee, Secretary of the Kansas Department of Labor, p. 7)

The *Warburton* court cited by the Secretary held that:

> "The doctrine of *stare decisis* is not generally applicable to decisions of administrative tribunals. An administrative agency may refuse to follow its prior ruling when its action is not oppressive or it does not act arbitrarily, unreasonably or capriciously." *Warburton v. Warkentin*, 185 Kan. 468, Syl. ¶ 4, 345 P.2d 992 (1959).

More recently, however, the courts have held as follows with regard to administrative agencies:

> "Generally, administrative agencies may change positions on an issue if the new position is supported by substantial competent evidence. However, when an administrative agency deviates from a policy it had adopted earlier, it must explain the basis for the change. *Western Resources, Inc.*, 30 Kan.App.2d 348, Syl. ¶ 7, 42 P.3d 162. Likewise, the process by which an administrative agency reaches its decision must be logical and rational, especially if the agency is

> deviating from its prior standards. *Home Telephone Co. v. Kansas Corporation Comm'n,* 31 Kan.App.2d 1002, 1012, 76 P.3d 1071 (2003), *rev. denied* 277 Kan. 923 (2004)."

Kansas Industrial Consumers Group, Inc. v. State Corp. Comm'n, 36 Kan.App.2d 83, 90, 138 P.3d 338 (2006).

Regardless, the Secretary's appeal to this principle is inapplicable here. The administrative agency is not deviating from its previously-adopted policy. The "topic approach" was adopted by the Supreme Court for use by the Secretary and the district courts in determining whether proposals made during professional negotiations are mandatorily negotiable under K.S.A. 72-5413(*l*). *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources*, 235 Kan. 968, 971, 685 P.2d 874 (1984); *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137, 141, 785 P.2d 993 (1990). Since the policy is not a Department of Labor policy, the Department is not free to change a policy mandated for its use by the Court.

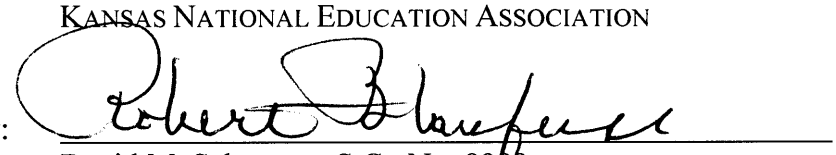
The Secretary and the district courts have used the "topic approach" for determining negotiability for nearly 30 years. The Secretary has identified no amendment to the PNA in those 30 years that justifies abandoning the "topic approach." The Secretary has presented no rational justification for reinterpreting the PNA contrary to the Court's decision in *U.S.D. No. 501*. The Secretary has acted arbitrarily, unreasonably and capriciously in reinterpreting "terms and conditions of professional service" to be the exclusive list of topics for mandatory negotiation under the PNA.

CONCLUSION

The Secretary's decision to abandon the topic approach and to reinterpret the PNA to find that the only specifically enumerated in K.S.A. 72-5413(*l*) is clearly erroneous and contrary to the mandate of the Supreme Court in its decision in *U.S.D. No. 501*.

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

By: 

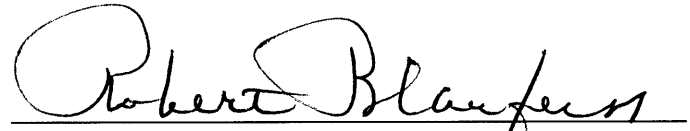
David M. Schauner S.Ct. No. 8989
Robert M. Blaufuss S.Ct. No 15199
715 SW 10th Street
Topeka, Kansas 66612
Phone: (785) 232-8271
Fax: (785) 290-0375
E-mail: david.schauner@knea.org
Attorney for Petitioner/Appellant
Ottawa Education Association

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the above and foregoing Reply BRIEF OF PETITIONER/APPELLANT OTTAWA EDUCATION ASSOCIATION was placed in the United States mail, postage prepaid, this 25 day of June, 2013, addressed to each of the following:

Michael G. Norris
Melissa Hillman
NORRIS & KEPLINGER, L.L.C.
Financial Plaza II
6800 College Boulevard, Suite 630
Overland Park, KS 66211
E-mail: mnorris@nkfirm.com
mhillman@nkfirm.com
Attorneys for Respondent/Appellee
Board of Education of U.S.D. No. 290, Franklin County, Kansas

Chief Counsel Glenn H. Griffeth
Justin L McFarland
Kansas Department of Labor
Office of Legal Services
401 SW Topeka Blvd.
Topeka, KS 66603
Justin.McFarland@dol.ks.gov
Phone: (785) 296-5000 ext. 2714
FAX: (785) 296-2749
Counsel for Respondent/Appellee
Kansas Department of Labor



Robert M. Blaufuss S.Ct. No 15199