No. 13-109308-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Ottawa Education Association
Petitioner-Appellant

vs.

Secretary of the Kansas Department of Labor

And

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

BRIEF OF APPELLEE
Secretary of the Kansas Department of Labor

APPEAL FROM THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS
HONORABLE ERIC W. GODDERZ, DISTRICT JUDGE
DISTRICT COURT CASE NO. 12-CV-136

Justin McFarland #24247
Deputy General Counsel
Special Assistant Attorney General
Kansas Dept. of Labor
401 SW Topeka Blvd.
Topeka, KS 66603
Tel: 785.438.9891
Fax: 785.296.0196
Justin.mcfarland@dol.ks.gov
Counsel for Appellee

Table of Contents

Introduction

Appellant, Ottawa Education Association ("OEA") has been denied three times so far on its contention that the appellee's the Board of Education of U.S.D. No. 290, Franklin County, Kansas ("U.S.D. 290") adoption of a Key Policy without negotiation with OEA constituted a prohibited practice within the meaning of the Public Negotiations Act ("PNA"). Now, under the provisions of the Kansas Judicial Review Act, OEA seeks yet another review of the State of Kansas Department of Labor's ("KDOL") order finding U.S.D. 290's implementation of the Key Policy without negotiating with OEA did not constitute a prohibited practice. Because OEA cannot, under the provisions of the Kansas Judicial Review Act, show that the agency erroneously interpreted or applied the PNA, the Court should follow the district court, agency head, and presiding officer to find U.S.D. 290 did not commit a prohibited practice.

Statement of Facts

KDOL concurs with OEA's statement of facts.

Statement of Issues

KDOL concurs with OEA's statement of the issues on appeal, as set forth in the Brief of Appellant, pg. 2.

Standard of Review

Under K.S.A. 77–623, an appellate court is to review a district court's review of an agency action in the same manner it would review any other decision of a district court in a civil matter. *Bd. of Educ., U.S.D. No. 352, Goodland v. NEA-Goodland*, 246 Kan. 137, 140 (1990). Further, under the Kansas Judicial Review Act, it is the petitioner's burden to show agency error. See K.S.A. 77-621(a). The Court is constrained to

reviewing the record, and can grant relief only if one of the eight factors set forth in K.S.A. 77-621(c) is present. As this case was presented on stipulated facts, the issue before the Court is whether the agency erroneously interpreted or applied the law, i.e., the PNA.

Since the death of the doctrine operative construction, an appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's or board's interpretation of the authorizing statutes. See *Fort Hays State University v. Fort Hays State University Chapter, American Association of University Professors*, 290 Kan. 446, 457 (2010).

OEA's Key Return Policy is not a term and condition of professional service as set forth in the plain language of the PNA and is therefore not mandatorily negotiable under the PNA.

The PNA at K.S.A. 72-5430(b)(5), makes it a prohibited practice for a board of education such as U.S.D. 290 to "refuse to negotiate in good faith with representatives of recognized professional employees' organizations...." If a topic is by statute made a part of the terms and conditions of professional service, then a topic is by statute made mandatorily negotiable. *Bd. of Educ., U.S.D. No. 352, Goodland,* 246 Kan. at 141 (1990)(citing *NEA–Wichita v. U.S.D. No. 259,* 234 Kan. 512, Syl. ¶ 5 (1983)). Here, the Court is tasked with determining whether the Key Policy is a "term and condition of professional service" as defined in the PNA and is therefore mandatorily negotiable. "Terms and conditions of professional service" is defined in statute at K.S.A. 72-5213(l). Accordingly, this Court's task is one of statutory interpretation.

It is the Court's primary function to interpret a statute to give it the effect intended by the legislature. *Junction City Educ. Ass'n v. Bd. of Educ., Unified Sch. Dist. No. 475,*

Geary County, 264 Kan. 212, 215-16 (1998)(citing *U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources,* 247 Kan. 519, 524 (1990)). But when interpreting a statute, an appellate court's first method of ascertaining legislative intent is through an analysis of the language employed, giving ordinary words their ordinary meaning. *State v. Marks*, 298 P.3d 1102, 1114 (2013)(citing *State v. Coman,* 294 Kan. 84, 92 (2012)). When a statute is plain and unambiguous, the Court may not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. *N. Nat. Gas Co. v. ONEOK Field Services Co.*, 296 P.3d 1106, 1115, 2013 WL 1010609 (Kan. 2013).

The statute at issue here, K.S.A. 72-5413(l) plainly states, in relevant part,

> (l)(1) "Terms and conditions of professional service" means (A) salaries and wages, including pay for duties under supplemental contracts; hours and amounts of work; vacation allowance, holiday, sick, extended, sabbatical, and other leave, and number of holidays; retirement; insurance benefits…

OEA contends that the Key Policy is within the purview of "salaries and wages" and is therefore within the definition of "terms and conditions of professional service." But, in its commonly understood meaning, salary and wages does not include a replacement fee for lost key and the presiding officer, secretary's designee, and district court all correctly held that the Key Policy did not amount to "terms and conditions of professional service."

While salary and wages are not defined in the PNA, other statutes within the authority of KDOL do define the term "wages". These statutes lead credence to the prior determinations that the Key Policy was not part of salary and wages. For example, the Kansas Wage Payment Act defines wages as "compensation for labor or services

rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis less authorized withholding and deductions." K.S.A. 44-313(c). The Kansas Employment Security Law defines wages to mean "all compensation for services, including commissions, bonuses, back pay and the cash value of all remuneration, including benefits, paid in any medium other than cash." See K.S.A. 44-703(o). Finally, the Kansas Workers Compensation Act clearly sets forth that "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered. See K.S.A. 44-511(a)(3). None of these statutes even come close to suggesting that "wages" includes reimbursement for lost keys. Instead, they all suggest that wages, as commonly understood, means compensation or payment for services—not reimbursement for lost keys.

Further, as the district court correctly noted, the Key Policy was not an attempt to recoup compensation paid to the professional employees by imposition of a penalty. U.S.D. 290 did not implement the Key Policy to try to avoid negotiation on the topic of compensation to be paid to the professional employees. Clearly, OEA's position that the Key Policy had to be negotiated because it was part of terms and conditions of professional service cannot be maintained.

The Court is not required to utilize the topic approach.

OEA suggests that a proposal does not have to be specifically listed under K.S.A. 72–5413(*l*) to be mandatorily negotiable as a term and condition of employment and all 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." *Unified Sch. Dist. No. 501 v. Sec. of Kansas Dept. of Human Resources*, 235 Kan. 968, 969

(1984). While this "topic approach" to determine whether a proposal is within the purview of K.S.A. 72-5413(l), has been affirmed as a reasonable analysis to be utilized by the agency, the Court should refrain from embracing OEA's attempt to envelope the Key Policy within terms and conditions of professional service based on an expansion of the topic approach.

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. Rather, the most reasonable construction of K.S.A. 72-5413(l) is that the legislature intended only for those items listed in the statue to be conditions of employment which are mandatorily negotiable between professional employees and school districts.

The prior decisions in this case were a correct exercise of judicial restraint in interpretation of the PNA. 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 University Chapter of Kansas-National Educ. Assn.*, 233 Kan. 801, 833-835 (1983)(Schroeder, C.J. dissenting). There is no language to suggest a legislative intent to apply a "topic" or "within the purview" approach as advanced by OEA.

The legislature's use of the word "means" followed by a list of topics demonstrates a clear intent for the list to be exhaustive, not illustrative. Had the legislature intended the list of topics to be illustrative, it could have used language "includes, but not limited to." *Id.* Or, the legislature could have left "terms and conditions

of professional service" undefined. But it didn't. Instead, the legislature used the word "means" which is indicative of an exhaustive list. Further, the legislature's express inclusion of topics such as salaries, wages, number of holidays, etc., shows an intent to exclude any items not expressly included in the specific list. See *Phillips v. St. Paul Fire & Marine Ins. Co.,* 39 Kan.App.2d 758, 763 (2008).

The rule of *ejusdem generis* (of the same kind- where enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind, or things that fall within the classification of the specific terms, *State v. Moler,* 269 Kan. 362, 363 (2000)) does not apply as the list of items included in the definition of "terms and conditions of professional service" is not followed by a general word or phrase. Therefore, the most reasonable construction of K.S.A. 72-5413(l) is that the legislature intended only for those items listed in the statute to be terms conditions of professional service which are mandatorily negotiable between OEA and U.S.D. 290. Replacement cost for lost keys is not listed in the statutory definition of "terms and conditions of professional service" and is therefore not mandatorily negotiable. The presiding officer did not err in his analysis.

KDOL notes the seeming conflict between this position that the list of topics contained in K.S.A. 72-5413(l) is exhaustive – not illustrative – and prior agency decisions and the Kansas Supreme Court's affirmation in the *U.S.D. 501* case of the agency's "topic" or "within the purview" approach to determine whether a topic is negotiable. But, developments in the law in the years since the *U.S.D. 501* case was decided necessitate such a departure. Such a departure is permitted, as the doctrine of stare decisis in inapplicable to decisions of administrative tribunals. *Appeal of K-Mart*

Corp., 238 Kan. 393, 396 (1995)(citing *Warburton v. Warkentin*, 185 Kan. 468 (1959) and Ryan, Kansas Administrative Law with Federal References p. 18 (2d ed 1985)). 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.

The *U.S.D. 501* case presented an issue of first impression to the Supreme Court. That issue was whether the topic approach for interpretation of K.S.A. 72-5413 was reasonable. The issue was not whether the topic approach was the sole method for interpreting the PNA. Interestingly, in *U.S.D. 501* none of the parties challenged the use of the topic approach. This lack of a challenge to the use of the topic approach does not mean, however, that the topic approach is the end-all, be-all, exclusive method of determining whether an item is included in the definition of "wages" as set forth in "terms and conditions of professional service."

U.S.D. 501 was decided when the doctrine of operative construction was in full force. Under that doctrine, legal interpretation of an administrative board, charged by the legislature with the authority to enforce or administer a statute, was entitled to a great deal of judicial deference. Such judicial deference to an administrative agency's interpretation of law has been completely eradicated. Now, an appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's or board's interpretation of the authorizing statutes. See, *Fort Hays State University v. Fort Hays State University Chapter, American Association of University Professors*, 290 Kan. 446, 457 (2010). When a statute is plain and

unambiguous, the Court may not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. See *Fernandez v. McDonald's*, 296 Kan. 472, 476 292 P.3d 311, 316, 2013 WL 276240 (2013).

The topic approach of determining negotiability was considered reasonable by the Supreme Court at a time in legal history when it was required to give great judicial deference to KDOL's interpretation of the PNA. But under current judicial review standards, it is highly improbable the topic approach would withstand an appellate court's unlimited review without deference. The two dissenting justices in the *Pittsburg State University* case, Chief Justice Schroeder and Justice McFarland, make this clear. In their dissents, the justices persuasively demonstrate that the majority's opinion is supportable *only* because of the Court's then required deference to—nay, abdication to—the agency's interpretation of law.

Abuse of regulatory authority has been consistently curbed and corrected by judicial intervention, lest administrative agencies become the uncontrolled and uncontrollable fourth branch of government. *Pittsburg State University*, 233 Kan. at 830-831 (Schroeder, C.J., dissenting)(citations omitted). The Kansas Supreme Court is willing to strike down actions of administrative bodies that are contrary to statute. See, e.g., *Fort Hays State University v. Fort Hays State University Chapter, American Association of University Professors*, 290 Kan. 446, 457 (2010). The interpretation of K.S.A. 72-5413(l) advanced herein requiring a strict construction of the definition of "terms and conditions of professional service" must now be deployed. This construction is in accord with the intent of the legislature as demonstrated by the plain language of the statute.

The Key Policy was not a violation of the Kansas Wage Payment Act.

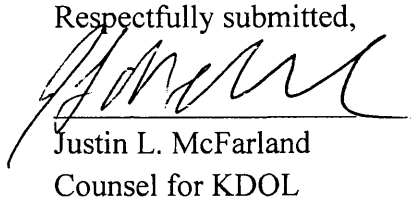
OEA maintains that the Key Policy is subject to the Kansas Wage Payment Act. See Brief of Appellant at 9-11. However, OEA misses the mark with this contention. First, the KWPA only prohibits employers from withholding, deducting or diverting any portion of an employee's wages. See K.S.A. 44-319(a). Such withholdings, deductions, and diversions are only violative of the KWPA if they are taken from an employee's paycheck. In this case, there is no evidence the reimbursement sought by U.S.D. 290 would be taken directly from an employee's paycheck. Thus, there is no violation of the KWPA.

Second, violation of the KWPA has not been properly raised by OEA. The proper route for an individual to allege violations of the KWPA is either through the administrative process with KDOL, see K.S.A. 44-322a, or through an original action in district court. See K.S.A. 44-324. Neither of these courses of action was sought by OEA to relief under the KWPA.

Conclusion

To constitute a prohibited practice, U.S.D. 290's unilateral implementation of the Key Policy has to be mandatorily negotiable. To be mandatorily negotiable, the Key Policy has to fit within the definition of terms and conditions of professional service as defined in K.S.A. 72-5413(l). As the presiding officer, Secretary's designee, and district court found, the Key Policy does not come within that definition and was therefore not mandatorily negotiable before its implementation.

Respectfully submitted,



Justin L. McFarland
Counsel for KDOL

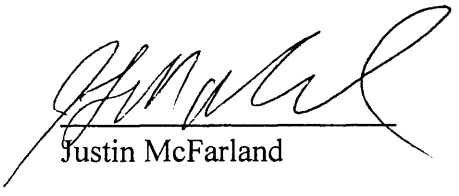
CERTIFICATE OF SERVICE

This is to certify that on June 10, 2013 the foregoing Brief was filed by delivering 16 copies to:

Office of Carol G. Green
Clerk of the Kansas Appellate Court
Kansas Judicial Center
301 SW 10th Avenue
Topeka, KS 66612-1507

And 2 copies were served via U.S.P.S. to:
David M. Schauner
Robert M. Blaufuss
KNEA
715 SW 10th Street
Topeka, KS 66612
Counsel for Appellant

Michael G. Norris
Norris & Keplinger, LLC
6800 College Blvd.
Overland Park, KS 66211
Counsel for Appellee U.S.D. 290



Justin McFarland