TESTIMONY BEFORE THE HOUSE COMMITTEE
ON COMMERCE, LABOR AND ECONOMIC DEVELOPMENT
Regarding Substitute for HB 2027
Submitted by: Rebecca Proctor, Attorney
On behalf of the American Federation of Teachers, Kansas (AFT Kansas)

Mr. Chairman and Members of the Committee:

My name is Rebecca Proctor. I am a labor and employee benefits attorney and lifelong Kansas resident. I appear before you today on behalf of my client, the American Federation of Teachers, Kansas. AFT Kansas and I have several concerns regarding the changes made in HB 2027, and I will raise those concerns for you today. Just to frame the discussion, Kansas has two public employee bargaining laws: the Professional Negotiations Act (PNA) and the Public Employer/Employee Relations Act (PEERA). This bill modifies one of those laws, the PNA.

As an overview to my remarks, please note that Substitute for HB 2027 indicates it will take effect from and after its publication in the Kansas register. Should Substitute for HB 2027 become law, the changes discussed below will result in disruption of numerous existing contracts, creating upheaval and potential litigation for both employees and employers.

I. PNA's Purpose

The PNA was enacted in 1970 to provide bargaining rights to professional employees of school districts. The Act'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). The list of terms and conditions of professional service subject to negotiation were expanded by the legislature during the 1980 session.

The PNA, like other bargaining laws, focuses on the employees' right to bargain through a representative of their choosing. KSA 72-5414 provides:

> *Professional employees shall have the right to form, join, or assist professional employees' 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. Professional employees shall also have the right to refrain from any or all of the foregoing activities.*

This statutory section is left unchanged by Substitute for HB 2027. However, Substitute for HB 2027 thoroughly undercuts the rights set out in 72-5414. The bill sets forth a process whereby in every even-numbered year the employee organization must revalidate its majority support. If this revalidation is "not

accepted by a board of education" or if an individual "or competing group of professional employees challenges the certification of majority support" the board of education gets to post a notice asking other groups to submit a request for recognition. After that, the board of education "shall conduct the selection process."

The bill does not set forth any criteria for when or why a revalidation of majority support may be "not accepted" by a board of education. The bill also does not set forth any methods or mechanisms for the "selection process" the boards of education may use to determine the employees' representative. The lack of detail on these provisions is disturbing, as it means a board of education could randomly determine not to accept a revalidation in order to select a different employee representative over which the board of education has more influence.

These changes are all contrary to the law's intent and purpose. They do not encourage good relationships…they instead change the nature and balance of the relationship by placing all decision-making power, including the power to select an employee representative, in the hands of the employer.

II. Revised Definition of "Professional Employee"

The bill also changes the balance of the relationship by removing large numbers of employees from bargaining units. It does this by changing the definition of "Professional employee." Under the law as it currently exists, the PNA covers "any person employed by a board of education in a position which requires a certificate issued by the state board of education or employed by a board of education in a professional, educational, or instructional capacity."

Substitute for HB 2027 changes this definition so that only persons who are employed by a board of education in a position which requires a license issued by the state board of education will be covered by the PNA. This is a very significant change, as it will restructure a large number of the state's PNA-covered units.

If you are familiar with our State's public employee bargaining laws, you know anyone who is NOT a supervisory/confidential employee, or elected or appointed official, and who is NOT a professional employee of a school district, is a public employee subject to coverage under the state's other bargaining law, PEERA.

Unlike PNA, PEERA is an opt-in statute. PEERA only automatically covers State employees. Employees of all other public entities in Kansas are only covered if their employer opts in. At this point, only three school districts across the state of Kansas have opted in. Accordingly, every employee that no longer qualifies as a professional employee and works in a school district that has not opted in to PEERA will be stripped of labor contract coverage while also completely losing the right to organize and bargain.

Second, the change will disrupt previous legal determinations on what constitutes an appropriate unit, both under the PNA and under PEERA. The various bargaining units have been developed based on the PNA's existing language. For those without a background in Kansas labor law, let me explain what that means. Under both public employee bargaining laws, the right to determine what constitutes an appropriate unit of employees for bargaining purposes is vested in a particular party. For the PNA, it is the Secretary of Labor. For PEERA, it is the Kansas Public Employee Relations Board. Those parties, and only those parties, may formally alter the composition of established bargaining units.

The impact is that for each and every unit altered by this bill's changes, a unit clarification/amendment petition must be filed to formally change and re-shape the units. This will create a huge administrative burden for the Secretary of Labor. Other cases that excluded employees from PEERA units based on PNA coverage will also need to be reopened. I personally represent unions in two such cases. Since the bill will take effect upon publication, all of these petitions will hit more or less simultaneously.

III. Terms and Conditions of Professional Service

For those employees who would maintain PNA coverage under this bill, the number of topics subject to bargaining are drastically reduced and are limited to salaries, hours and amounts of work outside of teaching periods but within a standard eight hour work day, sick leave, personal leave, and holidays. As noted above, KSA 72-5414 grants employees the right to negotiate for the purpose of "establishing, maintaining, protecting, or improving terms and conditions of professional service."

Drastic limitation of negotiable subjects does not achieve this goal. Covered employees cannot establish, maintain, protect, or improve terms and conditions of professional service if they are limited to bargaining over only salary, holidays, leave, and work outside of teaching periods.

In cases involving the PNA, decisions have routinely stated that labor relations laws are remedial and must be construed liberally to accomplish their objectives. Limiting the subjects of bargaining prevents any sort of broad construction and works against the law's objectives.

Additionally, the bill's breakdown of mandatory and permissive subjects of bargaining flies in the face of years of administrative and judicial determinations, both in the public and private sector, about what constitutes a mandatory subject of bargaining. Generally speaking, wages, hours, and other conditions of employment are considered mandatory.

The decision and order in PNA case Wallace County Teachers Association, Case #72-CAE-6-2004, adopted a test from a California case, *San Mateo City School*

District v. PERB, 663 P.2d 523, 528 (Cal. 1983), for determining negotiability under the PNA.

> *A subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.*

The drastic limitation the bill places on subjects of bargaining is completely and totally inconsistent with both court jurisprudence and administrative agency jurisprudence on what constitutes a mandatory subject of bargaining.

IV. Appropriate Units/Exclusive Representation

As referenced above, under both the PNA as it exists today and the proposed changes in Substitute for HB 2027, the Secretary of Labor shall decide an appropriate unit, based on, among other factors, "the community of interest between and among the professional employees of the board of education." So what constitutes community of interest? In a general community of interest analysis, the following factors are considered:

- Similarity in scale and manner of determining earnings;
- Similarity in employment benefits;
- Hours of work and other terms and conditions of employment;
- Similarity in type of work performed;
- Similarity in qualifications, skills, and training of employees;
- Frequency of contact or interchange among employees;
- Geographic proximity;
- Common supervision and determination of labor relations policy

Please note that both the PNA and Substitute for HB 2027 specifically state that a unit including classroom teachers shall not be appropriate unless it includes all such teachers employed by the board of education.

The way Substitute for HB 2027 is structured does not allow for either full consideration of what constitutes an appropriate unit, or for units made up of all classroom teachers employed by the board of education. Substitute for HB 2027 does away with the idea of an exclusive bargaining representative. Under this bill, a bargaining unit could be split into multiple parts, each part with a different bargaining representative. In addition, individual employees could choose to not to

be represented by any bargaining representative, but instead to bargain individual for themselves.

There is an internal inconsistency between these provisions, and the provision requiring all classroom teachers to be in the same unit. Substitute for HB 2027 also contains no language setting out any guidelines for allowing new, subdivided units. Under this bill's language, units consisting of two to three employees are possible and permissible.

This type splintering is completely inconsistent with good public policy as well as with the general labor policy pursued by the State of Kansas. For background, in 2006-2007, the State of Kansas hired a consultant, Peter Pashler, to analyze its bargaining structure. The consultant's report identified that the state had 62 bargaining units, represented by 9 unions. The report notes, "One consequence of the current system is fragmentation of personnel management. The effect of this total number of units is that management of key decisions is harder to achieve. Bargaining under this structure is difficult when different unions are simultaneously bargaining for the same job classification." The report ultimately recommended that the state's bargaining units be condensed and streamlined, with the total number of bargaining units being reduced from 62 to 16. The State, in cooperation with the unions, ultimately acted on the consultant's recommendations, and the new bargaining units took effect in 2008.

It is difficult to understand why, when the State itself has recognized the inefficiencies of splintered units, that the Legislature would pursue a change that would directly bring about such inefficiency.

V. Elimination of Arbitration

Also at odds with established public policy principles is the bill's elimination of arbitration. The bill provides that "Any agreement covering terms and conditions of professional service shall not include in such agreement any language which provides for binding arbitration of any dispute between the board of education and any association of employees."

For those who are not familiar with arbitration, arbitration is a process where the parties to a dispute (in the case of the PNA, a contract dispute), agree to submit their conflict to a third-party neutral and to be bound by the neutral's decision. The parties' bargaining agreement or labor contract usually sets parameters on an arbitrator's authority.

Arbitration is the preferred method for settling labor disputes, in both public and private sectors, because it is a faster and much less expensive way to resolve those disputes. It is also a matter of judicial economy: the use of arbitration helps reduce the judicial system's workload. Removing the ability of the parties to arbitrate disputes simply means that all cases previously submitted to an arbitrator

will become cases that must be handled by the judicial system. This increases costs for both the employer and the employee organization, while burdening the judicial system.

CONCLUSION

There is no logical reason, and no public policy justification, for making the changes contained in Substitute for HB 2027. The changes proposed run contrary to the PNA's central purpose as well as to the years of jurisprudence interpreting the PNA. The changes will only create chaos and numerous legal and administrative filings.

In closing, I would like to urge you to vote against these changes. However, contrary to established practice, the committee voted to move this bill to the full House prior to hearing from its opponents. So instead, I will ask you to re-think this bill as it advances to the House floor. As elected representatives, you are charged with making sound public policy decisions for our state. I have heard no sound, public policy based arguments for adopting this bill, while there are a multitude of public policy arguments against it. Please fulfill your duty to your electorate and your duty to make solid public policy by voting against this bill when it comes to the floor. Thank you for your time and attention.

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