

BEFORE THE DEPARTMENT OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Russell County NEA,
Petitioner,

v.

Board of Education of
Unified School District No. 407,
Russell County, Kansas,
Respondent.

Professional Negotiations Act:
Prohibited Practice Complaint
No. 72-CAE-16-1995

Pursuant to K.S.A. 72-5413 et seq.
and K.S.A. 77-501 et seq.

INITIAL ORDER

On the 24th day of May, 1995 this matter came on for a formal hearing in Russell, Kansas before Don Doesken, presiding officer.

The Petitioner Russell County NEA appeared by Gene F. Anderson, counsel, and called Asher Bob White, Area Uniserv Director; and Sandy Daugherty, President of Russell County NEA; as witnesses.

The Respondent Board of Education of Russell County USD 407 appeared by Dennis R. Davidson, counsel, and called Dr. Edward Stehno, chief negotiator; Don Degenhardt, Superintendent of Schools; and Rick Dougherty, school board member; as witnesses.

After the hearing, a transcript of the proceedings was prepared, and on October 13, 1995 the parties submitted simultaneous briefs setting forth their arguments and authorities. Neither party filed a response to the other party's brief.

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72-CAE-16-1995 EMPLOYMENT SECURITY

Questions Presented

Whether Respondent willfully refused to bargain in good faith, in violation of K.S.A. 72-5430(b)(5), by:

- a. Failing to give its chief negotiator sufficient authority at the bargaining table to reach tentative agreement on any mandatory topics;
- b. Refusing to negotiate the topic of binding arbitration of teacher grievances.

Findings of Fact

1. Petitioner Russell County NEA is the exclusive bargaining representative of the professional employees of Unified School District No. 407, Russell County, Kansas.
2. Respondent is the elected school board which administers the public schools in U.S.D. 407.
3. Under the Professional Negotiations Act K.S.A. 72-5413 et seq., Petitioner and Respondent are required to negotiate in good faith with each other about the terms and conditions of professional service of the teachers in their school district, and they must avoid the "prohibited practices" described in K.S.A. 72-5430, which are considered evidence of bad faith in professional negotiations.
4. Petitioner has complained that the Respondent failed to negotiate in good faith during negotiations for the 1994-95 school year, in violation of K.S.A. 72-

5430(b)(5). Petitioner's Complaint, as originally filed February 15, 1995, stated that the Respondent: (a) failed to give its bargaining team sufficient authority to engage in meaningful discussions on all mandatory subjects; (b) failed to respond adequately to Petitioner's proposals and requests for information; (c) failed to demonstrate any willingness to work toward agreement at the bargaining table; and (d) refused to negotiate certain mandatory topics.

However, by the time the hearing was held in this matter, the Petitioner had reduced its complaint to two items, namely: (a) that the Respondent's chief negotiator lacked sufficient authority at the bargaining table to reach tentative agreement on any subject; and (b) that the Respondent refused to negotiate the topic of binding arbitration of teacher grievances. The parties agree these are the only two prohibited practice issues to be decided in this case (Petitioner's Suggested Findings of Fact and Conclusions of Law, at p.1; Respondent's Brief, at p. 1).

5. For its suggested remedy, Petitioner has asked that the Respondent be ordered to cease its unlawful activity and return to the bargaining table. Petitioner has also asked that an Order to that effect be posted conspicuously in all work sites (Petitioner's Suggested Findings of Fact and Conclusions of Law, at p.14).

6. For its response, Respondent has contended the Petitioner's complaint is completely without merit, and has asked for an order directing the Petitioner to

reimburse the Respondent for its costs of defending the complaint, including reasonable attorney fees (Respondent's Brief, at p. 12).

7. The record shows that on January 31, 1994 the parties gave each other formal written notice of the topics they wanted to negotiate for the 1994-1995 school year. (Tr. pp. 20-21; Petitioner's Exhibits H and J). However, the parties did not actually begin negotiations for the 1994-95 school year until June 7, 1994 (Tr. p. 118).

Once negotiations were underway, the parties met at the bargaining table at least sixteen times, and engaged in negotiations for over 25 total hours, excluding caucuses (Petitioner's Exhibit K). Negotiations began on June 7, 1994 and continued through May 22, 1995, two days before the hearing in this matter (Tr. p.18). As of the date of the hearing, negotiations were still ongoing (Tr. p.27).

Eleven of the sixteen negotiating sessions were tape-recorded, and the Petitioner introduced tape recordings and transcripts of those sessions as exhibits (Petitioner's Exhibits A through G and L through P). Witnesses were then examined at length about the statements they had made during those tape-recorded negotiation sessions.

After the hearing, Respondent was given an opportunity to review the tapes and transcripts of the eleven recorded sessions, to point out any discrepancies between the tape recordings and the transcriptions. However, no errors were brought to the presiding officer's attention. Apparently the transcripts are reasonably accurate renditions of the

statements made by the participants at the bargaining table.

8. In addition to the sixteen negotiating sessions, there were two public meetings which involved the negotiators for both sides as well as the school board. The first meeting with the school board occurred on November 14, 1994 and lasted about an hour. That meeting included a round-table discussion on the topics of salaries and supplemental contracts, and some comments about the decision of each side to employ a professional negotiator (Tr. pp. 62-63, 301-303). There was also a discussion at that meeting between the chief negotiators on the subject of binding arbitration of teacher grievances (Tr. pp. 118-124).

The second meeting with the school board occurred on January 16, 1995 and included a presentation by Dr. Carl Parker to the school board on the topic of binding arbitration of grievances. Dr. Parker is employed by Fort Hays State University as a professor of economics, and is the university's labor relations representative. Dr. Parker appeared before the board at the request of the Petitioner's chief negotiator, Asher Bob White, with the consent and cooperation of the Respondent's chief negotiator, Dr. Edward Stehno (Tr. pp. 62-64, 123-124, 267-268).

9. The negotiation sessions between the parties resulted in tentative agreements on contract language for seven items, including hours and amounts of work, personal leave, sick leave, bereavement leave, insurance and fringe benefits, discipline procedures,

and teacher appraisal procedures (Respondent's Exhibit #2; Tr. pp. 108-117). The negotiators did not reach any agreement on the topic of teacher grievance procedures (Tr. p. 34).

10. On the topic of teacher grievance procedures, the Petitioner made only one proposal, which was for a system which provided at the last stage for binding arbitration of all teacher grievances (Petitioner's Exhibit I; Tr. p. 132). The Respondent made only one counter-proposal, which was to retain the existing grievance procedure (Tr. pp. 34, 125-126, 225). The existing grievance procedure ends with a hearing before the school board, which then makes the final decision on the grievance (Tr. pp. 31-32).

11. Despite the lack of meaningful give-and-take on the subject, approximately 80% of the time at the negotiation meetings was spent discussing the topic of binding arbitration of teacher grievances (Tr. pp. 218-219).

12. Taken as a whole, the evidence in the record fails to show, by a preponderance of the evidence, that the Respondent willfully refused to negotiate in good faith on the topic of teacher grievance procedures. Instead, the record shows that the Respondent took several steps to obtain more information about the topic of binding arbitration and to respond to the Petitioner's proposal.

Not only did the school board agree to listen to Dr. Parker speak on the subject of binding arbitration, the district's chief negotiator, Dr. Stehno, asked for and obtained

a list from the Petitioner's chief negotiator, Asher Bob White, of other school districts that had implemented binding arbitration (Respondent's Exhibit #8, Tr. pp. 207-208). Dr. Stehno then followed up with phone calls to approximately fifteen of those school districts to inquire whether they were satisfied with binding arbitration as a method for resolving teacher grievances (Tr. p. 209). After obtaining a negative reaction from the districts he called, Dr. Stehno reported back to Mr. White, and asked him for names of individuals who could help him convince the board that binding arbitration would be workable and satisfactory (Tr. p. 214). However, Mr. White did not respond with the names of any individuals who could report a favorable experience with binding arbitration (Tr. p. 214).

Although Mr. White argued repeatedly that teachers were reluctant to avail themselves of the existing grievance procedure, and that a shift to binding arbitration was necessary to provide fairness for teachers (Tr. p. 172), the school board and the board's chief negotiator were not convinced that teachers were afraid of the existing procedure, or that a change in the existing procedure was necessary (Tr. pp. 152-153, 217-219, 286-288). Dr. Stehno was of the opinion that an elected school board could never agree to binding arbitration, because they would be voted out of office if they did (Tr. p. 218).

Unfortunately, neither party made much effort to think creatively about, or to

suggest other alternatives to, their entrenched bargaining positions on the subject of teacher grievance procedures. The bargaining on this subject consisted primarily of each side repeating their own non-negotiable position, with one side adamantly clinging to the status quo, in which the school board made the final decision, while the other side insisted absolutely on binding arbitration by a disinterested third party. No middle ground was explored or discussed (Tr. p. 132), although several other options come readily to mind. Neither party suggested mediation or non-binding arbitration of grievances by an outside neutral, or the appointment of a jointly selected grievance panel of school district employees. One of these options might have been acceptable to both sides, but neither side made an effort to explore alternatives to their original bargaining positions (Tr. pp. 268-270).

In such a context, Petitioner's accusation that the Respondent refused to negotiate concerning the subject of teacher grievance procedures, amounts to a case of the pot calling the kettle black. Both parties argued with each other about the subject, instead of negotiating or thinking creatively; both parties are to blame for their failure to make any progress on this topic.

13. With regard to the issue whether the Respondent gave its bargaining representative sufficient bargaining authority, the record as a whole fails to support the Petitioner's claim that Dr. Stehno lacked authority to develop bargaining positions or

to exchange meaningful proposals at the bargaining table.

Although Petitioner claims that Dr. Stehno lacked sufficient authority to engage in meaningful negotiations, it appears more likely that Dr. Stehno had sufficient authority at the table (Tr. pp. 284, 289, 308). In fact, he actually reached tentative agreement with the Petitioner's bargaining team on a number of topics (Respondent's Exhibit 2; Tr. pp. 116-117, 204-205).

However, it was Dr. Stehno's view that tentative agreements were of little value, unless he could be sure the board would accept them. Dr. Stehno's approach to bargaining was to consult closely with the school board at every stage, rather than going out on a limb with proposals that he was not sure would be ratified by the board (Tr. pp. 85-94, 97-100, 275-275).

The record shows that Dr. Stehno's previous experience as a negotiator was rather limited (Tr. pp. 198-199). If Dr. Stehno had been more experienced in representing this particular school board, or more experienced in the role of labor negotiator, he might have been more active at the table, with more confidence that he could persuade the board to go along with his ideas. However, under the circumstances, he was understandably cautious, and wanted to take each proposal back to the board before reaching agreement on it (Tr. p. 245).

Dr. Stehno's bargaining style may indicate a lack of experience, but it certainly

does not demonstrate a lack of authority to bargain or a willful failure to bargain in good faith on the part of the school board. His bargaining style did tend to drag out the negotiations, but it did not in itself make bargaining impossible or unproductive.

14. In labor relations, negotiations usually go better when both sides are patient with each other; when they listen to each other; when they make an effort to think creatively, rather than argue endlessly or make personal attacks; when they adapt their bargaining style to the pressures being experienced by their counterparts across the table; and when they give each other time to evaluate each other's proposals. Rigidity in demands, confrontational attitudes, and a litigious "gotcha" mentality are not likely to result in any progress at the bargaining table.

To encourage a more open, free-wheeling climate for negotiations, this presiding officer strongly recommends that the parties discontinue their practice of tape recording their bargaining sessions. Tape recorders tend to have a chilling effect upon the free exchange of ideas and proposals, especially when the entire negotiation session is being recorded.

If a record of the negotiations is desired, it would be better to limit that record to a chart of the proposals, objections, explanations, and counter-proposals made by each side on each topic under negotiation. Such a chart would help the parties focus on the task at hand, and would remind them of their duty to respond to each other's proposals,

but would be less likely to stifle the free exchange of ideas.

Conclusions of Law

1. Petitioner has alleged that Respondent has committed a prohibited practice. As the complaining party, the Petitioner has the burden of proving its allegation by a preponderance of the evidence.

2. The specific prohibited practice alleged in this case is defined in K.S.A. 72-5430(b)(5) as follows::

"(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:

(5) refuse to negotiate in good faith with representatives of recognized professional employees' organizations, as required in K.S.A. 72-5423 and amendments thereto; ..."

3. To prove its allegation, the Petitioner must show that the Respondent refused to negotiate in good faith, and that it did so "willfully", that is, by conduct which was purposeful and intentional and not accidental. This determination must be made from the totality of the conduct between the parties. See Hays-NEA v. U.S.D. 489, PNA Case No. 72-CAE-1-1993. Syl. ¶2.

4. In the Kansas Professional Negotiations Act at K.S.A. 72-5430, and in the Kansas Public Employer-Employee Relations Act at K.S.A. 75-4333, prohibited practices are defined as acts done "willfully". However, to date, that term has never been

construed in a labor relations context by the Kansas appellate courts. In addition, there are no helpful federal labor relations cases on the question, because the word "willfully" is not included in the definition of an unfair labor practice in the National Labor Relations Act. See 29 U.S. Code § 158.

However, in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), the United States Supreme Court was required to construe what was intended to constitute a "willful violation" under the Federal Fair Labor Standards Act at 29 U.S.C. Sec. 255(a). In that case the U.S. Supreme Court stated:

"In common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.' See Roget's International Thesaurus Sec. 622.7, p 479; Sec. 653.9, p 501 (4th ed. 1977). The word 'willful' is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in Thurston--that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute--is surely a fair reading of the plain language of the Act."

--- 486 U.S. at 132-33, 108 S.Ct. at 1681.

This interpretation of the meaning of a "willful" violation was recently cited with approval by the Kansas Supreme Court in Dickens v. Snodgrass, Dunlap & Co. 255 Kan. 164 (1994), 872 P.2d 252, at 264. The Kansas Supreme Court found in Dickens that, in order to establish a willful violation under the equal pay provisions of the federal fair labor standards act, there must be evidence that the alleged violator "knew or showed

reckless disregard for the matter of whether its conduct was prohibited". This appears to be a useful definition for our purposes, as we examine whether the Respondent committed a willful prohibited practice under K.S.A. 72-5430(b)(5).

5. Under the Professional Negotiations Act, a particular topic is mandatorily negotiable if it is a "term and condition of professional service", as defined in K.S.A. 72-5413 (1). In this case, the relevant portion of that definition is found in part (1):

(1) "Terms and conditions of professional service" means (1) 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; wearing apparel; pay for overtime; jury duty; *grievance procedure, including binding arbitration of grievances*; disciplinary procedure; resignations; termination and nonrenewal of contracts; reemployment of professional employees; terms and form of the individual professional employee contract; probationary period; professional employee appraisal procedures; each of the foregoing being a term and condition of professional service, regardless of its impact on the employee or on the operation of the educational system; ... "

--- K.S.A. 72-5413 (1)(1) [Italics added].

This definition clearly includes the topic of teacher grievance procedures, and the question whether the teacher grievance procedure for U.S.D. 407 should end with binding arbitration.

6. Under the facts of this case, the weight of the evidence does not suggest any intentional or reckless disregard by the school district of its duty to negotiate in good faith, either in general or on the topic of teacher grievance procedures. Instead, the

totality of the conduct suggests a sincere effort by the school district to negotiate on all subjects.

Rather than a willful refusal to negotiate in good faith, it appears we have a simple difference of opinion in this case whether the bargaining style of the school district's representative was appropriate under the circumstances. Although Dr. Stehno did not bargain as efficiently as he might have, the record as a whole does not show that he exhibited a willful refusal to negotiate on any subject, or that he lacked sufficient authority to engage in meaningful negotiations.

7. The Respondent has asked in its brief to be reimbursed for the costs of defending the Petitioner's complaint, including reasonable attorney fees (Respondent's Brief, at p. 12). However, this presiding officer has no authority to award attorney fees or other costs in favor of the prevailing party.

First of all, K.S.A. 72-5430a does not specifically allow for attorney fees or costs, but provides only the following authority:

" (b) The secretary shall either dismiss the complaint or determine that a prohibited practice has been or is being committed, and shall enter a final order granting or denying in whole or in part the relief sought. ..."

-- K.S.A. 72-5430(b).

To qualify for an award of attorney fees under this section of the Professional Negotiations Act, a party would have to file a prohibited practice complaint, prove that an offense has been willfully committed, and make a showing that an award of costs is

necessary to remedy the prohibited practice.

In the present case, the presiding officer lacks authority to grant relief in favor of the Respondent under K.S.A. 72-5430(b), because the Respondent has not filed a prohibited practice complaint against the Petitioner. Having found the Petitioner's complaint against the Respondent to be without merit, the presiding officer is required to dismiss the complaint, without any award of relief. See Garden City Educators Ass'n v. U.S.D. No. 457 15 Kan App. 2d 187, 196, 805 P.2d 511 (1991).

It should also be kept in mind that K.S.A. 72-5430a(a) mandates that this proceeding be conducted in accordance with the provisions of the Kansas Administrative Procedures Act (KAPA). KAPA does not authorize the allowance of attorney fees in favor of a prevailing party, but simply states the general rule that each party should bear its own expenses in administrative proceedings, as follows:

" 77-515. Participation and representation.

(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be represented *at the party's own expense* by counsel or, if permitted by law, other representative.

(c) A state agency may require a corporation or other artificial person to participate by counsel."

-- K.S.A. 77-515 [Italics added].

Even upon judicial review of state agency action, authority is lacking to award attorney fees in favor of the prevailing party. K.S.A. 77-622 states that attorney fees are to be awarded on appeal only to the extent specifically authorized by law:

"77-622. Relief on final disposition.

(a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.

(b) The court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment or take any other action that is authorized and appropriate.

(c) The court may also grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, *but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.* "

-- K.S.A. 77-622 [Italics added].

It is true that the district court has the authority to award attorney fees and costs pursuant to K.S.A. 60-211 and K.S.A. 60-2007, as a sanction for the filing of a frivolous claims or pleadings. However, no similar authority has been extended to state administrative agencies. Furthermore, K.S.A. 60-2007 cautions that an award of attorney fees and costs as a sanction is not to be handed down routinely. Subsection (d) of K.S.A. 60-2007 states:

"(d) The purpose of this section is not to prevent a party from litigating bona fide claims or defenses, but to protect litigants from harassment and expense in clear cases of abuse. "

--K.S.A. 60-2007 (d).

For all of the foregoing reasons, an award of attorney fees and costs is not appropriate in this case, and cannot be awarded in favor of the Respondent.

Order

Under the circumstances of this case, the Respondent did not willfully refuse to negotiate in good faith, either by failing to clothe its representative with sufficient authority to reach tentative agreements at the bargaining table, or by refusing to negotiate on the topic of teacher grievance procedures. As a result, the Petitioner's request for a remedy must be denied.

Respondent's request for attorney fees and costs must also be denied, for the reasons set forth above.

IT IS SO ORDERED this 30th day of April, 1996.



Don Doesken, Presiding Officer
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Notice of Right to Review

This is an Initial Order issued by a presiding officer pursuant to K.S.A. 77-526. This order will become a Final Order pursuant to K.S.A. 77-530 unless reviewed by the Secretary of Human Resources pursuant to K.S.A. 77-527.

This order may be reviewed by the Secretary of Human Resources, either on the Secretary's own motion, or at the request of either party. Any party seeking review of this order must file a Petition for Review with the Secretary of Human Resources within 18 days after the mailing of this order. See K.S.A. 77-527(b) and K.S.A. 77-531. To be considered timely, a petition for review must be actually received in the Secretary's office by the close of business on Monday, May 20, 1996.

Certificate of Service

I, Don Doesken, do hereby certify that on this 1st day of May, 1996 true and correct copies of the foregoing Initial Order were deposited in building mail and in the United States Mail, first-class, postage pre-paid, addressed to:

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