STATE OF KANSAS

BEFORE THE SECRETARY OF HUMAN RESOURCES

Diane Marie Taylor, Complainant, vs. Unified School District 501, Topeka, Kansas Respondent.	CASE NO: 72-CAE-2-1981

O R D E R

Comes now on 17th day of August, 1981, the above-captioned case for consideration before the Secretary of the Department of Human Resources.

The case come before the Secretary of the Department of Human Resources on the petition of Diane Marie Taylor alleging that respondent Unified School District 501, Shawnee County, Kansas engaged in certain practices which are violations as specified at K.S.A. 72-5430 (b) (1) (5).

APPEARANCES

Complainant, Diane Marie Taylor appeared by and through her counsel Mr. Wesley A. Weathers, 201 West Sixth Street, Topeka, Kansas

Respondent, Unified School District 501, Topeka, Kansas, appeared by and through its counsel Mr. William G. Haynes, 900 Merchants National Bank Building, Topeka, Kansas.

FINDINGS OF FACT

1. That U.S.D. 501, Shawnee County, Kansas is the appropriate public employer or Board of Education as defined at K.S.A. 72-5413 (b).

2. That the NEA-Topeka was recognized pursuant to the provisions of K.S.A. 72-5415 by respondent as the exclusive representative of the professional employees of U.S.D. 501 in May, 1970. (See DHR-1002 filed October 20, 1980 by the employer)

3. That complainant and respondent has stipulated to a set of facts upon which the questions of law contained herein will be based. (See stipulation of facts and transcript)

DISCUSSION - CONCLUSIONS OF LAW

The parties to the matter have agreed on the issues to be resolved by the Secretary. They are as follows:

1. Does Diane Marie Taylor have standing to bring the above referenced complaint?

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2. Did Diane Marie Taylor have a duty to grieve and arbitrate her case?

3. Did the U.S.D. 501 board action to change policy and subsequent refusal to pay Diane Marie Taylor constitute a prohibited practice?

The Secretary will first address issue number one (1). Complainant Taylor alleges violations of K.S.A. 72-5430 (b) (1) (5) which states:

> "(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:
> (1) Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414;
> (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;

K.S.A. 72-5414 then states:

> "Professional employees' rights; representation of employees and school boards; negotiations. 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. In professional negotiations under this act the board of education may be represented by an agent or committee designated by it."

K.S.A. 72-5414 clearly speaks to, among other things, the rights of individual employees to form, join or assist professional employees organizations. An employee could, under the statute, form, join, or assist an organization other than the exclusive representative. Conceivably that employee could experience interference, restraint or coercion in the exercise of that right. In such a case, only the employee could decide if in fact his or her rights had been infringed upon. And secondly, the exclusive representative, if found to be the only party eligible to bring a (b) (1) charge, would be placed in a position of defending the right of an employee to abolish the organization's existence as the exclusive representative. The Secretary is convinced that the legislature had no intention of allowing such a circumstance to arise. Rather, the Secretary believes that K.S.A. 72-5430 (b) (1) is the avenue through which an individual employee may protect his/her rights as granted at K.S.A. 72-5414. There is no doubt then, based upon the language contained in K.S.A. 72-5414 which grants certain "rights" to employees, that an individual employee would have standing to bring a prohibited practice charge. While a charge filed by an employee under K.S.A. 72-5430 (b) (1) could be properly filed, the nature of the charge still might not be within the scope of jurisdiction of the Secretary.

K.S.A. 72-5430 (b) (5) speaks to a refusal by the employer to enter into good faith negotiations with representatives of professional employee organizations. K.S.A. 72-5415 (a) states:

> "Exclusive representation of negotiating units; any employee or group may present its position or proposal. (a) When 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 such purpose."

The above statute provides for exclusivity of representation. That is, once an appropriate unit of professional employees selects a representative, the employer is obligated to negotiate terms and conditions of employment with and only with such representative. As the authorized second party at the table, the exclusive representative has standing to evaluate the proceedings at the table and arrive at an opinion regarding the good or bad faith of those proceedings. It would follow then that only the exclusive representative can allege a (b) (5), failure to negotiate in good faith, violation. To rule otherwise could conceivably be construed to allow another union, or even a casual observer, the right to file such a charge. Utilizing much the same logic as was outlined in discussing the employee's right to identify and pursue a charge of infringement of rights, the only party authorized to identify a failure to negotiate in good faith is the party with whom the negotiations are taking place. Therefore, the Secretary must dismiss the charge filed under K.S.A. 72-5430 (b) (5), but must rule that complainant does have standing to file a prohibitied practice alleging violations of K.S.A. 72-5430 (b) (1).

The Secretary believes that issue number three (3) must be addressed prior to addressing issue number two (2).

3. Did the U.S.D. 501 board action to change policy and subsequent refusal to pay Diane Marie Taylor constitute a prohibited practice?

This issue raises two basic questions.

1. When, why, and how often are the parties obligated to bargain terms and conditions of employment?
2. Does a violation of a memorandum of agreement constitute a prohibited practice?

Please note that question number one (1) speaks to an obligation to bargain rather than agreement to bargain. It is doubtful that anyone would argue the parties' right to agree at any time to negotiate and, if agreement is reached, amend a memorandum of agreement.

K.S.A. 72-5423 states in part:

> "Notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party, such notices shall be in writing and delivered to the superintendent of schools 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."

At first blush this statute seems to indicate that either party can "notice" the other thus obligating both parties to enter into negotiations to "amend an existing agreement." In other words either party who might be unhappy with the terms of an existing memorandum could force renegotiations for the memorandum in its current year. In light of our open ended law such an interpretation would be most advantageous to unscrupulous employers. In the event such an employer found a contracted provision repugnant, the employer could simply file notice to negotiate, reach impasse, participate in mediation and fact-finding and then issue a unilateral contract provision. Therefore, such an interpretation is totally illogical. When one considers other provisions of the Professional Negotiations Act, the intent of the legislature become clear. The above cited statute provides that both parties give up their right to negotiate a successor agreement if they fail to file notice to negotiate on or before February 1 in any given school year. The right given up is the right to negotiate a contract for the following or next school year. K.S.A. 72-5413 (n) defines statutory impasse date as June 1 in the current school year. K.S.A. 72-5426 (d) then provides that an impasse is deemed to exist if the parties to the negotiating process have not reached agreement by June 1. The Secretary interprets the three above cited statutes to "obligate" the parties to negotiate, if either party so desires, once a year or once during a contract period. Logically then, "labor peace" would prevail during the remainder of the school year. There could, of course, be certain exceptions to this rule. For example, a court might find a contractual provision contrary to another law thus rendering the provision invalid. The legislature might enact a law which could render a contractual provision invalid. In such cases the concept of "good faith negotiations" would dictate that the parties attempt to remedy the problem via the negotiating process. The act of changing a board policy, however, would not constitute such an exception. The board has the right to change its policy at any time. The board might choose to meet with the employee organization prior to a change but no such obligation exists. If such a policy change affects the terms and conditions of employment contained within a valid memorandum of agreement, the employer must obtain an agreement from the exclusive representative to amend the memorandum of agreement

or risk a charge of a violation of the contract. Obviously, if the parties agree to the change in terms and conditions of employment an addendum to the contract can be made. If the employer cannot secure the agreement and proceeds to implement the change, a breech of contract might occur.

Does a violation of a contract term constitute bad faith bargaining? The prohibited practice section of the Professional Negotiations Act mandates that the Secretary shall "oversee" professional negotiations to insure that good faith bargaining takes place. Additionally, the statute mandates the Secretary to insure that professional employees are not coerced, interfered with, or discriminated against in exercising their rights to form, join or participate in employee organizations of their choosing. Nothing in K.S.A. 72-5430 authorizes the Secretary to make a determination that either party to a memorandum of agreement has violated such agreement. At the point in time when a violation of a contract occurs it is immaterial whether the contract was entered into in good faith. Rather the important questions are whether the contract was violated and the remedy for making the injured party whole. Such a determination of a contract violation might carry with it a connotation of bad faith bargaining but such an individual finding of bad faith would be unnecessary. Allegations of contract violations are properly adjudicated by district courts. The Secretary is without authority to make such determinations. Therefore, based upon the above reasoning the Secretary finds that the board did not commit a prohibited practice by its action to change the board policy and that its refusal to pay Diane Marie Taylor is properly submitted to district court for a contract violation determination.

Some memorandums of agreement contain a grievance procedure to be utilized as an alternative to filing contract violation charges in district court. Such grievance procedures are usually more expeditious and less costly than seeking resolutions in district court. In the event a grievant fails to timely file his/her grievance the grievant's right to subsequently file in district court would be decided by district court. Therefore, issue number two (2) is most appropriately answered by district court. The Secretary is without jurisdiction to rule regarding complainant's obligation to file a grievance in this matter.

In sum the Secretary's findings are as follows:

1. An individual employee has standing to file a prohibited practice allegation under subsection (b) (1) of K.S.A. 72-5430.

2. Only the certified or recognized professional employee organization has standing to file a prohibited practice allegation under subsection (b) (5) of K.S.A. 72-5430.

3. Respondent has no obligation to negotiate a change in board policy.

4. The Secretary is without authority to rule regarding alleged contract violations when such violations are not based upon complainant's choice to form, join or participate in union activities.

5. The Secretary is without authority to rule regarding complainant's obligation to grieve pursuant to the provisions of the memorandum of agreement.

Therefore, it is the order of the Secretary that 72-CAE-2-1981 be dismissed.

IT IS SO ORDERED THIS 17th DAY OF August, 1981, BY THE SECRETARY OF HUMAN RESOURCES.

Jerry Powell (for Dr. Harvey L. Ludwick)
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