STATE OF KANSAS

BEFORE THE SECRETARY OF HUMAN RESOURCES

IN THE MATTER OF Teachers Association of District 366 Complainant, vs. Unified School District 366, Yates Center, Kansas, Respondent.	*	CASE NO: 72-CAE-7-1981

O R D E R

Comes now on this 10th day of November, 1981 the above captioned case for consideration by the Secretary of Human Resources.

PROCEEDINGS BEFORE THE SECRETARY

1. Complaint filed by Paul Harrison, Director, Sunflower Uni-Serv District against U.S.D. 366, Yates Center, Kansas on April 10, 1981.

2. Respondent's answer to complaint received by Secretary on April 16, 1981.

3. Parties met with Secretary designee, Mr. Jerry Powell, on May 15, 1981, to discuss mutual resolution of complaint.

4. Pre-hearing conference conducted by Mr. Powell on July 8, 1981. (All parties in attendance).

5. Stipulations of facts received from parties:

   A. Complainant - July 29, 1981

   B. Respondent - August 6, 1981

6. Briefs of parties received by Secretary:

   A. Complainant - August 17, 1981

   B. Respondent - September 8, 1981

7. Complainants proposed amendment to complaint submitted and denied, September 30, 1981.

FINDINGS OF FACT

(See attached Stipulations of Fact and attachments thereto as submitted by the parties).

DISCUSSION

The instant case comes before the Secretary without benefit of formal hearing inasmuch as there are no disputed factual matters. The parties have entered into

stipulations of the facts in regard to this matter and ask the Secretary simply to rule relative to a question of law. Specifically stated, the two basic questions in this case are: "Was Mr. Weston acting in the capacity of a member of the Board of Education in his letter to the editor of the Yates Center News (Published on April 2, 1981)?" and "Did the action and statements of Mr. Weston, via his letter to the editor, evidence a refusal to negotiate in 'good faith' as required by K.S.A. 72-5423?"

Complainant alleges that Mr. Weston's letter was issued by him in his capacity of president and chief negotiator for the U.S.D. 366 Board of Education. Respondent alleges that the letter written by Mr. Weston was issued in his capacity of candidate for a school board position and not in his capacity of board president and/or chief negotiator. Both parties have, however, stipulated to the fact that Mr. Weston was indeed serving in both capacities on April 2, 1981. While Mr. Weston is certainly entitled to the constitutional guarantees granted to all citizens, the Kansas legislature has imposed certain restrictions on the exercise of those rights by a Board of Education in a collective bargaining atmosphere. It is not the task of the Secretary to determine if those restrictions violate Mr. Weston's constitutional rights but rather if those restrictions have been adhered to and followed. The specific restrictions outlined at K.S.A. 72-5415(a) in concert with K.S.A. 72-5430(b) (6) do, in fact, limit the freedom of speech enjoyed by a board member in regard to subjects of professional negotiations. There can be no argument that the matter of salary discussed within Mr. Weston's April 2nd letter was a subject of negotiations under way during the time the letter was published. Logic dictates that statements regarding negotiations, which are made by the designated representative of the board for negotiations, can reasonably be assumed to "mirror" the board's position on those issues. It matters little, however, in what capacity Mr. Weston was speaking. Each member of the Board of Education has a like responsibility to participate in the negotiations process in good faith. If that board has selected a representative to act in their behalf, that responsibility extends to the representative as well as the board. Certainly a candidate for a position on the board could not engage in a prohibited practice until such time as he/she had won the authority and responsibility to act as a board member. Mr. Weston had won that authority at some prior point in time. That authority and responsibility continues in effect until such time as Mr. Weston, or any board member, is defeated via an election, resigns, is recalled, or in some other manner loses the authority of office. The fact that Mr. Weston was a candidate for a school board position carries no more significance than if he were a candidate for Mayor. He was, in fact, a school board member at the time his letter was published.

The fact that the board was not in official session is, in the opinion of the Secretary, of no consequence. Mr. Weston's term of office does not expire at the close of each board meeting and he may not move into and out of his official role at his pleasure. Even if Mr. Weston had entered a disclaimer within his letter and alleged that he was speaking as a private citizen or as a board candidate, the restriction on his freedom of speech would still exist relative to subjects of negotiations. In the opinion of the Secretary, an employer may not discharge any legal obligations under the Professional Negotiations Act via a simple disclaimer of his or her official position. To do so would undermine the intent of the Act. For example, the law prohibits an employer from intimidating employees in the exercise of their organizational rights. Even if the employer claimed to be acting as an individual without authority, the capacity of the employer to hire and terminate is ever present in reality and in the minds of the employees. If the statutues did provide an avenue for discharging employer responsibilities via a disclaimer, they would in turn grant free rein to employers to act in any manner they so desire. The Secretary is confident that the legislature did not intend to allow such a condition to exist. The Secretary finds therefore, based upon the above rationale, that Mr. Weston was acting in the capacity of a member of the Board of Education in his letter to the editor published on April 2, 1981 in the Yates Center News.

As stated before, the second question to be addressed is; "Did the action and statements of Mr. Weston via his letter to the editor, evidence a refusal to negotiate in 'good faith' as required by K.S.A. 72-5423?". In regard to this question, the Secretary must analyze the statements made within Mr. Weston's letter to determine the existence or lack of 'good faith' as required by the statute. In order to properly analyze those statements, the Secretary must be particularly cognizant of several specific statutory provisions which identify the players and their parts in the negotiations process.

K.S.A. 72-5414 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. 72-5415 then states:

> "Exclusive representation of negotiating units; any employee or group may present its position or proposal. (a) When a represenative 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. (b) Nothing in this act or in acts amendatory thereof or supplemental thereto shall be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education, a superintendent of schools or other chief executive officer employed by a board of education."

These two sections of the Professional Negotiations Act give the employees the right to opt for organization, and give the selected organization "exclusive" representation rights. The employees in this case have opted for organization, and designated the complainant as their exclusive representative. The actions taken by the employees are solely theirs to exercise and employers must be especially wary to insure that they do not interfere with the employees in the exercise of those rights. In a recent opinion (81-185) the Kansas Attorney General analyzed the language in K.S.A. 72-5415(a) and found in part that; "Clearly, if a Board of Education attempted to negotiate directly with members of a collective negotiations unit for which a representative had been selected, said board might well be adjudged to have committed a prohibited practice under the provisions of K.S.A. 72-5430(b) (6)". The Secretary concurs with this interpretation, finding that the employer, the Board of Education in this instance, has the responsibility to acknowledge the exclusive rights of the representative and to engage in professional negotiations with, and only with, the representative "in good faith". In order to properly participate in the process, each party should arrive at the table with an open mind. Certainly they will each arrive with positions in which they believe and which convey the wishes of the majority of those they represent. The good faith requirement in the statute, however, contemplates a great deal more than an exchange of those positions or proposals. The Secretary is of the opinion that the parties are required to meet embracing the attitude that their positions are amendable if the facts so dictate. Certain statements in Mr. Weston's letter indicate an absence of this potential for flexibility. Mr. Weston indicates that his position favors the younger teachers and that irrespective of the wishes of "some of the employees", via their exclusive representative, he has "no intention of changing". While not controlling, it is certainly worthy of notice that the National Labor Relations Board and the courts in review, have long held that a "take-it-or leave-it" approach to bargaining is not always an illegal one. The Second Circuit Court of Appeals in a review of a National Labor Relations Board decision on this matter did find however that the take-it-or-leave-it approach was illegal when coupled with communications to the employees that the company and not the union was their true representative. The Court further affirmed that the employer may not deal with the union through the employees but is

required to deal with the employees through the union.

If Mr. Weston and the balance of the board believe it to be in the best public interest to expend all their tax dollars attracting and rewarding the younger teachers they may certainly exercise that option but only after full participation in the negotiations process. If the younger teachers do not believe they are being properly represented by the organization they may petition to decertify the organization or they may bring charges before the Secretary alleging the existence of such a condition. In no case, however, are the internal workings of the employee organization subject to the scrutiny of the Board of Education. Statements of the type which appeared in Mr. Weston's letter can only be interpreted as an attempt to inflame the public and the younger teachers against the employee organization and are, in and of themselves, a subtle form of negotiations. That is, they constitute an attempt on the part of the board to force the organization to amend their positions through a means other than "professional negotiations". Activities of this type can only serve to destroy a process which the legislature has implemented to facilitate harmonious and cooperative problem solving within the school districts of this State. Additionally, "negotiations" with the public or factions of the appropriate bargaining unit deny the organization the right to function as the exclusive representative of the unit which is a violation of K.S.A. 72-5430(b) (6). The discrediting statements and innuendos contained in Mr. Weston's letter constitute violations of K.S.A. 72-5430 (b) (1) and/or (2), in the opinion of the Secretary, and when viewed in total, evidence a clear lack of good faith as alleged by complainant. The Secretary is of the further opinion that Mr. Weston's letter became a violation of the Professional Negotiations Act at the time his statements began to insinuate misrepresentation of unit members by their representatives, and when he espoused a position of unyielding favoritism toward the younger teachers.

It should be noted that while the Professional Negotiations Act requires that any violation thereof must be found to be "willful", the existence of intent may be determined by inference. From the moment Mr. Weston became a board member he was charged with the duty and responsibility for familiarity with the provisions of the Act. In addition, as the chief negotiator for the board, Mr. Weston should have made himself totally familiar with the provisions of the Act. Any failure to do so does not constitute an adequate defense against potential violations of the Act. In summary, the Secretary finds 1) That Mr. Weston was acting in the capacity of President of the Board of Education and chief negotiator of U.S.D 366 at the time the letter to the editor was written and published. 2) That the actions and state-

ments made by Mr. Weston, via his letter to the editor, do evidence a refusal to negotitate in "good faith" as required by K.S.A. 72-5423, and 3) That the actions of Mr. Weston do constitute a "willful" violation of K.S.A. 72-5430 (b) (5) as alleged by petitioner.

Upon a finding that a willful violation of the Act has occurred, the Secretary is charged with the duty of determining an adequate remedy. The Secretary, therefore, orders U.S.D. 366 to henceforth cease and desist all such unlawful action. The Secretary further finds that additional remedies could destroy rather than promote a harmonious relationship between the parties and as such would be counter productive. The Secretary, therefore, denies all other relief sought by petitioner.

IT IS SO ORDERED THIS 10th DAY OF November, 1981.

Jerry Powell

Jerry Powell (for Dr. Harvey L. Ludwick,
Secretary of the Department of Human
Resources) Employment Relations Administrator
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