

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES
STATE OF KANSAS

NATIONAL EDUCATION ASSOCIATION-)
TOPEKA,)
Complainant,)
vs.)
BOARD OF EDUCATION, UNIFIED)
SCHOOL DISTRICT NO. 501,)
SHAWNEE COUNTY, KANSAS,)
Respondent.)

CASE NO: 72-CAE-7-1987

ORDER

Comes now on this 13th day of October, 1987, the above captioned case for consideration before the Secretary of the Department of Human Resources. This case comes forth as a prohibited practice and is filed in accordance with the provisions of K.S.A. 72-5413 et seq., the Professional Negotiations Act.

APPEARANCES

Complainant, National Education Association-Topeka appeared through its attorney, Mr. David M. Schauner.

Respondent, Board of Education of USD 501 Topeka appeared through its attorney, Mr. William G. Haynes.

PROCEEDINGS BEFORE THE SECRETARY

1) Complaint filed by David M. Schauner against the Board of Education of USD 501-Topeka on November 24, 1986.

2) Complaint submitted to Dr. Marvin E. Edwards, Superintendent of USD 501, for answer on November 24, 1986.

3) Answer of USD 501 submitted by Mr. William G. Haynes and received by the Department of Human Resources on December 3, 1986.

4) Answer of USD 501-Topeka submitted to NEA-Topeka on December 4, 1986.

5) Pre-hearing scheduled for January 9, 1987. Notice of pre-hearing sent to parties on January 6, 1987.

- 6) Pre-hearing conducted on January 9, 1987. All parties in attendance.
- 7) Hearing scheduled for March 18 and 19, 1987. Notice of hearing sent to parties on February 24, 1987.
- 8) Hearing rescheduled for April 9 and 10, 1987. Notice of hearing sent to parties on March 25, 1987.
- 9) Hearing conducted on April 9, 1987. All parties in attendance.
- 10) "Motion to Dismiss" received from USD 501 on April 24, 1987.
- 11) "Motion to Dismiss" submitted to NEA-Topeka on April 28, 1987.
- 12) "Answer to Respondent's Motion to Dismiss" received from NEA-Topeka on June 5, 1987.

FINDINGS OF FACT

- 1) That NEA-Topeka is the certified representative of the professional employees of USD 501-Topeka.
- 2) That the Board of Education of USD 501-Topeka is the appropriate Respondent in the instant case.
- 3) That this case is properly and timely before the Secretary of the Department of Human Resources for determination.
- 4) That Mr. Wagner Van Vlack is an administrator within USD 501 serving as principal of French Middle School. (T-68)
- 5) That Mr. Jeffrey Springer is a professional employee of USD 501 teaching at French Middle School. (T-68)
- 6) That Mr. Van Vlack scheduled and conducted a meeting with Mr. Springer on October 21, 1986. (T-68)
- 7) That Mr. Springer requested representation during the meeting conducted on October 21, 1986. (T-74, 77, 78)
- 8) That Mr. Springer was denied representation at the October 21, 1986 meeting with Mr. Van Vlack. (T-80)
- 9) That Mr. Van Vlack scheduled and conducted a meeting with Mr. Springer on October 23, 1986. (T-80)

- 10) That Mr. Springer requested representation during the meeting conducted on October 23, 1986. (T-82)
- 11) That Mr. Springer was denied representation at the October 23, 1986 meeting with Mr. Van Vlack. (T-82)
- 12) That Mr. Springer received a written reprimand on November 24, 1986 which warned of his possible termination. (T-84).

CONCLUSIONS OF LAW/DISCUSSION

The instant case comes forth on petition of the National Education Association-Topeka alleging that the Board of Education of USD 501, through its representatives has violated the provisions of K.S.A. 72-5430 (b) (1), (2), and (3). In resolving this dispute, the central issue or question in need of an answer may be stated as:

"Does the Kansas Professional Negotiations Act require an employer to allow an employee, upon request, union representation at meetings with their administrators if the employee reasonably believes that the meeting will result in discipline?"

The above mentioned right to union representation has been found to exist within the National Labor Relations Act. The leading case in regard to these rights, National Labor Relations Board v. J. Weingarten, Inc. 420 U.S. 251 (1975) was referenced by the Complainant as providing some degree of guidance in resolving this question even though both parties realize that it arises from the language of the National Labor Relations Act and not the Kansas Professional Negotiations Act. The examiner similarly recognizes the nature of the Weingarten decision but believes the substance of the decision is deserving of review.

As a point of departure the examiner notes the language contained in S 7 of the N.L.R.A. which states:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to re-

frain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." (Emphasis added).

In their decision on Weingarten the Supreme Court reiterated the N.L.R.B. established limits controlling the statutorily imposed right. The five limits are:

"First, the right inheres in S 7's guarantee of the right of employees to act in concert for mutual aid and protection."

"Second, the right arises only in situations where the employee requests representation."

"Third, the employees' right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action."

"Fourth, exercise of the right may not interfere with legitimate employer prerogatives."

"Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview."

The Supreme Court also found that;

"The Board's holding is a permissible construction of 'concerted activities for . . . mutual aid or protection' by the agency charged by Congress with enforcement of the Act, and should have been sustained."

In reviewing the decisions of both N.L.R.B. and the Supreme Court, it appears to the examiner that considerable importance was assigned to two particular phases contained in S 7 the N.L.R.A. Specifically those phrases are; "other concerted activities" and "mutual aid or protection". As the examiner considers the findings of Weingarten he also takes note of the dissenting opinion of Justices Powell and Stewart wherein they state;

"An employee's right to have a union representative or another employee present at an investigatory interview is a matter that Congress left to the free and flexible exchange of the bargaining process. . .".

It is further stated,

"The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the employment relationship to the collective bargaining process. . .".

As stated earlier, the examiner recognizes that Weingarten sets no standards which the examiner is compelled to follow. The value derived from a review of the case is the insight into the rationale applied in arriving at the decision. The Board and the Court were faced with the task of interpreting the exact language of the Act just as this examiner must interpret the language of the Kansas Professional Negotiations Act (PNA).

The rights which are granted to employees by the P.N.A., and which Complainant alleges were violated, are outlined at K.S.A. 72-5414 which states:

"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."

The PNA, unlike the N.L.R.A., says nothing of any right to engage in "other concerted activities" for "other mutual aid or protection". The P.N.A. gives "the right to form, join or assist professional employee's organizations" and the right "to participate in professional negotiations with boards of education." The act goes on to state the purposes for which the action of professional negotiations might occur. Some of those purposes are the maintaining, protecting, or improving terms and conditions of professional service. Complainant argues that the right to association representation at disciplinary meetings is an inherent part of a professional association's representation of its members in maintaining, protecting or improving terms and conditions of professional service under K.S.A. 72-5414. As stated earlier, however, the examiner's reading of the act indicates that maintaining, protecting, or improving terms and conditions of employment occurs during the process called "professional negotiations". The act then specifically defines "professional negotiations" wherein it states:

"'Professional negotiation' means meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."

The act goes on to define "terms and conditions of professional service" in lengthy detail which contains as some of its items "disciplinary procedures", "grievance procedures" and "employee appraisal procedures".

Certainly it appears to the examiner that the legislature recognized the fact that an employee organization would have an interest in the conduct of the above mentioned procedures. Similarly, the examiner recognizes the concerns of the employee organization and understands the interest they would have in participating in those procedures. Fulfillment of their representation obligation would seem to dictate that involvement. However, the legislature did not explicitly grant the organization the right to automatically participate in any particular activity other than "professional negotiations". It would be during those "professional negotiations" that the association would attempt to bargain regarding the particulars associated with the conduct of any of those aforementioned procedures.

As a portion of the information submitted in support of its contention that Weingarten rights were intended by the legislature under K.S.A. 72-5413 et seq., the Complainant directs the examiner's attention to the language contained in K.S.A. 75-4321 (b).

Even if it was the intention of the legislature to grant such rights under K.S.A. 75-4321, the examiner would still have at least two difficulties in extending those rights to the professional employees of a school district. First, while it is true that a school district is listed as one of the entities defined as a "public agency" or "public employer" under K.S.A. 75-4322 (f), this act deals with the relationship between "public agencies" and "public employees" and clearly deletes professional employees of school districts from that definition of "public employees" at K.S.A. 75-4322 (a) which states:

"'Public employee' means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees."

Second, K.S.A. 75-4321 (c) states in pertinent part:

"The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election."

In light of that language, therefore, unless and until such time as it can be shown that USD 501 has elected coverage of K.S.A. 75-4321, the provisions of that statute are inapplicable.

The general issue of association representation at disciplinary meetings has been previously ruled upon by the Secretary in Southern Lyon County Teachers Association vs. Unified School District 252, case number 72-CAE-2-1984. Within the body of the Order issued in that case the Secretary states:

"The examiner finds nothing within K.S.A. 72-5414 which in any way speaks to a right to have witness present during any type of meeting. Rather this statute grants a right or protects the employee in organizational and negotiations endeavors. K.S.A. 72-5413 (1) then clearly defines disciplinary procedure to be a mandatorily negotiable subject. If, in fact an employee has any right to the presence of a witness during a disciplinary meeting such a right would stem from a contract."

Later in that Order, speaking to the provisions of K.S.A. 72-5415, the Secretary continues:

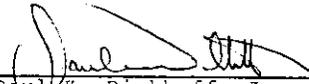
"This statute simply establishes the exclusivity of an organization to represent employees in professional negotiations. The statute does not grant a right to the exclusive representative to represent employees in all types of meetings. It follows then that once a grievance procedure is negotiated the exclusive representative has a vested interest in protecting the terms and conditions of professional service which have been negotiated. However, this interest only extends to the limits of the contracted grievance procedure."

The examiner finds nothing in the instant case which would occasion a departure from the rulings set out in Southern Lyon County.

Lacking the existence of the statutory right to participate in such meetings it matters not whether the employee demanded association representation or whether the employee reasonably believed that the meeting would result in discipline. Accordingly, the examiner does not choose to address those questions in this order.

In summary, the examiner is of the opinion that K.S.A. 72-5413 et seq., grants professional employees the right to protection in their organizational efforts and in their negotiations efforts. It grants no other automatic rights but rather leaves the existence or nonexistence of those rights to the collective bargaining process. Based on all of the foregoing, therefore, the complaint in this matter is dismissed.

It is so ordered this 13th day of October, 1987.



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