

STATE OF KANSAS

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

UNIFIED SCHOOL DISTRICT 501,
TOPEKA, KANSAS,

Complainant,

vs.

NEA-TOPEKA,

Respondent.

CASE NOS: 72-CAEO-1-1982
72-CAEO-3-1981
(Paragraph Two)

O R D E R

Comes now on this 19th day of July, 1983, above captioned matter for consideration by the Secretary of Human Resources. This case comes before the Secretary on petition of Unified School District 501, Topeka, Kansas, alleging violations by NEA-Topeka of K.S.A. 72-5430 (c) (1) (2) (3) and (5) (72-CAEO-1-1982); and K.S.A. 72-5430 (c) (1) (2) and (3) (72-CAEO-3-1981).

A P P E A R A N C E S

William G. Haynes, Attorney at Law; Edison, Lewis, Porter and Haynes; 1300 Merchants National Bank Building, Topeka, Kansas 66612, on behalf of complainant U.S.D. 501.

David Schauner, Attorney, Kansas-National Education Association, 715 West Tenth Street, Topeka, Kansas 66612, on behalf of respondent NEA-Topeka.

PROCEEDINGS BEFORE THE SECRETARY

1. 72-CAEO-3-1981 filed with the Secretary of Human Resources on June 16, 1981 by Unified School District 501 against NEA-Topeka.

2. 72-CAEO-1-1982 filed with the Secretary of Human Resources on July 7, 1981 by Unified School District 501 against NEA-Topeka.

3. Answer to 72-CAEO-3-1981 filed by respondent, NEA-Topeka, on July 16, 1981.

4. Answer to 72-CAEO-1-1982 filed by respondent, NEA-Topeka, on July 27, 1981.

5. Pre-hearing conference between the parties and hearing examiner, Jerry Powell regarding 72-CAEO-1-1982 and 72-CAEO-3-1981 on December 4, 1981.

6. Hearing regarding 72-CAEO-3-1981 and 72-CAEO-1-1982 before the Honorable Jerry Powell on October 25 and 26, 1982.

72-CAEO-1-1982
72-CAEO-3-1981

7. Respondent's Memorandum Brief regarding 72-CAEO-1-1982 received on April 8, 1983.

8. Respondent's Memorandum Brief regarding 72-CAEO-3-1981 received on April 25, 1983.

9. Complainant's Memorandum Brief regarding 72-CAEO-1-1982 and 72-CAEO-3-1981 received on April 27, 1983.

FINDINGS OF FACT

1. That the school board of U.S.D. 501 is the employer of the professional employees represented by NEA-Topeka and thus has standing to bring this complaint.

2. That NEA-Topeka is the certified representative of the professional employees of U.S.D 501 and thus is the appropriate respondent to this complaint.

3. That on July 1, 1981, Mr. Don Larscheid was the president of NEA-Topeka. (T - 114)

4. That on July 1, 1981, Mr. Larscheid addressed the Board of Education of District 501. (T - 114)

5. That Mr. Larscheid, in his speech to the Board on July 1, 1981, introduced himself as the new president of NEA-Topeka. (T - 103)

6. That during his speech to the Board on July 1, 1981, Mr. Larscheid stated that he was speaking as a concerned teacher. (T - 114)

7. That Mr. Larscheid in his speech to the Board on July 1, 1981, indicated that the negotiations as they were proceeding were a charade and that if the Board did not discontinue such a charade, they would be responsible for whatever might be the ultimate outcome in the district, which could be a work stoppage. (T - 104 and T - 401, Complainant's Exhibit 13)

8. That in his speech to the Board on July 1, 1981, Mr. Larscheid mentioned the impasse in negotiations and pending fact-finding. (Complainant's Exhibit 13, T - 401)

9. That in his speech to the Board on July 1, 1981, Mr. Larscheid stated that the failure of mediation could harm the morale of the teachers and would be detrimental to the student-teacher relationship. (T - 114)

10. That there is conflicting testimony as to whether Mr. Larscheid, in his speech to the Board, referred to specific subjects of negotiations. (T - 104, 115)

11. That Mr. Nusbaum, Assistant Superintendent of Administrative Services for School District 501, took notes during the school board meeting of July 1, 1981, and subsequently destroyed those notes.

(T - 111)

12. That Board President, Pat Thompson interrupted Mr. Larscheid's speech several times to remind him that board policy prohibited employees from addressing the board directly on matters involving negotiations.

(T - 401)

13. That subsequent to July 1, 1981, neither NEA-Topeka or its members engaged in a strike or work stoppage. (T - 109)

14. That Board Policy #1030 prior to August of 1981 prohibited U.S.D. 501 employees in a collective bargaining unit and/or their representatives from speaking to the Board concerning matters covered by the Collective Negotiations Act or items relating to negotiations at any time. (Complainant's Exhibit 1A, T - 41, Respondent's Exhibit 1)

15. That the Attorney General of Kansas delivered an opinion on August 11, 1981 that specifically addressed the Constitutionality of Board Policy #1030, as well as its consistency with K.S.A. 72-5413 et seq. (Respondent's Exhibit 1)

16. That A. G. Opinion #81-185 reflects the opinion that the portion of Board Policy #1030 which forbids District 501 employees and/or their representatives from speaking to the Board regarding items relating to negotiations was a violation of the First Amendment to the U. S. Constitution which protects the right of freedom of speech. (Respondent's Exhibit 1)

17. That A.G. Opinion #81-185 states "that membership in a collective negotiating unit does not preclude a professional employee from making his or her positions or proposals or both known to the Board of Education by whom he or she is employed." (Respondent's Exhibit 1)

18. That subsequent to the Board's receipt of A. G. Opinion #81-185, the Board amended policy #1030 by deleting the limitations as to the subject matter that could be presented to the Board. (T - 41, 42)

19. That around July 1, 1981, NEA President Don Larscheid and board member Ross Freeman talked in general terms about a salary schedule. (T - 115)

20. That in the discussions referenced in finding of fact number nineteen (19), board member Ross Freeman expressed some of his ideas regarding the concept of a salary schedule to Mr. Don Larscheid.

(T - 116)

21. That discussions were had between board members (other than Ross Freeman) and Don Larscheid regarding the general concept of a salary schedule. (T - 116)

22. That NEA president, Don Larscheid initiated the discussions referenced in findings of fact numbers nineteen (19), twenty (20), and twenty-one (21). (T - 116)

23. That in the conversations referenced in findings of fact numbers nineteen (19), twenty (20), and twenty-one (21), Mr. Larscheid was unable to determine the board members' personal positions regarding negotiation matters.

24. That in the conversation referenced in findings of fact numbers nineteen (19), twenty (20), and twenty-one (21), Mr. Larscheid was able to further explain to the board members the association's positions regarding negotiation matters. (T - 123, 124, 125)

25. That Duane Pomeroy met on several occasions with Pris Callison in the Spring of 1981. (T - 68, 69)

26. That at the time of the meetings referenced in finding of fact number twenty-five (25) Pris Callison was president of NEA-Topeka and Duane Pomeroy was a member of the Topeka 501 School Board. (T - 58, 113)

27. That the meetings referenced in finding of fact number twenty-five (25) were unscheduled and initiated by Duane Pomeroy when he visited the NEA office. (T - 69)

28. That during the meetings referenced in finding of fact number twenty-five (25) Duane Pomeroy and Pris Callison discussed issues of the board tapes and the Attorney General's Opinion on forced resignations. (T - 66)

29. That the forced resignations issue referenced in finding of fact number twenty-eight (28) was being negotiated on or around the date of May 27, 1981. (Complainant's Exhibit 12)

30. That 1981 negotiations ended on or around Memorial day and mediation began around the 1st of July. (T - 86)

31. That during the 1981 negotiations, Mr. Bill Haynes was chief spokesman for the District 501 school board. (T - 84 and 408)
32. That between May 20, 1981 and October 27, 1981, NEA-Topeka issued a series of statements regarding specific matters of negotiations via the NEA-Topeka Code-A-Phone system. (Complainant's Exhibits 3-9)
33. That the school board had asked the administration to send the board copies of everything that NEA-Topeka was publishing. (T -25)
34. That during 1981 and 1982 Nancy Peipmeier, Secretary to the Associate Superintendent of Management Service, prepared transcripts of NEA-Topeka Code-A-Phone messages. (T - 80)
35. That the transcripts referenced in finding of fact number thirty-four (34) were furnished to Ms. Peipmeier's supervisor, Don O'Neil. (T - 81)
36. That District 501 Board Member Duane Pomeroy received the NEA Code-A-Phone messages in "his packet from 501 administration." (T - 61)
37. That Board Member Ross Freeman received at least some of the copies of the Code-A-Phone messages. (T - 20)
38. That copies of the Code-A-Phone messages were sent to the Board at its own request by the administration of U.S.D. 501. (T - 20, 21)
39. That NEA-T Beat, a publication by NEA-Topeka dated May 27, 1981, was sent to Board Member Ross Freeman. (T - 25)
40. The publication referenced in finding of fact number thirty-nine (39) referred to matters under negotiations. (Complainant's Exhibit 12)
41. A brochure entitled "Why are Topeka 501 teachers upset"?, was given to Ross Freeman by NEA-Topeka. (T - 25)
42. The brochure referenced in finding of fact number forty-one (41) referred to subject matter under negotiations. (Complainant's Exhibit 11, T - 32)
43. That the issues of salaries and a salary schedule were major issues in the 1981-82 negotiations between U.S.D. 501 and NEA-Topeka. (T - 32)
44. That the 1981-82 negotiations between U.S.D. 501 and NEA-Topeka reached impasse and went through fact-finding. (T - 32)

45. That negotiations and impasse proceedings were ongoing during the time that the messages were on the NEA-Topeka Code-A-Phone and the negotiations bulletin and NEA-T Beat were circulated. (T - 86)

46. That Don Larscheid contacted Board President, Pat Thompson to arrange a meeting to talk about negotiations. (T - 404)

47. That Pat Thompson declined Mr. Larscheid's offer to meet regarding negotiations, unless a witness was present at the meeting. (T - 404)

48. That the meeting proposed by Don Larscheid and referenced in finding of fact number forty-six (46) never took place. (T - 404)

49. That during negotiations, Board President Pat Thompson received several telephone calls from teachers regarding negotiations. (T - 414)

50. That Curtis Barnhill called Pat Thompson with regard to the salary schedule under negotiations. (T - 416)

51. That the date of the phone call from Mr. Barnhill to Ms. Thompson is unclear. (T - 416)

52. That Curtis Barnhill became President-Elect of NEA-Topeka sometime in 1981. (T - 417, 418)

53. That Ms. Thompson was aware of Mr. Barnhill's position, whether official or not, at the time of his phone call. (T - 419)

54. That Ms. Thompson informed Mr. Barnhill in the conversation referenced in finding of fact number fifty (50) that she was not in favor of a salary schedule. (T - 420)

DISCUSSION

Complainant has alleged that since February 1, 1981, NEA-Topeka, through its officers, agents and representatives has circumvented the designated representative of the School Board of District 501. Two complaints have been filed with the Secretary, 72-CAEO-1-1982 and 72-CAEO-3-1981, both of which request rulings with regard to provisions set forth at K.S.A. 72-5430 (c) (2). Since paragraph two (2) of 72-CAEO-3-1981 and 72-CAEO-1-1982 relate to the 1981-82 negotiations period and the crux of these complaints relate to the same legal principles, the examiner has chosen to combine the similar elements of the two complaints.

Paragraph two (2) of 72-CAEO-3-1981 states,

"Since February 1, 1981, officers, agents, repre-

sentatives and members of the Association have communicated with members of the Board of Education of U.S.D. 501 verbally, and by written correspondence in an attempt to circumvent their representative agent designated pursuant to K.S.A. 72-5414 with regard to matters described in K.S.A. 72-5423 and have therefore interfered, restrained and coerced members of the Topeka Board of Education in violation of K.S.A. 72-5430 (c) (2) with respect to the selection of their representative for purposes of professional negotiations."

The complaint in Case No. 72-CAEO-1-1982 states,

"On July 1, 1981, the president of NEA-Topeka, Don Larscheid, appeared at the public meeting of the Topeka Board of Education, and in violation of Board policy 1030 addressed the Topeka Board of Education on matters relating to professional negotiations and the collective bargaining process, circumventing the Board of Education's designated representative, William Haynes, and threatened and coerced the Topeka Board of Education by stating a strike or work stoppage was possible because of the lack of progress in the current negotiations and mediation."

Complainant argues that the alleged activities constitute prohibited practices as set forth at K.S.A. 72-5430 (c) (1) (2) (5).

CONCLUSIONS OF LAW

Complainant alleges that certain actions of NEA-Topeka officers, agents and representatives (hereafter NEA-Topeka) during the 1981 negotiations, constitute violations of K.S.A. 72-5413 et seq. Specifically, the actions that form the basis of the complaint include meetings, telephone conversation and written communications between NEA-Topeka and members of the U.S.D. 501 school board. At the time that NEA-Topeka was engaging in communications with the Board, NEA-Topeka representatives were negotiating with the School Board's designated representative for negotiations, Bill Haynes.

In the opinion of the examiner, the record clearly indicates that there were communications between NEA-Topeka and the school board of U.S.D. 501, during the time when NEA-Topeka was negotiating with the U.S.D. 501 school board's designated representative. The examiner further believes that the ruling on this complaint is predicated on the resolution of the following issues:

- (1) Did the purpose and content of these communications relate to matters of negotiations?
- (2) Was the Topeka Board of Education a willing participant in these communications?
- (3) Are communications between the board and the exclusive representative prohibitive practices?

Before addressing these issues in the context of the events surrounding the 1981 negotiations between NEA-Topeka and U.S.D. 501, the examiner is compelled to discuss the intent of the Kansas legislature with regard to designating representatives for the purposes of negotiations.

K.S.A. 72-5413 et seq. contains numerous provisions which deal with the designation and authority of representatives for negotiation purposes. Initially, the statute establishes a definition of the term "representative" for use in the interpretation and application of the Professional Negotiations Act. K.S.A. 72-5413 (f) provides:

"(f) 'Representative' means any professional employees' organization or person it authorizes or designates to act in its behalf or any person a board of education authorizes or designates to act in its behalf."

The statute further provides that both parties to the negotiations may designate a representative to act in that party's behalf for negotiations purposes. The applicable provision of the act is:

72-5414. "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." (Emphasis added)

It is clear from these provisions that either party may designate a representative for negotiations purposes. Furthermore, the legislature clearly intended to protect the parties from interference or coercion with respect to the designation of their representative. The relevant provisions are:

K.S.A. 72-5430 (b) states in part,

"(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;

K.S.A. 72-5414 then gives professional employees the right to participate in negotiations through representatives of their own choosing.

The school board's right with regard to selecting a representative is protected by the following provision:

K.S.A. 72-5430(c). "It shall be a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to:

(2) Interfere with, restrain or coerce a board of education with respect to rights or duties which are reserved thereto under K.S.A. 72-5423 and amendments thereto, or with respect to selecting a representative for the purpose of professional negotiation or the adjustment of grievances."

In summary, it is clear that both parties have the right to designate a representative for negotiations purposes. Furthermore, it is a prohibited practice for either party to interfere with the other party's selection of their representative.

It is a well-established principle that the designation of a representative by the parties is accompanied by rights of exclusivity for negotiations purposes. The examiner is of the opinion that the legislature intended to give both parties the right to exclusive representation for negotiations. In the ruling on 72-CAE-16-1981, the examiner discussed the obligation of the school board to negotiate with individual teachers through their exclusive representative. In that case, NEA-Topeka interpreted K.S.A. 72-5415 to mean that the representative of the professional employees is the exclusive representative for negotiations purposes. Therefore, when individual teachers presented their salary requests to the board, it was a prohibited practice for the board to act on those requests. The examiner agreed with NEA-Topeka that the board must negotiate individual salary requests with the exclusive representatives even though individual teachers could make known their proposals to the board.

In the instant case, NEA-Topeka claims that the association retains the right to communicate directly with the board, regarding negotiation matters, thereby circumventing the designated representative of the board. NEA-Topeka claims this right, based on K.S.A. 72-5415 (b) which states:

"(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."

The examiner is unaware of any similar provisions in other state or federal labor relations law. Thus, the uniqueness of this provision leaves the examiner without precedence or guidance with regard to its meaning. The examiner is of the opinion that the legislature fully intended to embody the general principles of labor relations when they enacted the Professional Negotiations Act. The legislation protects the rights of teachers to organize and negotiate, through representatives of their own choosing. The school board also has the right to designate a representative. In addition, by designating a representative and participating in negotiation in good faith through that representative, the board has fulfilled its duty to bargain with the professional employee organization. Most importantly, once a school board has designated a representative, that representative is the exclusive representative of the board for negotiations purposes, unless the board indicates to the contrary.

Once a representative has been designated by the Board, the employee organization must negotiate in good faith with that representative, as provided by K.S.A. 72-5430 (3) which states:

K.S.A. 72-5430(c). "It shall be a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to:

(3) refuse to negotiate in good faith with the board of education or its designated representatives as required in K.S.A. 72-5423 and amendments thereto."

The examiner believes that once a representative is appointed, the appointing parties may fulfill their responsibilities to bargain through that representative. If the legislature had not intended for this to be the case, it would have provided that professional employees and their representatives must bargain in good faith with the board and its representative. By inserting the word "or", the legislature has implied that the employees have the right to transfer negotiating responsibilities to the representative. The same language is then used to delineate the responsibilities of the school board. K.S.A. 72-5430 (b) states,

"(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;"

The examiner suggests that the conjunctive "or" implies that the board may meet its statutory duty by transferring its negotiating responsibilities to a representative, although the board remains accountable for the actions of that representative.

The examiner feels that reconciliation of the provisions contained in the statute requires a comprehensive view. The statute provides for representation for both sides, requires good faith bargaining between the representatives (if designated), yet also permits teachers to individually or collectively make their proposals known to the Board. NEA-Topeka would suggest that the right of the teachers to collectively make known their proposals to the board means that the association may take its proposals regarding negotiations directly to the Board. However, the examiner believes that the association cannot be negotiating in good faith with the representative of the board if it is simultaneously negotiating directly with the Board. This would also deny the Board the right to designate a representative for negotiations purposes; a right expressly granted by the statute. Therefore, the examiner believes that the legislature was not referring to the association when it permits teachers, individually or collectively, to make their positions or proposals known to the board. An individual teacher or collection of teachers has neither the right or the responsibility to negotiate a contract for the bargaining unit. The association does have this right, exclusively. K.S.A. 72-5421 (a) outlines very clearly who may enter into a negotiated agreement.

72-5421(a). "A board of education and an exclusive representative selected or designated under the provisions of this act, or the act of which this section is amendatory, may enter into an agreement covering terms and conditions of professional service." (Emphasis added)

The examiner believes that this provision is clear regarding the restriction as to who may participate in negotiations. The statute does not provide for individual teachers or groups of teachers, other than the exclusive representative of the teachers, to engage in negotiations with the board or its representative.

The examiner is, therefore, of the opinion that K.S.A. 72-5415 (b) provides a forum for teachers to express their views directly to the board rather than through their representatives. The examiner further believes that this provision was in no way intended to give the association the unfair advantage of negotiating with the Board and its designated representative.

At this point, it is necessary to determine when and to whom this limitation applies. The examiner is aware that a professional employees' association is comprised of a collection of professional employees. However, only certain individuals may speak for the association or represent the association for negotiations purposes. Furthermore, once these individuals have been designated to act in an official capacity for the association, they may not disclaim their official capacity in their dealings with the board. The Secretary previously ruled that this principle applies to school board members as well. In 72-CAE-7-1981, the teacher association claimed that a school board member circumvented the exclusive representation rights of the association when he published a letter, "as a candidate for reelection" regarding negotiations matters. The Secretary ruled that the Board member may not "move into or out of his official role (as board member and chief spokesperson in negotiations) at his pleasure." The examiner believes that the same principle applies to any individual who acts as a representative or in an official capacity for the association. Furthermore, any proposals submitted by the association regarding negotiations matters constitute professional negotiations for the purpose of this act.

K.S.A. 72-5413 (g) states,

"(g) '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."

Since the association, exclusively, has the right to reach an agreement on the behalf of the teachers, its proposals to the board regarding subjects of negotiations are indistinguishable from what the legislature considered "professional negotiations." On the other hand, teachers are capable of doing no more than making their positions or proposals known to the board. The same logic applies to the school board. Since the Board has the right to consummate an agreement, its

proposals regarding negotiations matters constitute professional negotiations and must, therefore, be directed to the representatives of the teachers. The examiner does not, however, construe the provisions of K.S.A. 72-5413 et seq. to prevent the association from appearing before the board with regard to matters other than those which are properly subjects of negotiations during the period in which negotiations are taking place. Furthermore, the association may approach the board with regard to negotiations matters after the current year's negotiations are completed either through an agreement or by the exhaustion of the statutory impasse procedures. The examiner believes that it is only during the delicate period of negotiations that the association must direct its positions or proposals regarding negotiations subjects to the designated representative of the board.

The facts of the instant case suggest that the examiner must closely analyze the events that transpired during the 1981 negotiations in order to determine whether NEA-Topeka was acting in a manner which is violative of the statute. The record indicates that NEA-Topeka engaged in four categories of activities. These categories include a presentation to the board while it was in formal session, telephone conversations with board members, the distribution of literature regarding negotiations and informal meetings between NEA-Topeka officers or representatives and school board members. The examiner will consider each of these categories on an individual basis.

PRESENTATIONS BEFORE THE BOARD

The examiner has determined that presentation of positions or proposals regarding negotiations subjects to the school board by the officers or representatives of NEA-Topeka constitutes professional negotiations for the purposes of this act. In addition, since the District 501 board has designated a representative, NEA-Topeka must negotiate with that representative. If NEA-Topeka was to circumvent the designated representative of the board, it would in effect be denying the board the right to designate its representative and would constitute a refusal to negotiate in good faith with the board's representative. Such activities clearly constitute prohibited practices as set forth at K.S.A. 72-5430 (c) (2) (3). The meaning of the provisions were addressed earlier in this order, so no reiteration is

necessary. The examiner merely wishes to establish the framework within which each of the alleged NEA-Topeka activities are to be judged.

The determining factor in this instance is whether NEA-Topeka President Don Larscheid, in his speech to the board on July 1, 1981, was engaging in negotiations with the board. The examiner noted earlier that the association is limited only with regard to the presentation of positions or proposals which are properly subjects of negotiations. The examiner is of the opinion that Mr. Larscheid did not discuss or propose anything that could be construed as a proper subject of negotiations. Rather, he limited his comments to general statements regarding the lack of progress in negotiations. As stated in finding of fact number ten (10), there is conflicting testimony as to whether Mr. Larscheid discussed specific matters of negotiations, (the salary schedule). By a weighing of the evidence, the examiner believes that Mr. Larscheid did not discuss specific matters of negotiations. The testimony which suggested that he did was taken a full seventeen months after Mr. Larscheid's speech to the board. However, school board president, Pat Thompson, sent a letter to Mr. Larscheid only a few days after Mr. Larscheid had appeared before the board. The letter from Pat Thompson identified elements of the speech which were objectionable to the board. The letter refers to Mr. Larscheid's discussion of the lack of progress in negotiations, but does not refer to any discussion regarding specific subjects of negotiations. Mr. Larscheid has testified that he did not talk about subjects of negotiations. In the absence of a text of the speech, the examiner concludes that Ms. Thompson's letter and Mr. Larscheid's testimony should be weighed more heavily than one witness's recollection seventeen months after the event. Therefore, the examiner finds that Mr. Larscheid neither made a proposal or stated his position with regard to subjects of negotiations.

Complainant also alleges that Mr. Larscheid committed a prohibited practice when he stated that a work stoppage or strike was possible due to the lack of progress in negotiations. Respondent argues that Mr. Larscheid was without authority to call a strike.

K.S.A. 72-5430 (c) (5) states:

"(c) It shall be a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to:

(5) authorize, instigate, aid or engage in a strike or in picketing of any facility under the jurisdiction and control of the board of education."

In the opinion of the examiner, the mere suggestion that a strike might occur does not qualify as "authorizing, instigating, aiding or engaging in a strike." Since a strike did not occur at any time during or in the aftermath of the negotiations, it seems unreasonable to find Mr. Larscheid guilty of authorizing, aiding, engaging or instigating a strike.

In summary, the examiner finds nothing in Mr. Larscheid's speech that would constitute negotiations with the board or instigating a strike.

MEETINGS BETWEEN NEA-TOPEKA AND SCHOOL BOARD MEMBERS

The record reflects that NEA-Topeka President, Don Larscheid, on several occasions initiated conversations with various board members regarding a topic of negotiations. The record also reflects that board member, Duane Pomeroy, on several occasions contacted NEA-Topeka in an effort to discuss subjects of negotiations. The testimony reflects that at least two board members, Ross Freeman and Duane Pomeroy, were either willing participants or initiators of these discussions. The record suggests that discussions regarding negotiations matters may have occurred between NEA-Topeka and other individual board members. However, none of the board members have previously raised an objection to the informal communications, other than Ms. Thompson's testimony regarding a telephone call from Curtis Barnhill.

The examiner is of the opinion that both NEA-Topeka and the board have not acted within the spirit of the Act with regard to these informal communications. In the first place, K.S.A. 72-5423 (b) requires that "every meeting, conference, consultation and discussion" between a professional employees' association and the board during the course of negotiations is subject to the Open Meetings Law. The examiner believes that the "side-bargaining" that has occurred between NEA-Topeka and the District 501 board may well violate the Open Meetings Law.

The examiner also believes that while NEA-Topeka's actions could be construed as circumventing the board's designated representative, the board has also not honored the exclusivity of their representative. It is unreasonable to expect NEA-Topeka to respect the exclusivity of the representative when the board has failed to do so. The examiner reiterates that the board has a right to designate a representative. The board also has the right to remove the representative it has designated. The examiner believes that when board members initiated or willingly engaged in discussions regarding negotiations matters, this conveyed to NEA-Topeka that the board had not intended to channel all negotiations matters through its designated representative. The designation of a representative by a school board occurs by a procedure that differs greatly from the selection of a representative by the professional employees. The selection of a representative by the employees requires either a majority vote by the teachers which is consummated by certification by the secretary or a voluntary recognition by the employer that the representative is the exclusive representative of the professional employees for negotiations purposes. If the representative is selected via the election procedure or the voluntary recognition process, that representative becomes the exclusive representative of the professional employees. On the other hand, the school board has a great deal of flexibility with regard to designating a representative for negotiations purposes. The board may designate a representative, yet remain actively involved in negotiations. The board may also designate a representative and require that all negotiations be conducted with that individual exclusively. When the latter option is chosen, it is incumbent on the board to relay this information to the representative of the professional employees. The record is void of evidence that the school board of District 501 had effectively communicated the exclusive status of their representative to NEA-Topeka. Rather, certain board members willingly engaged in conversations involving negotiations matters and at least one board member initiated such conversations. Therefore, the examiner cannot find NEA-Topeka guilty of circumventing the board's exclusive representative when it is unclear as to the exclusive status of the representative.

PUBLICATIONS AND OTHER COMMUNICATIONS

The record indicates that NEA-Topeka published bulletins and newsletters, as well as Code-A-Phone Messages which dealt specifically with matters of negotiations. Complainant argues that these publications represent an effort by NEA-Topeka to communicate with school board members directly. In addition to the rationale regarding the board's ambiguity as to the exclusive status of their representative, the examiner notes that there is no evidence that the board objected to the receipt of these documents at the time they were received. Instead, the board actively solicited copies of the publications and transcripts of the Code-A-Phone Messages. The examiner believes that an association has a right to communicate with the members of the bargaining unit it represents. If the board wishes to be unexposed to these communications, it certainly may express that desire to the association. The examiner believes that this would be optimal if the board had in fact selected an exclusive representative. However, the board's active solicitation of these materials is, in the opinion of the examiner, further evidence that the board did not intend to have access to negotiations information solely through their exclusive representative. The examiner does not mean to imply that the association is acting in accordance with prevailing labor relations standards. Had the board been clear as to the exclusivity of their representative, the association would have denied the board its right to designate a representative when it sent negotiations communications directly to the board.

TELEPHONE COMMUNICATIONS

The record indicates that during the 1981 negotiations, Board President Pat Thompson received several telephone calls regarding negotiations. On one occasion, Don Larscheid contacted Ms. Thompson to arrange a meeting to talk about negotiations. Ms. Thompson declined to meet with Mr. Larscheid unless a witness was in attendance. On a separate occasion, Curtis Barnhill contacted Ms. Thompson regarding specific matters of negotiations. In that conversation Ms. Thompson relayed to Mr. Barnhill her position regarding certain subjects of negotiations. The examiner reiterates that the Board retains the right to designate an exclusive representative for negotiations purposes. However, Ms. Thompson's response to the overtures by NEA-Topeka

indicates some willingness, although slight, to meet with the association regarding negotiations matters. In the first instance she inferred that she would meet if a witness could accompany her. In the second instance, Ms. Thompson participated in the discussion and offered information regarding her position on certain subjects of negotiations. Once again, had the Board been clear regarding the exclusive status of their representative, NEA-Topeka would have been acting improperly.

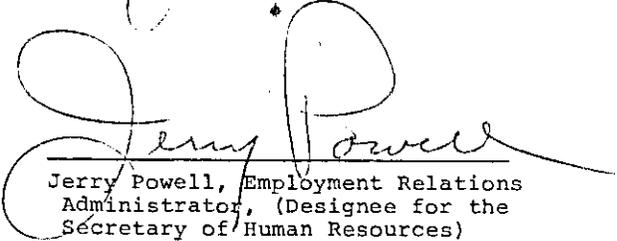
In summary, the examiner finds that NEA-Topeka did not violate the Professional Negotiations Act, but only because the board of District 501 was ambiguous as to the exclusive status of its representative. The examiner understands the Board's reluctance to restrict NEA-Topeka due to the provision in the Act that allows professional employees to make their positions or proposals known to the Board. However, the examiner sincerely hopes that this order will clearly define the rights and duties of the board and the association with regard to matters of negotiations.

In conclusion, the examiner rules:

1. That NEA-Topeka, through its officer Don Larscheid did not commit a prohibited practice as provided at K.S.A. 72-5430 (c)(1)(2) (5) in his speech to the board on July 1, 1981. The contents of the speech could not be construed as negotiations with the board nor did the speech incite a strike by the professional employees.
2. That NEA-Topeka did not commit a prohibited practice as set forth at K.S.A. 72-5430 (c)(2) by communicating with the board directly regarding negotiations. By its own actions, the Board has failed to make clear the exclusive status of their representative.

Complaint 72-CAEO-1-1982 and paragraph two (2) of Complaint 72-CAEO-3-1981 are hereby dismissed.

IT IS SO ORDERED THIS 19th DAY OF July, 1983.


Jerry Powell, Employment Relations
Administrator, (Designee for the
Secretary of Human Resources)
512 West Sixth Street
Topeka, Kansas 66603