

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

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KANSAS-NEA LEGAL DEPT.

U.S.A. No. 259 Sedgwick)
County, Kansas,)
)
Petitioner,)
)
v.)
)
NEA Wichita,)
)
Respondent.)

Case No. 72-CAEO-1-1990

INITIAL ORDER

ON the 6th day of August, 1990, the above captioned prohibited practice complaint came on for formal hearing pursuant to K.S.A. 72-5430a and K.S.A. 77-517 before the Secretary's designated presiding officer, Monty R. Bertelli.

APPEARANCES

Petitioner: Appears by counsel William H. Dye, FOULSTON & SIEFKIN, 100 North Broadway, Suite 700, Wichita, Kansas 67202-2295

Respondent: Appears by Counsel David Schauner, Kansas-National Education Association, 715 West Tenth St., Topeka, Kansas 66612

ISSUES PRESENTED FOR REVIEW

- I. DID THE PICKETING OF THE ADMINISTRATIVE CENTER ON MAY 31, 1990 BY NEA-WICHITA, A PROFESSIONAL EMPLOYEES' ORGANIZATION, CONSTITUTE A PROHIBITED PRACTICE PURSUANT TO K.S.A. 72-5430(c)(5)?
- II. WAS THE "WRIGHT IS WRONG" CAMPAIGN UNDERTAKEN BY NEA-WICHITA TO INTERFERE WITH, RESTRAIN OR COERCE THE BOARD OF EDUCATION WITH RESPECT TO ITS SELECTION OF A REPRESENTATIVE FOR PURPOSES OF PROFESSIONAL NEGOTIATIONS IN VIOLATION OF K.S.A. 72-5430(C)(2)?

SYLLABUS

- 1) INTERPRETATION OF STATUTES - Constitutionality - Authority of Secretary. It is universally recognized that administrative agencies do not determine constitutional issues and specifically do not determine the constitutionality of statutes under which they act.
- 2) INTERPRETATION OF STATUTES - Constitutionality - Authority of Secretary. Administrative Tribunal should construe statutes to avoid constitutional questions if such a construction is fairly possible. An agency head may evaluate a statute against constitutional criteria to reach an interpretation that will avoid constitutional difficulties.
- 3) PROHIBITED PRACTICES - Picketing - Freedom of Speech. Peaceful picketing is a means of communication and conveys the information of a labor grievance to the public, and as such is protected against abridgment under the First and Fourteenth Amendments, though subject to the same legislative restrictions as other forms of speech.
- 4) PROHIBITED PRACTICES - Picketing - Freedom of Speech - Test. The state may enforce reasonable time, place, and manner regulations as long as the restriction are 'content neutral', are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.
- 5) PROHIBITED PRACTICES - Picketing - Freedom of Speech - Compelling State Interest. Preventing disruption of schools is a substantial and legitimate governmental concern.
- 6) PROHIBITED PRACTICE - Picketing - Definition. The term "picketing" has two distinct meanings depending upon the result to be obtained: interference with an employer's business by influencing employees and customers to withhold their work or business, referred to as "economic picketing"; to publicize a labor dispute, referred to as "informational picketing".
- 7) PROHIBITED PRACTICE - Picketing - Construing term as used in statute. The term "picketing" referred to in K.S.A. 72-5413(c)(5) is limited to "economic picketing", the intent of which is a coercive or disruptive activity usually associated with, and employed in, a strike. Peaceful, non-disruptive, non coercive "informational picketing" is not prohibited.

- 8) PROHIBITED PRACTICE - Selection of Negotiation Representative - Generally. It is a prohibited practice of the Board or professional employee organization to interfere with, restrain or coerce the other in its choice of a representative for purposes of professional negotiations.
- 9) PROHIBITED PRACTICE - Selection of Negotiation Representative - Test. The test to be applied is whether the misconduct is such that, under the existing circumstances taken as a whole, it may reasonably tend to interfere with, restrain or coerce the Board of Education in the exercise of its rights under K.S.A. 72-5430(c)(2).
- 10) PROHIBITED PRACTICE - Burden of Proof - Generally. The burden of affirmatively establishing an unfair labor practice rests upon the complaining party, and the burden of proof never shifts to the accused.

FINDINGS OF FACT

1. NEA-Wichita, hereinafter referred to as the "Association", is the exclusive bargaining representative for the professional employees of Unified School District No. 259, hereinafter referred to as the "Board". (Tr. p. 21)
2. Robert Wright, Associate Superintendent, served as the Chief Negotiator for the Board in professional negotiations since 1976 except for 1988 when Dr. Al Jones served in that capacity. (Tr. p. 90-91).
3. Robert Wright was generally recognized as the Board's Chief Negotiator among the professional employees of the district. (Tr. p. 20) and was so referred in media reports. (Tr. p. 107).
4. The parties exchanged proposals for the 1991 memorandums of agreement on or about February 1, 1990, met on a number of occasions in professional negotiations, reaching impasses May 23, 1990 (Tr. p. 46, 158).
5. Through distribution of a flyer on or about May 29, 1990, the Association requested teachers support their negotiating team by: a). Wearing red on Tuesday, May 29, and signing petitions in support of the bargaining team; b). signing petitions on May 30, 1990; c). Wearing "Wright is Wrong" arm bands, and participating in informational picketing at the Administrative Center and rally at the Century II parking lot; and d). Wearing "Wright is Wrong" arm bands, and return petitions.

This conduct constituted what was referred to as the "Wright is Wrong" campaign. (Ex 2 and 3).

6. A letter was distributed to teachers from the Association urging participation in the May 31, 1990 picketing less a low turn-out be interpreted "that Wichita Teachers don't really care about the improvements in their working conditions and salaries which the NEA-Wichita bargaining team is seeking"; i.e. that Wright is right. rather than wrong as alleged by the association (Ex 1, Tr. p. 42).
7. The Board received no complaints that the wearing of the color red or the "Wright is Wrong" arm bands by teachers pursuant to the May 29th flyer resulted in disruption of the educational process (Tr. p. 73), and there is evidence in the record of any disruption (Tr. p. 54). There is no evidence the Board received any petitions (Tr. p. 75)
8. On May 31, 1990, teachers and other interested individuals picketed the Board's Administrative Center in Wichita (Tr. p. 32). The picketers carried signs with slogans such as "Teachers are Professionals", "Wright is Wrong", "Strength in Unity", "Our contract is not for sale", and "We are not indentured servants" (Tr. p. 29-30, Ex. 4).
9. The picketing began at or about 4:00 p.m. and ended approximately 5:15 p.m. (Tr. p. 11, 30). The picketing did not disrupt any activities taking place in the administrative Center (Tr. p. 50); block access to or from the Center (Tr. p. 50, 124); result in any vulgarities being exchanged or name-calling (Tr. p. 31); and none of the participants were hostile, inhospitable or obstructive (Tr. p. 39). There was no disruption of the public school buildings or educational process.
10. The Administrative Center is a facility under the jurisdiction and control of the Board of Education.
11. The intent of the picketing was publicity (Tr. p. 52-53). The new media was notified of the event in advance (Tr. p. 53), and the picketing was covered by the radio and television news media (Tr. p. 52), who interviewed NEA-W President Jan Miller as part of its coverage. In the interview President Miller explained the purpose of the picketing (Tr. p. 52).
12. The Association never intended nor took the position that Robert Wright should be replaced as the Board's negotiations representative (Tr. p. 40, 51), never indicated to nor demanded of the Board that Robert Wright be replaced (Tr. p. 73-74), and never threatened to no longer participate in negotiations if he continued as the Board's representative (Tr. p. 51).

13. The Association by the "Wright is Wrong" campaign did not intend to attack Robert Wright personally but rather intended the slogan to state the Association's opinion that Robert Wright's statements or inferences during negotiations that the Wichita teachers would accept the Board's proposal for a 1991 contract if NEA-W would take it to them was incorrect (Tr. p. 15, 16).
14. Robert Wright's ability and/or value to the Board during professional negotiations was not diminished by the slogan "Wright is Wrong" (Tr. p. 67), he will remain the Board's Chief Negotiator through mediation and fact-finding (Tr. p. 68), and the picketing did not actually interfere with, restrain or coerce the Board in the selection of its representative for the purpose of professional negotiations (Tr. p. 74).

CONCLUSIONS OF LAW AND OPINION

ISSUE I.

Did the picketing of the Administrative Center on May 31, 1990 by NEA-Wichita, a professional employees organization, constitute a prohibited practice pursuant to K.S.A. 72-5430(c)(5)?

A. Constitutionality of Statute.

(1.2.) The Association would have the Secretary of Human Resources rule on the constitutionality of K.S.A. 72-5430(c)(5). It is universally recognized that administrative agencies do not determine constitutional issues and specifically do not determine the constitutionality of statutes under which they act. 1 Am. Jur. 2d, Administrative Law, Sec. 185, p. 989-990. As the U.S. Supreme Court concluded in Davis Warehouse Co. vs. Bowles, 321 U.S. 144 (1943):

**The argument, in short, is that the Administrator would have to decide whether the state regulation is constitutional before he should recognize it. We cannot give weight to this view of his functions, which we think it unduly magnifies. State statutes, like federal ones, are entitled to the presumption of constitutionality until their validity is judicially declared.*

*Certainly, no power to adjudicate constitutional issues is conferred on the administrator.**

A review of the Professional Negotiations Act, K.S.A. 72-5413 et seq., reveals no statutory language conferring the power to adjudicate constitutional issues upon the Secretary either specifically or by inference. Since neither the Kansas Supreme Court nor the Court of Appeals has addressed the issue raised by Respondent, the validity of K.S.A. 72-5430(c)(5) has not been judicially determined. Accordingly, the statute must be presumed constitutional until ruled otherwise by the courts.

It is well established that statutes should be construed to avoid constitutional questions if such a construction is fairly possible. Crowell v. Benson, 285 U.S. 22 (1932); New York v. Ferber, 458 U.S. 747 (1982). Federal courts have the power to adopt narrowing constructions of federal legislation, Ferber, Id. at 769; and have a duty to avoid constitutional difficulties by doing so. Id.

The same rules have been adopted by the Kansas Supreme Court. In U.S.D. No. 503 v. McKinney, 236 Kan. 224, 230, 689 P.2d 860 (1984), the court stated:

"Long-standing and well-established rules are that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover it is the duty of the court to uphold the statute under attack, whenever possible, rather than defeat it and if there is any reasonable way to construe the statute as constitutionally sound, that should be done. State, ex rel., v. Fadely, 180 Kan. 652, 658-59, 308 P. 2d 537 (1957); Wall v. Harrison, 201 Kan. 600, 603, 443 P. 2d 266 (1968); Moore v. Shanahan, 207 Kan. 645, 651, 486 p. 2d 506 (1971); 16 Am Jur. 2nd, Constitutional Law, Sec. 254, pp. 719-73. See Leek v. Theis, 217 Kan. 784, 792-93, 539 P. 2d 304 (1975)."

Administrative tribunals should be guided by these same rules when interpreting state statutes. Accordingly, while the Secretary may not rule on the constitutionality of K.S.A. 72-5430(c)(5), he may evaluate the statute against constitutional criteria to reach an interpretation that will avoid constitutional difficulties.

B. Picketing As Constitutionally Protected Speech

(3.) The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added). The general proposition that freedom of expression upon public questions is secured by the First Amendment has been settled through numerous decisions of the U.S. Supreme Court. As the Court has noted, the constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 US 476, 484, (1957). The First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, (1964).

The freedom of speech which is secured by the First Amendment against abridgment by the United States, is among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state, Thornhill

v. Alabama, 310 U.S. 88, 95, (1939); U.S.D. 503 v. McKinney, 236 Kan. 224, 234, 689 P.2d 860 (1984). This freedom of speech "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment," Thornhill, supra at 101.

It is clear that the right peaceably to assemble and discuss public questions, and to communicate respecting them "is a privilege inherent in citizenship of the United States" which the First and Fourteenth Amendments protect, Hayne v. Committee for Industrial Organization, 307 U.S. 496, 512 (1938). The U.S. Supreme Court has repeatedly held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." Pickering v. Board of Education, 391 U.S. 563 (1968); Madison Sch. Dist. v. Wisconsin Emp. Comm'rs., 429 U.S. 167 (1976); See also Keyishrain v. Board of Education, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); and Wieman v. Updegraff, 344 U.S. 183 (1952).

The Kansas Supreme Court reached a similar conclusion in U.S.D. 503 v. McKinney, supra at 235:

"The court said that public school Teachers may not constitutionally be compelled, as a condition of retaining employment, to relinquish the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they worked. Statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Absent proof of false statements knowingly or

recklessly made by him, a Teacher's exercise of his right to speak on issues of public importance would not be abridged."

Peaceful picketing "is a means of communication and as such it conveys the information of a labor grievance to the public," Hewell v. Local Union 795, 181 Kan. 898, 912, 317 P. 2d 817 (1957). In Thornhill, supra, the U.S. Supreme Court equated peaceful picketing in general to freedom of speech, and as such found it protected against abridgement under the First and Fourteenth Amendments, though subject to the same legislative restrictions as other forms of speech.

In Thornhill, the State of Alabama had passed a statute which outlawed all picketing. The statute did not distinguish between peaceful or violent picketing. It was not aimed merely at a particular form of picketing, rather the provisions of the law applied to the general picketing process, outlawing completely this form of union activity. Violators of the statute were subject to fines and imprisonment.

In striking down the state statute the U.S. Supreme Court declared that:

"freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. ... In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed in the constitution."
Id. at 101.

This principle was recognized by the Kansas Supreme Court in McKinney, supra at 235.

(4.) By their decisions the courts have served notice that federal and state action restricting the picketing process must not infringe on the constitutional guarantee of free speech. At the same time the states were acknowledged to have the right to regulate the peaceful picketing process:

"The right of employees and employers to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. (citations omitted). It does not follow that the states in dealing with the evils arising from industrial dispute may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." Thornhill, supra at 103.

The courts have acknowledged that the right to communicate is not limitless. E.g. Cox v. Louisiana, 379 U.S. 536 (1965). In cases following Thornhill the U.S. Supreme Court permitted restrictions on peaceful picketing by states and cities: Teamsters v. Vogt Inc., 354 U.S. 284 (1957), a state may place a statutory ban on peaceful picketing which conflicts with its public policy; Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), a state may confine peaceful picketing to the industry directly related to a labor dispute; Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), peaceful picketing is not protected if it seeks an objective that is illegal under a valid state law; Hudgens v. NLRB, 424 U.S. 507 (1976), employees have no First Amendment right to picket a retail store in a privately owned shopping mall.

There can be no question but that statutes which prohibit peaceful picketing constitute a legislative system suppressing speech in advance of actual expression and are therefore deemed a

prior restraint. Prior restraints are not unconstitutional per se, however, any system of prior restraint "bears a heavy presumption against its validity," McKinney, supra at 235. Because anti-picketing legislation operates at the core of the First Amendment by prohibiting citizens from engaging in picketing on an issue of public concern, Frisby v. Schultz, 487 U.S. 474, 479 (1988), the Court has traditionally subjected such legislative restrictions to careful scrutiny. See, e.g., Boos v. Berry, 485 U.S. 312, 318 (1988); United States v. Grace, 461 U.S. 171 (1983); Carey v. Brown, 447 U.S. 455 (1980).

To determine what limits, if any, may be placed on protected speech, the courts focus first on the "place" of that speech, considering the nature of the forum because the standards by which any limitations on speech will be reviewed "differ depending on the character of the property at issue." Perry, supra at 44. Three types of fora have been identified: the traditional public forum, the public forum created by government designation, and the non public forum. Cornelius v. NAACP Legal Defense Educational Fund, Inc., 473 U.S. 788. 789 (1985).

In this case on May 31, 1990 teachers and other interested people picketed on the public sidewalk in front of the Board's Administrative Center in Wichita (Pet. Ex. 3; Tr. p. 32). Accordingly, the relevant forum may be easily identified. The U.S. Supreme Court has repeatedly referred to public streets as the archetype of a traditional public forum. See, e.g. Boos, supra at

318; Cornelius, supra at 802; Perry, supra at 45. As the Court noted in Frisby, supra at 428:

"[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum'

* * *

"In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' Hauke v. CIO, supra, at 515, 58 L Ed 1423, 59 S.Ct. 954 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora...; the anti-picketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

"In these quintessential public for[a], government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that is narrowly drawn to achieve that end."

In accepting these standards the Kansas Supreme Court stated in McKinney, supra at 235:

"Where a statute restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."

In summary, when dealing with peaceful picketing in a traditional public forum, the state's ability to permissibly restrict expressive conduct is very limited: The government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry, supra at 45. This is the standard against which K.S.A. 72-5430(c)(5) must be evaluated.

The initial determination to be made is whether the statute distinguishes between "prohibited" and "permitted" speech on the basis of content. When a statute regulates speech based upon its content, governmental action must be scrutinized to ensure that communication has not been prohibited merely because public officials disapprove of the speaker's views. Niemotko v. Maryland, 340 U.S. 268, 282 (1951). As a consequence, regulations must be applicable to all speech irrespective of content." Erznozik v. City of Jacksonville, 422 U.S. 205, 209 (1975). Therefore, a constitutionally permissible restriction on speech may not be based upon either the content or subject matter of that speech. Consolidated Edison v. Public Serv. Comm'rs, 447 U.S. 530, 536 (1980).

Here K.S.A. 72-5430 makes it a prohibited practice for professional employees or professional employees' organizations or their designated representatives willfully to authorize, instigate, aid or engage in picketing at any facility under the control and jurisdiction of the board of education. It is clear this statute, when read in context with the entire Professional Negotiations Act, discriminates on its face against certain forms of speech based on content; i.e. , labor related communication and specifically labor related communication from professional employees and their organizations. Other non-professional employees of the school district, and possibly even professional employees participating in non-labor related communication, are not subject to the same restrictions. Neither are members of labor unions in the private

sector working on facilities under the control and jurisdiction of the school board, or public citizens in general. In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. First National Bank of Boston v. Bellott, 435 U.S. 765, 784 (1978).

Even if it were determined that K.S.A. 72-5430(c)(5) does not favor either side of a political controversy, its regulation of labor communication is nonetheless impermissible because the "First Amendment's hostility to content-based regulation extends ... to prohibition of public discussion of an entire topic." Consolidated Edison supra at , 447 U.S. 530, 537 (1980). Here the State has determined that an entire category of speech - peaceful labor picketing - is not to be permitted.

As a content-based restriction on speech in a public forum, K.S.A. 72-5430(c)(5) "must be subjected to the most exacting scrutiny," Boos, supra at 322. The State is required to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry, supra at 45.

(5.) Preventing disruption of schools is a "substantial" and "legitimate" governmental concern. Police Department v. Mosely, 408 U.S. 92, 100 (1972). The State "certainly [has] a substantial interest in stopping picketing which disrupts a school." Id. at 219. In sum, "no mandate in our Constitution leaves states and governmental units powerless to pass laws to protect the public

from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected... for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools and hospitals." Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J. concurring).

A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-810 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. Frisby, supra at 485.

While not questioning the necessity to protect persons or property or to maintain the educational function of the school from disruption, one must question whether a total ban on peaceful labor picketing by professional employees or their organization at any facility under the jurisdiction and control of the school board serves these purposes.

There is no suggestion that the Association's activities in any way obstructed the sidewalks or access to the Board's buildings, threatened injury to any person or property, or in any way interfered with the educational or administrative functions of the school district. It would appear a total ban on peaceful picketing is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the Administrative Center than on any other sidewalks in Wichita. As the U.S. Supreme Court recognized in Thornhill:

"The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." supra at 105.

As this case illustrates the danger of breach of the peace or serious invasion of rights of property or privacy at a facility under the control and jurisdiction of the school board from peaceful labor picketing by professional employees is not sufficiently imminent in all cases to warrant the legislature in determining that such activity as set forth in K.S.A. 72-5430(c)(5) should be totally banned. This is particularly true under the facts in this case. There was but a single incident of peaceful picketing (Tr. p. 74); it lasted only approximately one and one half hours (Tr. p. 23); it commenced at 4:00 p.m., and ended overlapped only 45 minutes of the work day (Tr. P. 137); it was located at only the Administrative Center and not at any of the classroom buildings (Tr. p. 11); and no classes or administrative operations were disrupted (Tr. p. 135).

"In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter" Mosley, supra at 100. The State may not vindicate

its interest in preventing disruption of the schools by the wholesale exclusion of labor picketing by professional employees while tolerating picketing by other organizations, employees and public citizens. Any disturbances can be controlled by narrowly drawn statutes "focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter." United States v. O'Brien, 391 U.S. 367, 377 (1968). K.S.A. 72-5430(c)(5) imposes a selective restriction greater than is essential to the furtherance of a substantial governmental interest.

The underlying rationale for this determination can best be summarized by the statement of the Kansas Supreme Court in McKinney, supra at 233:

"a free society prefers to punish a few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."

C. Fourteenth Amendment - Equal Protection Argument

The Association additionally asserts protection for its picketing activity pursuant to the Equal Protection Clause of the Fourteenth Amendment. In this case, the legislature, through enactment of K.S.A. 72-5430(c)(5) has determined labor picketing by professional employees or their organizations of any facility under the jurisdiction and control of the board of education should be prohibited, whether peaceable or non-peaceable. There is no similar prohibition on non-professional employees of a school district, See the Public Employer Employee Relations Act, K.S.A. 75-4333(c); members of labor organizations or labor organizations

in the private sector working at facilities under the jurisdiction and control of the board of education; or public citizens in general.

K.S.A. 72-5430(c)(5) clearly affects picketing, which is expressive conduct, by classifications formulated in terms of the subject of the picketing, (i.e. professional employee labor activity v. non professional employees and public sector union members labor activity), and the participants involved in the activity, (i.e. professional employees v. non-professional employees, union members and other public citizens). As the Court stated in Mosley, supra at 217:

"There is an 'equality of status in the field of ideas'; and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."

Discriminations among pickets must be narrowly tailored to serve a substantial governmental interest. Williams v. Rhodes, 393 U.S. 23 (1968).

As discussed above, preventing school disruption is a legitimate governmental concern. However, K.S.A. 72-5430(c)(5) prohibits only labor picketing by professional employees and their organizations, while no similar prohibition is placed on non-professional employees, members of public sector labor unions or public citizens, notwithstanding the disturbances their picketing activities would undoubtedly engender. Carey, supra at 462. It can only be assumed the legislature has determined that peaceful picketing by individuals or groups other than professional

employees is not an undue disturbance of the school's educational and administrative process. However, under the Equal Protection Clause the State may not maintain that picketing by professional employees disrupts the school unless that picketing is clearly more disruptive than the picketing by other employees, organizations or citizens. See Tinker v. Des Moines School District, 393 US 503 (1969).

In Mosley, supra at 219, the court concluded:

"If peaceful picketing is permitted, there is no justification for prohibiting all non labor picketing, both peaceful and nonpeaceful. "Peaceful non labor picketing ... is obviously no more disruptive than "Peaceful" labor picketing. But Chicago's ordinance permits the latter and prohibits the former. Such unequal treatment is exactly what was condemned in Niemotko v. Maryland, 340 U.S. at 272-273, 95 L. Ed at 270, 271."

The Court further accepted the concurring opinion of Justice Black in Cox, supra at 581:

"[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

Such reasoning would appear equally applicable where only picketing, labor or non labor, conducted by a specific class of persons or organizations is prohibited, as in this case. The apparent over inclusiveness or under inclusiveness of the statute's restriction undermines any claim that the prohibition on peaceful

professional employee picketing can be justified by reference to the State's interest in protecting schools from disruption.

D. Construing K.S.A. 72-5430(c)(5)

(6.) The crucial question then is whether, under the present set of facts, K.S.A. 72-5430(c)(5) can be construed to avoid constitutional difficulties. The answer appears to lie in the definition to be given the term "picket" as it appears in the statute while the term "strike" is defined, K.S.A. 72-5413(j), the "vague contours of the term 'picket' are nowhere delineated." Thornhill, supra at 100. It is necessary, therefore, to look to other authorities for guidance as to the meaning of the term.

Webster's Third New International Dictionary defines "Picketing" as posting at a particular place. The Kansas Supreme Court examined the term in The State v. Personett, 114 Kan. 680, 698 (1923) and concluded:

"The word 'picket' is defined in Webster's Dictionary as 'a body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union or against which a strike is in progress.' Black's Law Dictionary says, 'Picketing by members of a trade union on strike consists in posting members at all the approaches to the works struck against for the purpose of observing and reporting the workmen going to or coming from the works and of using such influence as may be in their power of preventing the workmen from accepting work there."

Black's Law Dictionary, 5th Ed. (1979) provides the following definitions:

"Picketing. Term refers to presence at an employer's business by one or more employees and/or other persons to publicize a labor dispute, influence employees or customers, to withhold their work or business, respectively, or show union's desire to represent employees; . . .

"Peaceable picketing, . . . It connotes peaceable methods of presenting a cause to the public in the vicinity of the employer's premises."

It is clear the term "Picketing" has two distinct meanings depending upon the result to be obtained; the first is interference with an employer's business by influencing employees and customers to withhold their work or business, referred to as "economic picketing" and the second is to publicize a labor dispute, a form of "informational picketing".

It is the Association's position that the picketing undertaken on May 31, 1990 falls within the "informational picketing" category. A review of the record reveals in the correspondence distributed to teachers by the Association prior to May 31st urging participation in the picketing activity, (Ex. 1, 3), the term "informational picketing" is used. The Association's President, Jon Miller, testified the purpose of the picketing was publicity, (Tr. p. 52-53), to make the community aware of the impasse in professional negotiations and the reasons for that impasse (Tr. p. 52-53). Through news media coverage of the picketing, this information was being disseminated in "the simplest and most effective means" (Tr. p. 53).

The picketing caused no disruption in administrative or educational functions of the school district (Tr. p. 50); took place only at the Administrative Center and only after class hours on the last day of the school term (Tr. p. 11); constituted a single occurrence lasting a period of only one hour and fifteen minutes (Tr. p. 23, 74); and was peaceful, non-hostile, nor obstructive in nature (Tr. p. 39). It is clear the picketing

activity in the instant case falls within the "informational picketing" category.

K.S.A. 72-5423(c) prohibits professional employee strikes and K.S.A. 72-5430(c)(5) makes it a prohibited practice for professional employees or their organizations to participate in a strike in any manner. The term "strike" as noted above, is defined in K.S.A. 72-5413(j) to mean:

"an action taken for the purpose of coercing a change in the terms and conditions of professional service or the rights, privileges or obligations thereof, through any failure by concerted action with others to report for duty including, but not limited to, any work stoppage, slowdown, or refusal to work."

(7.) The "picketing" referred to in K.S.A. 72-5413(c)(5) should be interpreted as limited to "economic picketing", the intent of which is a coercive or disruptive activity usually associated with and employed in a strike. Such interpretation permits the peaceful, non-disruptive, non-coercive, "informational" picketing as took place in this case, and is consistent with the dictate in State v. Smiley, 65 Kan. 69 P. 199 (1902), aff'd 196 U.S. 447 (1905), wherein the court "recognized the proposition that general language, valid upon its face, may be construed to exclude certain subjects or classes of things in order that the entire statute will not be held unconstitutional."

"The instances in which the application of the rule first mentioned most usually occurs are those where separable works, clauses, sentences or sections of the statute are stricken out, as it were, because constitutionally objectionable. However, the rule is not limited to such instances. It applies as well to exclude from the operation of the statutes subjects and classes of things lying without the legislative intent, although comprehended within the general terms of the act, as it does to exclude parts of the verbal phraseology." Id. at 248.

The Kansas Supreme Court then quoted from In re Opinion of the Justices, 41 N.H. 553, as illustrative of this rule of interpretation:

"But if these sections could not be applied in the cases supposed, they are not, therefore, necessarily void. If the intention of any part of the act, determined upon settled principles of legal interpretation, were to obstruct or impede the exercise of enjoyment of any right secured by the constitution of the United States, or by any constitutional law of the United States, that part would be unconstitutional. But if the intention thus determined were merely to establish, regulate, or guarantee rights or privileges consistent with the constitution and laws of the United States, in a mode not in conflict with either, and if the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, literally construed its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply; since, upon settled principles of construction, the latter are as fully and effectually excepted by necessary implication, as if the statute had contained an express proviso that it should not extend or apply to such cases. The rule of construction universally adopted is, that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." Id. at 256.

The court found additional support for this rule was found in Swarris, Sat. 138, [Domat's Rules]:

"It happens in two sorts of cases, that it is necessary to interpret the laws. One is when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law in order to discover its true meaning. And this kind of interpretation is limited to the expression, that it may be known what the law says, The other is, when it happens that the sense of a law, however clear it may appear in the words, would lead us to false consequences, and to decisions that would be unjust if the laws were indifferently applied to everything that is contained within the expression. For in this case the palpable injustice that would follow for this apparent sense, obliges us to discover by some kind of interpretation, not what that the law says, but what it means; and to judge by its meaning, how far it ought to be extended, and what are the bounds that ought to be set to its sense." Id. at 256.

With adoption of the above stated narrow interpretation of the term "picketing" as used in K.S.A. 72-5430(c)(5), the constitutional question is avoided. Such ruling is all-sufficient for the purposes of this prohibited practice complaint. The Association would seek to have the statute declared unconstitutional because of its restrictions on "economic picketing" as well. Standing to assert this claim requires a showing of a particularized injury distinguishing the Association from the general public. Sierra Club v. Morton, 405 U.S. 727 (1972). Kansas courts require direct injury. "The constitutionality of governmental action can only be challenged by a person directly affected and such challenge cannot be made by invoking the rights of others". Manzanares v. Bell, 522 P.2d 1291, 1312 (1974). Here the Association's picketing activities having been determined to be "informational" do not come within the narrowed interpretation adopted above. As the Kansas Supreme Court stated in Smiley, supra at 247:

"Suffice it to say for the moment that unless he does belong in such list he cannot be heard to complain. He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence unless appellant can show that he himself has been wrongly included in the terms of the law, he can have no just found of complaint. This is fundamental and decisively settled. (citations omitted).

The issue need not be addressed to resolve this prohibited practice complaint and the Secretary very properly refrains from making

pronouncements of what the law would be if petitioner's actions fell within the definition of "economic picketing".

The Board further intimates that the Association's resort to picketing is violative of the duty to bargain in good faith. Such argument is without merit. As the U.S. Supreme Court concluded in NLRB v. Insurance Agency International Union, 361 U.S. 477 (1960), the use of such pressure is not in and of itself inconsistent with the duty to bargain in good faith.

Accordingly under the narrow interpretation of the term "picketing" set forth above, the activities of Respondent did not constitute a prohibited practice as contemplated by K.S.A. 72-5430(c)(5), and therefore that portion of Petitioner's complaint is dismissed.

ISSUE II

Was the "Wright is Wrong" campaign undertaken by NEA-Wichita to interfere with, restrain or coerce the Board of Education with respect to its selection of a representative for purposes of professional negotiations in violation of K.S.A. 72-5430(c)(2)?

(8.) The Board alleges the Association, through its "Wright is Wrong" campaign attempted to interfere with the Board's selection of negotiating representative. It is a prohibited practice for the employer or the employee's certified representative to interfere with, restrain or coerce the other in its choice of representative for purposes of professional negotiations. See Cabinet Manufacturing Co., 140 NLRB, No. 51 (1963). However, mere criticism by one party to negotiations of the other party's representative does not indicate bad faith.

Discussion of language used or tactics employed is not prohibited if the party does not abandon an honest attempt to reach an agreement. Elwell-Parker Elec. Co., 75 NLRB, No. 1046 (1948).

(9.) The 3rd Circuit Court of Appeals in Local 542, International Union of Operating Engineers, AFL-CIO v. NLRB, 55 LRRM 2669 (1964) articulated the appropriate test to be applied :

"That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (citations omitted).

This test would appear applicable to alleged violations of employer rights under K.S.A. 72-5430(c)(2).

(10.) The burden of affirmatively establishing an unfair labor practice rests upon the complaining party, and the burden of proof never shifts to the accused. NLRB v. Cone Mills Corp., 64 LRRM 2540 (1967). The Board, therefore, carries the burden of establishing a violation of K.S.A. 72-5430(c)(2) which reads in pertinent part:

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

* * *

"(2) interfere with, restrain or coerce a board of education with respect to selecting a representative for the purpose of professional negotiation..."

To meet its burden the Board introduced the testimony of Robert D. Wright who testified the "Wright is Wrong" campaign was an attempt by the Association "To make [him] the issue rather than what the issues at the table were or that the Board is taking positions that they don't like." (Tr. P 131). It was his belief

the Association was singling him out in an effort to "take the quarterback out of the game" (Tr. p.132). According to Mr. Wright the campaign made use of literature which "misquoted me and claimed that I said something I didn't say in an effort to make the teachers angry at me and to see me as the issue" (Tr. p. 132).

Mr. Wright explained his opinion of the motive for this action by Association as follows:

*"I believe that NEA thought that if the Board of Education believed that Robert Wright was the issue and that Robert Wright could not produce an agreement, I think NEA felt the Board might be forced to take and appoint a different negotiator that they would have an easier time with."
(Tr, p. 113)*

This same intent on the part of the Association was perceived by Board member Carole Rupe. She stated it was her impression when she first became aware of the "Wright is Wrong" campaign "that they were trying to say that Robert Wright was acting on his own and not at the Board's direction" (Tr. p. 61). A second reason for the campaign being "that they were trying to drive a wedge between the Board's relationship with its chief negotiator in order to perhaps make Robert Wright ineffective as our negotiator" (Tr. p. 61, 71).

There is also testimony in the record that the "Wright is Wrong" campaign did result in concern on the part of Board members that Robert Wright "try not to become the issue, your effectiveness will be reduced" (Tr. p. 123) and affected his relationship with the Board (Tr. p. 105).

To rebut this evidence the Association produced testimony that the "Wright is Wrong" slogan that appeared on the arm bands, picket signs and Association correspondence, (Ex. #3), was not intended

"in any way to personally attack Mr. Wright" (Tr. p. 20). The slogan was intended to be a "reference to Mr. Wright's statement at the table that the Wichita teachers would accept the Board's proposal if NEA-W would take it to them" (Tr. p. 15, 16). The reason the slogan "Wright is Wrong" was used rather than "the Board is wrong" was because "Robert [Wright] is the designated spokesperson and was state their position" and it was more "succinct" and "catchier" and "easier to put on an armband" (Tr. p. 16-17).

NEA-W President, Jon Miller, testified that it was never the Association's position or intent to have Robert Wright removed as representative for the school board, (Tr. p. 40, 51), or "to force the Board in any way to remove Mr. Wright as chief negotiator" (Tr. p. 56). The Association never indicated to the Board they wanted Robert Wright replaced nor demanded he be replaced (Tr. p. 73-74). Further, no threats were made that "if Mr. Wright continued to be the representative, NEA would no longer participate in negotiations" (Tr. p. 51).

Given the short duration of the "Wright is Wrong" campaign as outlined supra and in particular the limited area and time devoted to picketing of the Administrative Center, the limited media coverage of the campaign (Tr. p. 72-73), the lack of substantive evidence in the record establishing wrongful intent on the part of the Association, statements of member Carole Rupe that the Board was not interfered with, restrained or coerced in the selection of its representative, Mr. Wright's value to the Board as negotiator

had not been diminished and he would remain as the Board's Chief Negotiator, (Tr. p. 74, 67, 68), the conduct of the Association when viewed with respect to the total circumstances of the case cannot be said to reasonably tend to interfere with, restrain or coerce the Board.

It may very well be that Robert Wright's and Carole Rupe's subjective perception was that the display of his name was intended to "drive a wedge" between the Board and its chief negotiator and thereby force the appointment of "a different negotiator that [the Association] would have an easier time with." However, such "subjective perception" is not the issue and there is no substantial, probative evidence to support that perception.

This record simply does not support a finding that the existing circumstances reasonably tended to interfere with, restrain or coerce the Board in the exercise of its protected rights. It is unreasonable, when one considers that Robert Wright has successfully served as the Board's chief negotiator since 1976, (Tr. p. 91), to believe a four day campaign composed of wearing the color red and "Wright is Wrong" armbands, collecting petitions, (Ex. 3), and one and one half hours of peaceful, non-disruptive picketing, (Tr. p. 11), with the limited media coverage it produced, would tend to "interfere with, restrain or coerce" this Board of Education with respect to selecting a representative for the purpose of professional negotiations. While conceding that conduct falling short of tangible threats, demands, or cessation of negotiations may constitute "interfere with, restrain or coerce"

within the meaning of K.S.A. 72-5430(c)(2), the actions of the Association, upon viewing the circumstances as a whole, do not rise to such a level.

The Board, having failed to meet its burden of proof, the "Wright is Wrong" campaign is found not to constitute a prohibited practice as contemplated by K.S.A. 72-5430(c)(2), and therefore that portion of the Board's complaint is dismissed.

ORDER

IT IS THEREFORE ORDERED, that the above captioned complaint be dismissed in its entirety.



Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
1430 Topeka Blvd.
Topeka, Kansas 66612

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become final fifteen (15) days from the date of service unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed with the Secretary of the Department of Human Resources, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of December, 1990, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

William H. Dye
FOULSTON & SIEFKIN

100 North Broadway, Suite 700
Wichita, Kansas 67202-2295

David Schauner
Kansas National Education Association
715 West Tenth St.
Topeka, Kansas 66612

Sharon G. Junstall