STATE OF KANSAS

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

UNIFIED SCHOOL DISTRICT 501, TOPEKA, KANSAS, Complainant,	*	
vs.	*	CASE NO: 72-CAEO-3-1981 (Paragraphs One, Three and Four)
NEA-TOPEKA, Respondent.	*	

O R D E R

Comes now on this 19th day of July, 1983, the 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) and (3).

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. Complaint filed June 16, 1981 by U.S.D. 501 against NEA-Topeka.

2. Complaint submitted to NEA-Topeka for answer on June 23, 1981.

3. Answer received by Secretary on July 16, 1981.

4. Answer submitted to U.S.D. 501 on July 28, 1981.

5. Pre-hearing conducted December 4, 1981.

6. Extension of time in which to prepare stipulations requested by U.S.D. 501 and granted by Secretary on December 16, 1981.

7. Parties unable to arrive at stipulations and contacted regarding desires to proceed with case on April 21, 1982.

8. Parties mutually agree on hearing dates of October 25 and 26, 1982 and notified Secretary on September 23, 1982.

9. Notice of hearing sent to parties on September 28, 1982.

10. Hearing reconvened on November 9, 1982 and November 26. 1982.

11. Hearing re-opened on March 7, 1983. Notice of hearing sent on February 11, 1983.

12. Extension of time in which to file briefs requested by NEA-Topeka and granted by Secretary on March 29, 1983. Briefs due April 11, 1983.

13. Extension of time in which to file briefs requested by U.S.D. 501 and granted by Secretary on April 11, 1983. Briefs due April 25, 1983.

14. Briefs received from NEA-Topeka on April 25, 1983 and U.S.D. 501 on April 27, 1983.

FINDINGS OF FACT

1. That NEA-Topeka is the certified representative of the collective bargaining unit within U.S.D. 501-Topeka and the proper respondent in this matter.

2. That U.S.D. 501-Topeka is the appropriate employer, board of education in this matter.

3. That evidence and testimony received in case 72-CAEO-1-1982 is incorporated within this record for purposes of proving paragraph two (2) of the instant complaint. (T - 6)

4. That the by-laws of NEA-Topeka allow the negotiations team the power to decide if a ratification vote should be taken. (T - 11)

5. That NEA-Topeka placed six (6) proposals on the table for bargaining which the board of education of U.S.D. 501 viewed as other than required subjects of bargaining. (T - 13)

6. That the NEA-Topeka negotiating team did not present U.S.D. 501's final offer for a ratification vote because, in their belief, it was not in the best interest of the bargaining unit. (T - R, 16, 17)

7. That legislative action would result in the district having a maximum of approximately five percent (5%) or 1.5 million dollars in "new" money for the 81-82 school year. (T - 29)

8. That U.S.D. 501 approximated NEA-Topeka's April 81 proposal to cost 13.6 million dollars in "new" money. (T-30)

9. That the NEA-Topeka proposal was approximated by U.S.D. 501 to be 3.6 million dollars by the time fact-finding occurred. (T - 30)

10. That U.S.D. 501 viewed NEA-Topeka's last proposal as requiring approximately twenty percent (20%) in "new" money to fund. (T - 31)

11. That the parties spent approximately fifty-four (54) hours at the negotiating table prior to discussing economic items or proposals. (T - 70, 71)

12. That NEA-Topeka calculated their first economic proposal on salary to be a twenty-five percent (25%) increase. (T - 71)

13. That U.S.D. 501 initially offered a salary proposal of five percent (5%) or $700 per employee. (T - 72)

14. That the first salary proposal offered by U.S.D. 501 occurred sometime in the month of April or May. (T - 72)

15. That U.S.D. 501 maintained "no-position" on several articles until some time in May when they took the position that the articles were not mandatory subjects of bargaining. (T - 81, 82)

16. That the proposal, mentioned in finding of fact number fourteen (14), occurred subsequent to legislative action on percentage increases for school districts. (T - 87)

17. That both parties altered their respective demands and offers subsequent to the issuance of the offer spoken to in finding of fact number thirteen (13). (T - 72)

18. That NEA-Topeka reduced their economic demands in mediation. (T - 93, 94)

19. That, even with knowledge of legislative action on the "budget improvement lid", NEA-Topeka insisted on an economic package which exceeded that lid. (T - 100, 101, 178)

20. That the initial proposals of NEA-Topeka were based on several factors. (T - 113)

21. That NEA-Topeka based their initial economic proposal in part on a study which indicated that the State of Kansas ranked thirty-third (33) in average teacher salaries and U.S.D. 501 ranked no better than fifty-eighth (58) within the state. (T - 207, Respondent's Exhibit 9)

22. That NEA-Topeka based their initial proposals in part on a document issued by the State Department of Education which indicates that U.S.D. 501 devoted the lowest percentage of their general fund budget to teacher salaries of the fifteen (15) districts compared. (Respondent's Exhibit 10)

23. That NEA-Topeka requested certain budget information from U.S.D. 501 on several occasions from October 7, 1980 until fact-finding when it was supplied in part. (T - 218, 219, 222, 223, 278, Respondent's Exhibit 11)

24. That the lack of information referenced in Finding of Fact number twenty-five (25) caused NEA-Topeka difficulty in attempting to determine certain costs paid by the district. (T - 222, 223, 225)

25. That U.S.D. 501, via their representative, took the position during negotiations that ability to pay was not at issue. (T - 229, 318)

26. That NEA-Topeka at no time, from the commencement of negotiations through fact-finding, allowed the bargaining unit to vote on the district's final proposals. (T - 10, 106, 382)

27. That the lack of a ratification vote was predicated on the dissatisfaction by the association's team with the district's final offer. (T - 388)

28. That the economic improvement implemented by U.S.D. 501 after fact-finding was characterized by the district to total 10.4%. (T - 334, Respondent's Exhibit 1)

CONCLUSIONS OF LAW - DISCUSSION

The complaint in this matter was filed by the Board of Education of U.S.D. 501 against NEA-Topeka and specifically outlines four items which the Secretary is asked to find constitute prohibited practices in violation of the Act:

> "1. The Association by and through its officers, agents and representatives has violated and is violating K.S.A. 72-5430, subsections (c) (1) of the Professional Negotiations Act, by failing and/or refusing to provide members of the bargaining unit with an opportunity to either accept or reject Unified School District No. 501's contract offer before and after impasse was reached on or about June 1, 1981. K.S.A. 72-5414 provides that 'Professional employees shall have a right ... to participate in professional negotiations with boards of educations through representatives of their own choosing for the purposes of establishing, maintaining, protecting or improving terms and conditions of professional service ....' The failure and refusal by officers, agents and representatives of the Association to provide members of the bargaining unit with an opportunity to vote and to either accept or reject U.S.D. No. 501's final contract offer interferes, restrains and coerces said employees in the exercise of their right to participate in professional negotiations with U.S.D. No. 501 for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional services.

2. Since February 1, 1981, officers, agents, representatives and members of the Association have communicated with members of the Board of Education of U.S.D. No. 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.

3. The Association by and through its officers, agents and representatives have continuously insisted upon an unrealistic economic package which they know or have reason to know unreasonably exceeds the statutory budget improvement limitation imposed by the Legislature, thereby creating an artificial impasse designed to undermine and frustrate the bargaining process.

Said Acts and conducts constitutes a willful failure to negotiate in good faith and a violation of 8 [sic] (c)(3) of the Act.

4. Said Association by and through its officers, agents and representatives has violated and is violating K.S.A. 75-5430[sic](c)(3) of the Act by insisting that subject not listed as required subjects within K.S.A. 72-5413 (1) be discussed to impasse even though the Board's designated representative maintained early in the negotiations that the following subjects were not mandatory subjects of bargaining and the school board was unwilling to discuss said subjects at the bargaining table. Said proposals include: class size limitation, reduction in force, student discipline, school curriculum, student teacher program, employee files and physical facilities."

Item one (1) will be addressed in this order. Item two (2), according to counsel for complainant, (See 72-CAEO-3-1981 Transcript Volume I, Pages 3-9) is spoken to by the record compiled in case number 72-CAEO-1-1982 and will therefore be addressed in the order eminating from that case. The examiner in that case has also taken note and considered the testimony of Patricia Thompson in this case in resolving item two (2). Item three (3) will be addressed in this order. Item four (4) has been previously addressed by the Secretary in case number 72-CAE-6 & 6a-1981 regarding the negotiability issue but will be addressed in this order regarding the issue of bad faith bargaining.

In regard to item one (1), petitioner would have the Secretary find that the association has in some way denied the members of the bargaining unit some of their statutory rights by its refusal to submit board offers to a ratification vote.

While the record does not speak to it, the Secretary is not convinced that the Board of Education of U.S.D. 501 has standing to bring a charge of this nature alleging a violation of employee

rights. In a previous case 72-CAE-2-1981 the Secretary has ruled that an individual employee has no standing to charge the board with a complaint of failure to bargain in good faith. The rationale is that the bargaining relationship must be evaluated by the parties to that relationship. Much the same case exists in the instant matter. That is, an individual employee might charge their association with a complaint of failure to represent. To allow the board the avenue to bring such a charge would place the board in the posture of representing the employees interests when in fact that right has been conferred upon the respondent in this matter. Surely the employees are in the best position to determine if in fact their representatives are fulfilling the task for which they were originally selected. By the same token, neither the association or any individual employee possesses the standing to charge the representative of the board with a failure to represent the board. Only the board can determine if their representative is fulfilling his obligations. In ruling on this issue, the Secretary is very cognizant of the principle of exclusivity outlined in the law. K.S.A. 72-5414 begins by giving the employees the right to select a representative and states:

> "Professional employees shall have the right to form, join or assist professional employees' organizations, to participate in professional negotiation with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service. Professional employees shall also have the right to refrain from any or all of the foregoing activities. In professional negotiations under this act the board of education may be represented by an agent or committee designated by it."

K.S.A. 72-5415 (a) then confers exclusive rights on that representative and states:

> "(a) When a representative is designated or selected for the purposes of professional negotiation by the majority of the professional employees in an appropriate negotiating unit, such representative shall be the exclusive representative of all the professional employees in the unit for such purpose."

Inherent in serving as a representative of either of the parties is the necessity for knowing the point at which a proposal ceases to be acceptable or becomes acceptable to those represented. When dealing with many proposals taken in concert, that point of acceptability may become increasingly difficult to identify. For that reason, the

representatives at the table must be given the latitude to make independent judgements relative to the offers and demands made at the table regarding their acceptability. This exercise of independent judgement is translated into tentative agreements during negotiations and that judgement is then either upheld or overturned by the ratification votes of those represented. Only after those agreements are ratified do they become binding on the parties. The ratification process coupled with the parties ability to depose their representative serves as the system designed to keep the representatives in check. The examiner is further convinced that the legislature in no way intended to place the Secretary of Human Resources in a position of substituting his/her judgement for that of the parties at the table. An order mandating a ratification vote by either party prior to the time the parties themselves had reached agreement would do exactly that. There can be no question that from time to time one party to the process may believe that the other is being unreasonable in their demands or offers. A prohibited practice charge could be filed in those cases and in fact has been under item three (3) of this complaint. The traditional tests in determining violations of that type are; (1) reasonableness of offers and (2) movement. The standard remedy when a violation of that type has occurred is an order directing the parties to return to the table to bargain in good faith. A finding of bad faith in the instant item under consideration would place the Secretary in the position of determing the acceptability rather than the reasonableness of offers and is beyond the scope of the Secretary's authority. The right to determine acceptability is reserved to the representatives at the table. Neither the Secretary nor anyone else, save the people selecting the representative, has the right to determine the point at which the representative should find an offer or demand acceptable. For the above stated reasons, the Secretary finds no prohibited practice as alleged in item one (1) of this complaint.

Item two (2) is spoken to in the order issued by the Secretary in case number 72-CAEO-1-1982.

Item three (3) alleges that the association has undermined and frustrated the bargaining process by their continual insistance on an economic package which exceeds the budget improvement authority

granted by the legislature. In arriving at a determination in this item of the complaint the examiner must look beyond a simple comparison of legislative action versus association demands. Nothing within the statute dictates that demands fall within those legislative parameters regarding new monies for school finance. The Professional Negotiations Act certainly reserves to boards of education the right to prioritize expenditures within the districts to meet the interests of the public as well as those of their employees. By the same token, the same legislative action mentioned earlier does not serve as a minimum level of improvement to which teachers are entitled. K.S.A. 72-5413 et seq. contemplates that the parties meet in an effort to arrive at an equitable agreement over the terms and conditions under which professional employees will be employed. The examiner can certainly imagine instances when the economic impact of such an agreement would exceed or fall short of arbitrary percentage amounts established by the legislature. The key lies in the board's prioritization and lies in their hands legally. Looking therefore beyond the simple comparison of figures, the examiner turns to the tests for good faith bargaining mentioned earlier, i.e., reasonableness of offers (or demands) and movement. The association presented testimony at the hearing which was designed to show that some other districts, faced with the same legislative budget bid as U.S.D. 501, had granted percentage increases above NEA-Topeka's own initial proposal. This information might help to substantiate the fact that school districts can offer economic improvements in excess of legislative budget improvement limits but does little to indicate reasonableness of their demands. In an attempt to substantiate their demands, the association did however conduct comparability studies depicting Kansas and more specifically Topeka teachers as underpaid. They additionally attempted to show that U.S.D. 501 was able to meet their economic demands based on a comparison of several districts which indicated that U.S.D. 501 was expending a lower percentage of their general fund monies on teacher salaries than any of the other districts studied. The reasonableness of an offer or demand may hinge on many criteria but certainly comparability coupled with the ability to pay are two of the most prominent. In rebuttal, the district did nothing

to contradict the comparability studies and in fact stated that ability to pay was not at issue. Finally, the examiner is without grounds to find that the association's demand was unreasonable because it exceeded the legislative budget bid when the district's own unilateral improvement also exceeded that same bid. For the above stated reasons, the examiner lacks sufficient evidence to find that a prohibited practice has occurred as alleged in item three (3) of this complaint.

Item four (4) of this complaint alleges a failure to bargain in good faith against the association based upon their insistance to bargain certain subjects not listed at K.S.A. 72-5413 (1) to the point of impasse. The Secretary has previously ruled on the negotiability of the six subjects listed. This examiner will, therefore, limit the issue in this item of the complaint to the question of good or bad faith based upon the actions of the parties. The examiner assumes that there must have been a legitimate question in the minds of the parties regarding the issue of negotiability based upon the Secretary's rulings on those subjects. The Secretary found some to be mandatory and some to be permissive topics. Both sides of the bargaining table must share some of the blame for not seeking a ruling on negotiability in a more timely fashion. If the association did not understand the board's "no position" regarding negotiability, they should have explored it further and if necessary addressed the question to the Secretary early on in the bargaining process. If the board of education believed the subjects to be other than mandatorily negotiable they should have so informed the association rather than taking a posture of "no position" on the proposal. Testimony received in this case indicates that the board first made known their belief that the subjects in questions were other than mandatorily negotiable and that they refused to bargain such subjects some time during the month of May, less than one month prior to the statutory impasse date. In the bargaining process, "no position" can in fact be a legitimate point of departure on any subject of bargaining. A continued refusal to adopt a position or counterproposal on a mandatory subject, however, might well constitute a refusal to bargain in good faith. In and of its self, however, a "no position" posture does not serve as adequate notification regarding a party's beliefs relative to the mandatory or permissive nature of a subject. In addition, it is not uncommon for

subjects, recognized as permissive, to reemerge during bargaining as potential items for trade or compromise. This can occur even when the employer has previously refused to negotiate those permissive subjects. It is bad faith to refuse to bargain mandatory subjects contingent on an insistence to bargain permissive subjects. Therefore any impasse arrived at by the association's desire to negotiate permissive subjects would constitute bad faith. There is however, no evidence presented in this record to indicate that the union's attempts to negotiate permissive subjects forced the impasse over the mandatory subjects.

The examiner must rule then that the union did not negotiate in bad faith simply by its desire to bargain permissive subjects. The examiner further believes that both parties are caused to suffer at their own hands when questions of negotiability are not addressed at an early time in the bargaining process and encourages the parties to be cognizant of this fact in future bargaining. The Secretary has established a process of issuing opinions on negotiability questions upon receipt of a joint petition of the parties. This process eliminates the need for filing bad faith charges in this area thus fostering more harmonious labor-management relations and may provide the parties to this action an avenue for avoiding problems of this type in the future.

In conclusion the examiner finds in regard to:

Item one: no prohibited practice

Item two: see case 72-CAEO-1-1982

Item three: no prohibited practice

Item four: no prohibited practice

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

Jerry Powell

Jerry Powell, Employment Relations
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Secretary of Human Resources)
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