

was held in the matter on March 6, 2001, before this Presiding Officer. Following transcription of the hearing record, the parties submitted post-hearing legal arguments, and proposed findings of fact and conclusions of law pursuant to provision of the Kansas Administrative Procedure Act, K.S.A. 77-519(b). The Presiding Officer considers this matter to be fully submitted and issues this, his initial order. *See* K.S.A. 77-526(b).

ISSUES OF LAW

The issues in dispute are as follows:

- 1) Are the nurses employed by the Respondent "professional employees" as that term is defined by the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*?
- 2) If so, do the nurses have the requisite community of interest with the members of the existing professional employees' bargaining unit such that their addition to said unit is appropriate?

Prior to any further examination of these legal issues, however, findings of fact will be set forth.

FINDINGS OF FACT

1. Respondent is organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.
2. Pursuant to the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, Petitioner is the duly recognized exclusive representative for the existing professional employees' bargaining unit.
3. Respondent's current professional employees' bargaining unit includes all teachers, school librarians and school counselors. Transcript, pp. 26-7.
4. School librarians and school counselors are not classroom teachers. *Id.*
5. Respondent's school nurses are not required to have, and do not have teaching certificates issued by the State Board of Education. Transcript, pp. 44, 101.
6. The practice of nursing in Kansas, including school nursing, is governed by the Nurse Practice Act, at K.S.A. 65-1113 *et seq.* Transcript, p. 32.
7. Kansas' Board of Nursing licenses all nurses, and regulates all nursing practice, in the state of Kansas. *Id.*

8. Respondent's school nurses are required to be licensed as registered professional nurses. Respondent's Exhibit B, School Nurse Job Description; Transcript, p. 121.

9. Respondent's school nurses and members of the existing professional employees' bargaining unit both work 190 days a year. Transcript, p. 93; Respondent's Exhibits E-N.

10. Respondent's school nurses and members of the existing bargaining unit both report for work on the same day at the beginning of the school year, Transcript, pp. 45-6, 76, 93; Respondent's Exhibits E-N, and their respective school year ends on the same day, Transcript, pp. 45-6, 93.

11. Respondent's classroom teachers and its school nurses are supervised by their building principal. Transcript, pp. 28, 64, 86, 108, 131, 180.

12. Respondent's classroom teachers and its school nurses are evaluated by their building principal. Transcript, pp. 28, 64, 86-7, 188-90.

13. Respondent's school nurses are required to attend monthly staff meetings. Transcript, pp. 58-9, 68, 97.

14. Until this past year, Respondent's school nurses attended the same inservice training as members of the existing bargaining unit. Transcript, pp. 51-2, 85-6, 98. A separate inservice training presentation was provided to school nurses for the first time during this past year. Transcript, p. 52

15. Both the Respondent's school nurses and members of the existing bargaining unit attend parent-teacher conferences. Transcript, pp. 60-1, 81, 97-8.

16. Respondent's school nurses are paid twice a month over a twelve-month period, i.e., twenty-four semi-monthly installments, Transcript, pp. 49, 95, as are the members of the existing bargaining unit, Exhibit 7, 2000-01 Negotiated Agreement, Article X—COMPENSATION, §1—Method of Payment; Transcript, p. 19.

17. Both Respondent's classroom teachers and its school nurses supervise paraprofessionals. Transcript, pp. 29, 43, 87, 151.

18. Respondent's school nurses do the initial evaluation of their paraprofessionals with the final evaluation done by the building principal. Transcript, pp. 64, 86-7, 100, 188-90.

19. Respondent's classroom teachers do the initial evaluation of their paraprofessionals with the final evaluation done by the building principal. Transcript, pp. 29, 188-90.

CONCLUSIONS OF LAW/DISCUSSION

ISSUE 1

Are the nurses employed by the Respondent "professional employees" as that term is defined by the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*?

The Professional Negotiations Act (hereinafter "the Act"), found at K.S.A. 72-5413 *et seq.*, is Kansas' statutory framework for labor relations between "professional employees" and "board[s] of education", as those terms are used in the statute. Under the law, "professional employees" have the right to form, join or assist professional employees' organizations, to participate in professional negotiations 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. K.S.A. 72-5414. Because these rights extend only to "professional employees", the threshold question for determination in this case is whether the school nurses employed by Respondent are within the Act's definition of "professional employee".

The Act defines the term "professional employee" to mean:

"any person employed by a board of education in a position which requires a certificate issued by the state board of education or employed by a board of education in a professional, educational or instructional capacity, but shall not mean any such person who is an administrative employee."

K.S.A. 72-5413(c)(emphasis added). The position in question here, that of school nurse, does not require a certificate issued by the state board of education. Finding of Fact No. 5. Since neither of the parties suggested, nor could it reasonably be construed, that the school nurse position is that of an administrative employee, this writing will address the remainder of the second prong above, the question whether Respondent's school nurses are employed in "a professional, educational or instructional capacity".

The Presiding Officer notes that the parties make extensive arguments in support of their respective positions. Having studied each of said arguments, it is the conclusion of the Presiding Officer that the nurses employed by Respondent are "professional employees" as defined by the Professional Negotiations Act for the following reasons. First, in a similar dispute recently considered by this agency, designee of the agency head declined to grant requests for review of an initial order which had determined that school nurses were within the statutory definition of "professional employees", and concluded that "[t]he presiding officer has properly resolved that question . . . by determining that the nurses belong in the unit". Order Declining to Exercise Review of Initial Order, Russell County Teachers' Association v. Russell School Dist. No. 407, Docket No. 72-UD-1-1999. The Presiding Officer in the instant matter must presume that the said decision was rendered with full knowledge of the statutory construction argument presented herein by Respondent, particularly in view that this agency was a party to the district court proceeding which rendered a decision consistent with that argument, an argument which Respondent relies upon in this matter. See Respondent's Proposed Findings of Fact, Suggested Conclusions of Law and Brief in Support, p. 8. In view of the agency's previous conclusion that school nurses meet the statutory definition of "professional employee", this Presiding Officer will not re-examine that question and adopts said conclusion in this matter.

Second, even had the legal issue presented in this matter been one of first impression to this agency, the Presiding Officer would not be inclined to accept Respondent's invitation to rewrite the plain language of the applicable statute. Although Respondent presents extensive legislative history argument to support its position, the current statutory definition of "professional employee" is clear and unequivocal. While some might conclude that the statutory definition is inconsistent with legislative intent, and that it is within their power to construe the definition in a manner more restrictive than its plain language, the Presiding Officer is not so inclined. *See, e.g., Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 459 (1984)(noting that an administrative agency may not under the guise of an order substitute its judgment for that of the legislature). Respondent's nurses are "professional employees" as that term is defined by applicable state law.

ISSUE 2

Do Respondent's nurses have the requisite community of interest with the members of the existing professional employees' bargaining unit such that their addition to said unit is appropriate?

The source of the Secretary's authority to determine the scope of a professional bargaining unit is found in the Professional Negotiations Act:

"In each case where the question is in issue, the secretary shall determine, on the basis of the community of interest between and among professional employees of the board of education, the wishes of the professional employees and/or the established practices among the professional employees including, among other things, the extent to which such professional employees have joined a professional employees organization, whether the unit appropriate for the purposes of professional negotiation shall consist of all persons employed by the board of education who are engaged in teaching or performing other duties of an educational nature, or some subdivision thereof, except that a unit including classroom teachers shall not be appropriate unless it includes all such teachers employed by the board of education."

K.S.A. 72-5420. A bargaining unit is a group of employees who may properly be grouped together for the purposes of meeting and conferring relative to terms and conditions of employment. The record in this matter, as more specifically reflected in findings of fact numbers 9 through 19, demonstrates that Respondent's school nurses share a sufficient community of interest with existing bargaining unit members that their inclusion in the unit is appropriate. In reaching this conclusion, the Presiding Officer has considered all appropriate factors, cited by both parties, and incorporates those relied upon as represented in his findings of fact. In addition, the Presiding Officer has considered each of Respondent's arguments and notes that although there could be a greater commonality, or community, of interest between two positions in a bargaining unit than that evidenced here, there is nevertheless a sufficient community of interest between Respondent's school nurses and teachers to make the inclusion of both within the same unit an appropriate exercise of the Secretary's discretion. The Presiding Officer notes that school nurses are included with teachers and other professional employees in other professional employee bargaining units. *See* Initial Order, Russell County Teachers' Association v. Russell School Dist. No. 407, Docket No. 72-UD-1-1999.

THEREFORE, IT IS ORDERED that the existing professional employees' bargaining unit of Unified School District No. 266, Maize, Sedgwick County, Kansas is amended by the addition of all school nurses employed therein.

IT IS SO ORDERED.

Dated this 29th day of June, 2001.



Douglas A. Hager, Presiding Officer
Designee of the Secretary,
Kansas Department of Human Resources
1430 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become a final order fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Secretary, Department of Human Resources, Division of Labor Relations, 1430 SW Topeka Blvd., Topeka, Kansas 66612.

CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Office Manager for Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 29th day of June, 2001, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action by and through their attorneys of record, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Ms. Marjorie A. Blaufuss
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715 SW 10th Avenue
Topeka, KS 66612-1686
Attorney for Petitioner

Mr. David Cunningham
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1420 SW Arrowhead Road
Topeka, KS 66604-4024
Attorney for Respondent

And, on this 29th day of June, 2001, a true and correct copy of the above and foregoing Initial Order was deposited in the building mail, addressed to:

Secretary Richard E. Beyer
Kansas Department of Human Resources
401 SW Topeka Blvd.
Topeka, Kansas 66603

Sharon L. Tunstall
Sharon L. Tunstall