

STATE OF KANSAS
PUBLIC EMPLOYEE RELATIONS BOARD
DEPARTMENT OF HUMAN RESOURCES

Osborne Education Association
NEA - Affiliate

vs.

USD #392 - Osborne, Kansas

CASE NO: 72-UD-3-1979

O R D E R

Come now on this 19th day of November, 1979 the above captioned case for consideration by the Secretary of the Department of Human Resources.

The Osborne Education Association appears by Mr. Bob White, NEA Uniserve District Director, and Ms. Mary Head, President of the Osborne Education Association.

USD #392 Osborne County appears by and through Mr. Norman Jeter, Attorney at Law, and Mr. Kieth Adams, Superintendent of USD #392.

PROCEEDINGS BEFORE THE SECRETARY

1. A petition for unit determination was filed on April 20, 1979 by the Osborne Education Association (NEA - Affiliate).
2. The petition was forwarded to USD #392 for answer on April 30, 1979.
3. USD #392 filed their answer to the petition on May 9, 1979 wherein they question the inclusion of the school nurse in the appropriate unit.
4. A hearing to resolve the question of including or excluding the school nurse was conducted by Mr. Jerry Powell on July 5, 1979 at 234 West Washington, Osborne, Kansas.
5. The Osborne Education Association and USD #392 were both allowed to review the transcript of the hearing and to submit written recommendations to the examiner. These recommendations were received:
 - a. USD #392 - October 5, 1979 and October 19, 1979
 - b. Association - October 12, 1979

72-UD-3-1979

FINDINGS OF FACT

1. That Joyce Applegate is employed as a school nurse by USD #392. (T-32)
2. That the school nurse in USD #392 is licensed by the State of Kansas as a professional nurse. (T-32)
3. That the school nurse in USD #392 does possess a certificate issued by the State Department of Education as a school nurse. (T-33)
4. That the school nurse shows films and conducts classroom discussions with the students on various health related matters. (T-35)
5. That the school nurse works directly with the classroom teachers in securing materials used in classroom discussions. (T-35)
6. That the school nurse is a salaried employee working from 125 to 131 days per contract year and her pay is not adjusted to reflect the days beyond 125 which she works. (T-39)
7. That the school nurse does spend approximately eleven days per school year in actual classroom presentation. (T-41)
8. That a school district may employ an individual, not certified by the State Department of Education and not possessing a degree as a registered nurse, to perform the function of school nurse. (T-45)
9. That the school nurse is bound by the same set of Board policies and rules which apply to the classroom teachers. (T-48-49)
10. That the school nurse is given leeway to decide which days she will work, within certain restraints. (T-49-50)
11. That the school nurse feels a stronger community of interest with the classroom teachers than with clerical or custodial staff of the district. (T-51)
12. That the school nurse does not have any lunch duty, extracurricular or nighttime assignments but does make after school "home visits". (T-51-52)
13. That the school nurse does attend elementary staff meetings with classroom teachers. (T-53)
14. That the school nurse does not possess a teaching certificate. (T-57)
15. That the school nurse views her classroom activities as instructional in that she presents material to the students which she wants them to learn and which will benefit their lives. (T-58)

DISCUSSION AND CONCLUSIONS

In each case where there is a question regarding the scope of an appropriate bargaining unit of employees there are several questions which must be answered. The most basic but often the most important question posed pertains to the identification of the law which governs public employee organization. Kansas has two statutes which govern these organizational attempts on the part of public employees, specifically K.S.A. 72-5413 et. seq. (The Professional Negotiations Act) and K.S.A. 75-4321 et. seq. (The Public Employer-Employee Relations Act). When one reviews these statutes one finds that employees eligible to organize are divided into three distinct classes including: "Professional Employees" as defined at K.S.A. 72-5413 (c), "Professional Employees" as defined at K.S.A. 75-4322 (d), and "Public Employees" as defined at K.S.A. 75-4322 (a).

K.S.A. 75-4322 (a) states:

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

Based on this definition, the examiner must first determine if the employee meets the criteria as set out at K.S.A. 72-5413 (c) which states:

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

If the employee does not meet this definition, his/her organizational attempts must be completed under the provisions of K.S.A. 75-4321 et. seq. If the employee does meet this definition, he/she is preempted from the coverage of K.S.A. 75-4321 and organizational attempts must be completed under the provisions of K.S.A. 72-5413.

When viewed in whole, K.S.A. 72-5413 (c) indicates that the legislature recognized the possibility that a board of education might have occasion to employ an individual in a professional educational or instructional capacity and not require that individual to possess a "teaching certificate". Librarians, social workers, or media specialists might be examples of such employees depending on their actual duties.

It is also quite possible that a school district might have occasion to employ an individual clearly viewed as a professional but not defined as such within the Professional Negotiations Act. For example, consider the somewhat remote possibility that a school district employ a licensed civil engineer to perform maintenance duties within the district. This individual could certainly demonstrate his "professional" credentials and yet not meet the definition of a "professional employee" as set out in K.S.A. 72-5413 et. seq.

The examiners job, while not made easier, at least becomes more clear cut. The examiner must first decide if the employee is a professional. If the professionalism is found to exist the examiner must then determine if the individual, based on his/her duties, is a professional under K.S.A. 75-4321 et. seq. or under K.S.A. 72-5413 et. seq. Finally, if the employee is found to meet the definition of a "professional employee" as outlined in the Professional Negotiations Act, should that employee be placed in the unit with certified teachers.

The first question to be resolved concerns the professional status of the school nurse. Petitioner directs the attention of the examiner to other school districts wherein the school nurse has been included in the appropriate unit of professionals to the apparent satisfaction of all involved. This would be used to indicate her professional status. At this point it is important to point out, however, that these inclusions were made through mutual agreement of the parties rather than through the formal hearing process. The examiner does not therefore believe the past practices of other districts to in any way guide or control his determination in this case. The examiner has no way of knowing the scope of the nurse's duties in those districts nor of the circumstances under which those nurses were included. Respondent has shown through evidence and testimony that a school district has a great deal of latitude in the employment of school health personnel. For example, a district may or may not choose to employ anyone in such a position. If the district does choose to employ health personnel it has three options which it may exercise including:

1. The employment of a certified school nurse,
2. Contracting with a county health unit for school health services, or
3. The employment of a non-certified person to provide limited health services.

In this case USD #392 has chosen to exercise option one as outlined above and has, in fact, employed a certified school nurse. It has been shown through evidence and testimony that the school nurse is recognized by the state of Kansas as a

professional nurse and has been licensed as such. The School nurse has also been certified by the State Department of Education as a school nurse. The nurse is a salaried person and has some degree of latitude in determining her work schedule which are conditions normally reserved for professional employees. Finally, in light of the Department of Education certification and the professional license possessed by this individual, the examiner is unable to find the nurse to be anything other than a professional. This finding of professionalism in and of itself does not dictate unit placement but simply draws the distinction between professional and non-professional status.

The second question to be answered concerns placement of the school nurse under the appropriate statute, based upon her actual duties. While testimony has shown that the school nurse does not possess a "teaching certificate", it has also shown that the school nurse does spend at least some of her time in classroom presentations and discussions which are certainly of an educational and/or instructional nature. The school nurse, furthermore, consults directly with the teaching staff in determining which materials will be utilized during classroom presentations. The school nurse does not have lunch duty, extracurricular or nighttime assignments which are normal duties of other teaching staff members, but she is on duty during the lunch hours and makes "home visits" during the after school hours. In light of the evidence and testimony presented it is the opinion of this examiner that the school nurse in USD #392 is a "professional employee" as defined at K.S.A. 72-5413 (c).

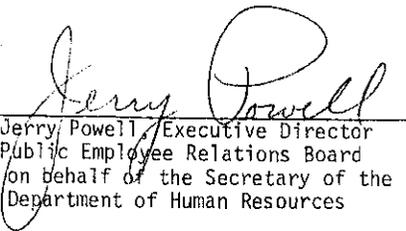
The final question to be answered concerns the placement of the school nurse in an appropriate unit. In the case of most school districts where organization has taken place there is but one appropriate unit of employees. The law, however, places no prohibition on the establishment of more than one appropriate unit. To clarify that statement, assume that a large school district employs several "support personnel" i.e., (social workers, librarians, media specialists, school nurses, etc.) Assume further that those employees have been determined to be "professional employees" in accordance with K.S.A. 72-5413 (c). Finally, assume that those employees have absolutely no community of interest with or desire to be represented with the classroom teachers. In this example it would be completely appropriate to establish a second appropriate unit.

In the instant case, the nurse attends staff meetings with the elementary teachers

and more importantly is bound by the same set of board policies and rules which are applied to the teaching staff. In the determination of an appropriate unit, the wishes of the employees involved are also to be considered. While the examiner does not place great weight upon this criteria, in this case the employee does voice a wish to be included in the unit with the teachers. There exists no other unit in which to place the school nurse and finally we are discussing only one position. To create a separate appropriate unit for one individual would simply ignore the community of interest demonstrated through testimony, would certainly constitute a splintering of the work force, and would not be in the interest of the employee. Similarly, the establishment of a separate unit for one employee would force the employer to accord all of the same rights to the second unit which are accorded to the first, i.e. (meet and confer, mediation and fact-finding). This could hardly be viewed as a move to enhance the efficient operation of the school district. It would conversely create hardships on the district and at very least cost the district additional monies to implement.

It is the opinion of this examiner that the school nurse does possess a community of interest with the classroom teachers of US D 392, and to create a separate unit of professional employees in US D 392 would be totally inappropriate. The school nurse in USD 392 is therefore determined to be a proper inclusion in the appropriate bargaining unit with the classroom teachers. It must be remembered that this order of the Secretary of the Department of Human Resources refers only to those school health personnel possessing a valid professional nurse's license, a valid school nurse's certificate, and performing duties in accordance with the definition of "professional employee" as set out in the act. This order in no way sets any precedent in regard to other individuals employed to provide the "limited health services" referred to as an alternative choice of school districts in this state.

IT IS SO ORDERED THIS *26th* DAY OF *November* 1979 BY:


Jerry Powell, Executive Director
Public Employee Relations Board
on behalf of the Secretary of the
Department of Human Resources