

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Board of Education of Galena)
Unified School District No. 499)
Galena, Cherokee County, Kansas,)
 Petitioner,)
v.)
 Respondent.)

Case No. 72-URE-2-1997

Pursuant to K.S.A. 72-5413 *et seq.* and
K.S.A. 77-501 *et seq.*

INITIAL ORDER

NOW, on this 2nd day of June, 1997, the above-captioned unit recognition and election petition came on for consideration before the presiding officer, Susan L. Hazlett, pursuant to the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.* The petitioner, Unified School District No. 499, Galena, Cherokee County, Kansas ("U.S.D. No. 499"), filed a Motion for Summary Judgment with supporting Memorandum by and through counsel, Larry A. Prauser, on May 9, 1997. The respondent, Galena Education Association ("GEA"), also filed a Motion for Summary Judgment with supporting Memorandum by and through counsel, Marjorie A. Blaufuss, on May 9, 1997. The GEA filed a Response to Petitioner's Motion for Summary Judgment through counsel on May 29, 1997, and U.S.D. No. 499 filed a Reply through counsel on June 2, 1997.

72-URE-2-1997

ISSUES

DOES THE PETITIONER, U.S.D. NO. 499, HAVE A GOOD FAITH DOUBT AS TO THE ACCURACY OR VALIDITY OF THE EVIDENCE DEMONSTRATING MAJORITY SUPPORT BY THE PROFESSIONAL EMPLOYEES IN AN APPROPRIATE NEGOTIATING UNIT TO BE REPRESENTED FOR THE PURPOSE OF PROFESSIONAL NEGOTIATION BY THE GEA?

- A. IS AN ACTUAL VOTE FOR REPRESENTATION BY THE PROFESSIONAL EMPLOYEES NECESSARY IN ORDER TO DEMONSTRATE MAJORITY SUPPORT PURSUANT TO KANSAS STATUTES ANNOTATED ("K.S.A.") 72-5416 AND K.S.A. 72-5417?
- B. IF AN ACTUAL VOTE FOR REPRESENTATION BY THE PROFESSIONAL EMPLOYEES IS NOT NECESSARY, AND OTHER EVIDENCE OF MAJORITY SUPPORT IS DEMONSTRATED, IS U.S.D. NO. 499 REQUIRED TO RECOGNIZE THE GEA PURSUANT TO K.S.A. 72-5416 AND K.S.A. 72-5417?

FINDINGS OF FACT

"Summary judgment is only appropriate if the record conclusively shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *C.J.W. v. State*, 253 Kan. 1, 16, 853 P.2d 4 (1993). As both parties in this matter have filed Motions for Summary Judgment, it can reasonably be concluded the parties are in agreement that no genuine issues of material fact remain. The uncontroverted facts, set out in the parties' respective Memorandums, are as follows:

1. The Board of Education of Galena U.S.D. No. 499 is duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.

2. The GEA is a voluntary association of U.S.D. No. 499 professional employees, and is affiliated with the Kansas National Education Association ("KNEA").

3. The GEA is a professional employees' organization, as defined by K.S.A. 72-5413(e).

4. The GEA has never been recognized by U.S.D. No. 499 or certified by the Secretary of the Kansas Department of Human Resources ("Secretary") as the exclusive representative of the professional employees of U.S.D. No. 499, pursuant to K.S.A. 72-5416, for the purpose of professional negotiation with representatives of U.S.D. No. 499.

5. The professional employees of U.S.D. No. 499 are not currently represented by any recognized or certified professional employees' organization for the purpose of professional negotiation.

6. During the 1996-97 school year, sixty-four (64) professional employees were employed by U.S.D. No. 499.

7. Thirty-four (34) of the professional employees employed by U.S.D. No. 499 during the 1996-97 school year were members of the GEA.

8. Pursuant to K.S.A. 72-8601, U.S.D. No. 499 deducts KNEA and GEA membership dues from the monthly paycheck of each of the professional employees who are members of the GEA.

9. On or about November 1, 1996, the GEA submitted a letter to U.S.D. No. 499 requesting recognition under the Kansas Professional Negotiations Act.

10. As specified in the above-described November 1, 1996 written request, the

proposed unit of employees shall include “[a]ll persons, except administrators, employed by the Board in a position requiring a certificate issued by the State Board or employed in a professional, educational, or instructional capacity ... [including], but not necessarily ... limited to, classroom teachers, counselors, librarians, school social workers, and school nurses.”

11. The GEA submitted a membership list with its written request on November 1, 1996, for voluntary recognition by U.S.D. No. 499.

12. U.S.D. No. 499 posted copies of the GEA’s above-described letter requesting voluntary recognition on bulletin boards in the school district’s schools as required by K.S.A. 72-5416(a).

13. In a letter dated November 12, 1996, the Board of Education of U.S.D. No. 499 denied the GEA’s request for voluntary recognition, stating that the Board had “a good faith doubt as to the accuracy or validity of the claims made in [the] request and will therefore file the appropriate petition with the [S]ecretary of the Kansas Department of Human Resources requesting a unit representation election.”

14. On or about November 12, 1996, U.S.D. No. 499 filed a petition for unit representation election pursuant to K.S.A. 72-5417.

15. The Secretary acknowledged receipt of the above-described petition and requested further information for service of said petition.

16. On or about December 6, 1996, U.S.D. No. 499 filed an amended petition with the Secretary alleging that “[t]he Galena USD 499 Board of Education has a good faith doubt

as to the accuracy or the validity of the evidence demonstrating majority support” and asking the Secretary to decide the question of “whether the professional employees [organization] should be granted recognition.” In the aforesaid petition, U.S.D. No. 499 advised the Secretary that the unit determination question was no longer an issue and agrees that the unit would include classroom teachers, counselors, librarians, school social workers, and school nurses, if any.

17. Minutes of a GEA meeting on August 28, 1996, reflect that fourteen (14) GEA members were in attendance. Said minutes also indicate that a discussion was held in regard to “a survey compiled to determine members’ opinions about forming a bargaining team to be trained. Every member was given a survey.”

18. Minutes of a GEA meeting on September 25, 1996, reflect a report on the results of the above-described survey as follows: “82% return rate, 68% in favor of putting a bargaining team in place, 15% not in favor of putting a bargaining team in place. The conscience of the members was to send a letter to the Board asking for recognition.” The September 25, 1996, minutes describe the aforesaid survey as one “which approved the creation of a committee to take the KNEA Negotiation Training Classes in Parsons.”

19. The GEA Executive Committee signed a letter dated January 7, 1996, which states that “the Galena Education Association agreed in early September through a vote to train members through KNEA’s bargaining seminars. In late September, members also agreed at a GEA meeting to request recognition as the bargaining agent from the board.” The letter states, further, that “[t]he GEA members have not been asked to vote to negotiate nor have

voted to negotiate with the board of education, as this was not part of our goals for this year.”

20. U.S.D. No. 499 and the GEA have never participated in collective bargaining or professional negotiation pursuant to the Kansas Professional Negotiations Act as defined in K.S.A. 72-5413 *et seq.*

21. No other professional employees' organization, other than the GEA, has been joined or has intervened in this matter.

CONCLUSIONS OF LAW

DOES THE PETITIONER, U.S.D. NO. 499, HAVE A GOOD FAITH DOUBT AS TO THE ACCURACY OR VALIDITY OF THE EVIDENCE DEMONSTRATING MAJORITY SUPPORT BY THE PROFESSIONAL EMPLOYEES IN AN APPROPRIATE NEGOTIATING UNIT TO BE REPRESENTED FOR THE PURPOSE OF PROFESSIONAL NEGOTIATION BY THE GEA?

A. IS AN ACTUAL VOTE FOR REPRESENTATION BY THE PROFESSIONAL EMPLOYEES NECESSARY IN ORDER TO DEMONSTRATE MAJORITY SUPPORT PURSUANT TO KANSAS STATUTES ANNOTATED (“K.S.A.”) 72-5416 AND K.S.A. 72-5417?

Pursuant to K.S.A. 72-5414, professional employees have the statutory “right to form, join or assist professional employees' organizations, [and] to participate in professional negotiation with boards of education through *representatives of their own choosing... .*” [Emphasis added] K.S.A. 72-5415(a) provides, further, that “[w]hen 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.”

[Emphasis added]

Once an exclusive representative has been designated or selected by professional employees, the duty of the board of education to negotiate terms and conditions of professional service arises only after the board's recognition of such exclusive representative or by certification by the Secretary. K.S.A. 75-5416(a), provides, in part:

(a) If professional employees of a board of education are not represented by a professional employees' organization for the purpose of professional negotiation, any professional employees' organization may file a request with the board of education alleging that a *majority* of the professional employees in an appropriate negotiating unit wish to be represented for such purposes by such organization and asking the board of education to recognize it as the exclusive representative under K.S.A. 72-5415. Such request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and *shall include a demonstration of majority support through verified membership lists.*”
[Emphasis added]

In the immediate case, U.S.D. No. 499 refused to recognize the GEA, as requested by the organization, alleging the board of education has a good faith doubt that the majority of Galena teachers want to be exclusively represented by the GEA. U.S.D. No. 499 has, instead, requested that a representation election be held to make that determination. K.S.A. 72-5417(a)(1) allows the board of education to “petition the Secretary to investigate and decide the question of whether its professional employees have designated a professional employees' organization for recognition as its exclusive representative.” Furthermore, K.S.A. 72-5418(a) provides that “the secretary or a person or persons designated by the secretary *may* direct and conduct a secret ballot election....”

As noted in the respondent's Memorandum in this matter, "may" is a discretionary word that does not create a duty to act that the use of "shall," "must" or "will," would. *P.W. v. Kansas Dept. of SRS*, 255 Kan. 827, 836, 877 P.2d 430 (1994). K.S.A. 72-5418 does not require the Secretary to hold a representation election if the evidence indicates that the professional employees have, in fact, designated a professional employees' organization as their exclusive representative.

As also noted by the respondent,

[t]he language of K.S.A. 72-5419 governing the conduct of elections supports this construction. K.S.A. 72-5419 provides: 'If the secretary does not dismiss a petition filed under K.S.A. 72-5416 *and* determines that it is necessary to direct and conduct a secret ballot election in order to resolve the questions raised by the petition, the secretary shall order the election held...' [Emphasis added] Thus, under K.S.A. 72-5419, the Secretary orders an election if both of two conditions are met, *i.e.*, (1) the Secretary does not dismiss the petition, and (2) the Secretary determines that an election is necessary to resolve the question raised by the petition.

Both parties agree that the GEA is the only employee organization involved in this matter. Both parties agree that a membership list of the GEA was submitted to U.S.D. No. 499, along with the GEA's written request for formal recognition. In fact, the petitioner submitted its own verified membership list as its "Exhibit 2", which is entitled "Membership Report 1996-97." Both lists clearly indicate that 34 professional employees are active, dues-paying members of the GEA. Both parties also agree that there were 64 teachers eligible for membership in the GEA according to the 1996 U.S.D. No. 499 personnel list.

Petitioner contends that, although a majority of the U.S.D. No. 499 professional employees are members of the GEA, only sixty-eight percent (68%) of the members of the

GEA actually voted to be recognized by the Board. Petitioner, therefore, contends that as 68% of 34 is only twenty-three (23), *that* number does not represent that a majority of the U.S.D. No. 499 professional employees wishing the board to recognize the GEA as their exclusive representative. The petitioner also attempts to argue that because the GEA did not file a notice of items to be negotiated with the board of education pursuant to K.S.A. 72-5423, and that because there were no GEA representatives at the prehearing conference on March 6, 1997, the majority of the U.S.D. No. 499 teachers do *not* want the GEA to be their recognized, exclusive representative.

The Professional Negotiations Act explicitly states that the professional employees' organization may file a request for recognition by the board, alleging that a *majority* of the professional employees wish to be represented and "*shall include a demonstration of majority support through verified membership lists.*" [Emphasis added] Majority support has already been determined through evidence that more than 50% of the teachers are, voluntarily, members of the GEA. There is no need to go any further. The fact that a survey/vote was taken of only GEA members, asking those members whether they were ready to actually put a bargaining team in place and train that team, is irrelevant when the law only requires evidence through membership.

Petitioner's other arguments are also irrelevant and have no merit. A filing by the GEA of a notice of items to be negotiated would have been premature and is not required for this issue; and, certainly, the fact that the union's attorney appeared at the prehearing conference instead of a GEA member is irrelevant, as the attorney was clearly the GEA's duly

authorized, legal representative.

Accordingly, the verified membership list submitted by the GEA at the time of its written request for recognition by U.S.D. No. 499 is evidence that a majority of the professional employees in an appropriate negotiating unit wish to be represented for the purpose of professional negotiation and wish the GEA to be recognized as the exclusive representative. No vote or election is necessary in this matter.

B. IF AN ACTUAL VOTE FOR REPRESENTATION BY THE PROFESSIONAL EMPLOYEES IS NOT NECESSARY, AND OTHER EVIDENCE OF MAJORITY SUPPORT IS DEMONSTRATED, IS U.S.D. NO. 499 REQUIRED TO RECOGNIZE THE GEA PURSUANT TO K.S.A. 72-5416 AND K.S.A. 72-5417?

After majority support has been demonstrated with a verified membership list, the board of education is required to recognize the employee organization unless specific circumstances exist. K.S.A. 72-5416(b) explicitly states, in part:

- A request for recognition under subsection (a) *shall* be granted by the board of education unless:
- (1) The board of education has a good faith doubt as to the accuracy or validity of the evidence demonstrating majority support;... [Emphasis added]

As noted above, the Kansas Supreme Court stated in *P.W. v. Kansas Dept. of SRS*, 255 Kan. 827, 836, 877 P.2d 430 (1994) that “[t]he crucial difference between guidelines that create a...duty and those that do not is that the former use mandatory language, *i.e.*, shall, must, or will, rather than discretionary words such as may, should, or can.”

K.S.A. 72-5416(b) clearly uses the mandatory term “shall,” when referring to the duty of the board to recognize the employees’ organization. An exception to this is if the board has a good faith doubt as to the accuracy of the evidence demonstrating majority support. As the

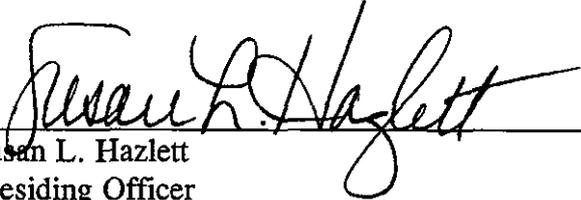
board, in this case, also submitted a membership list/report indicating the same number of members in the GEA as the GEA's own membership list, the board cannot in good faith doubt the accuracy of said membership.

ORDER

IT IS HEREBY ADJUDGED AND DECREED that based upon the findings of fact and conclusions of law in this case, U.S.D. No. 499 does not have a good faith doubt as to the accuracy or validity of the evidence demonstrating majority support of the GEA as the exclusive representative of the U.S.D. No. 499 professional employees unit. For the reasons set forth above, U.S.D. No. 499 is required by law to recognize the GEA as the exclusive representative of the U.S.D. No. 499 professional employees unit for the purpose of professional negotiation, and a secret ballot election conducted by the Secretary is not necessary and is denied.

IT IS THEREFORE ORDERED that the GEA's Motion for Summary Judgment is hereby granted, and U.S.D. No. 499's Motion for Summary Judgment is hereby denied.

IT IS SO ORDERED this 26th day of June, 1997.



Susan L. Hazlett
Presiding Officer

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the presiding officer's decision in this case. The Initial Order may be reviewed by the Secretary, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. The Order will become final fifteen (15) days from the date of service, plus three (3) days for mailing, unless a petition for review is filed pursuant to K.S.A. 77-526 within that time with the Secretary, addressed to: Secretary of the Kansas Department of Human Resources, Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66612.

Certificate of Service

I hereby certify that on the 27th of June 1997, a true and correct copy of the above and foregoing Initial Order was placed in the U.S. mail, first class, postage prepaid to:

Larry A. Prauser
ARMSTRONG & PRAUSER
P.O. Box 47
Columbus, KS 66725
Attorney for Petitioner U.S.D. No. 499

Marjorie A. Blaufuss
Kansas National Education Association
715 West 10th
Topeka, KS 66612-1686
Attorney for Respondent GEA

Sharon G. Junotall
Office Manager