

STATE OF KANSAS

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

National Education Association - *
Topeka, *
Complainant, *
vs. * CASE NO: 72-CAE-16-1981 *
Unified School District 501, Topeka, *
Kansas, *
Respondent. *

ORDER

Comes now on this 19th day of July, 1983, the above captioned case for consideration by the Secretary of Human Resources.

PROCEEDINGS BEFORE THE SECRETARY

1. Complaint filed by Don Larscheid, President, NEA-Topeka against School District 501 on June 10, 1981.
2. Respondent's answer to complaint received by Secretary of Human Resources on July 30, 1981.
3. A hearing was conducted by Mr. Jerry Powell on October 26 and November 9, 1982.
4. Briefs of parties received by the Secretary:
 - A. Complainant - May 11, 1983
 - B. Respondent - May 17, 1983

NATURE OF THE COMPLAINT

NEA-Topeka in its complaint 72-CAE-16-1981 alleges that U.S.D. 501 has bargained individually with members of the bargaining unit and thereby denied NEA-Topeka the exclusive representation rights conferred upon it by K.S.A. 72-5415.

FINDINGS OF FACT

1. That NEA-Topeka is the certified representative of the Professional employees in School District 501 and thus has standing to bring this complaint.
2. That Unified School District 501 is the appropriate employer and respondent to this complaint.
3. That in the spring of 1980, Mr. Richard Nitsch talked to Ron Epps about terminating his employment with U.S.D. 501.
4. That subsequent to the discussion, referenced in finding of fact number three, Mr. Epps specifically offered money to Mr. Nitsch to

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continue his employment with U.S.D. 501. (T - 11, 15, 16)

5. That each year the school board receives letters from a number of teachers asking that consideration be given to their individual requests for salary increases. (T - 86, 87)

6. That the school board responds to the individual requests by either granting or denying the salary increases referenced in finding of fact number five. (T - 88)

7. That the professional agreement between the Board of Education, U.S.D. 501 and NEA-Topeka sets forth salary differentials for coaches and supplemental pay for duties performed outside the regular duty day. (Complainant's Exhibit #1)

8. That prior to the hiring of Mr. Frank Walton as coach for U.S.D. 501, district administrator Ned Nusbaum carried to the school board Mr. Walton's initial salary request. The board acted directly on that request. (T - 77, 78)

9. That it has been general practice for the school board to receive individual salary requests from professional employees and for the board to subsequently act on the individual requests. (T - 82)

10. That in the spring of 1982, Mr. Frank Walton contacted Mr. Nusbaum to discuss the terms of his contract. Mr. Nusbaum told Mr. Walton that he would receive the same percentage increase as was negotiated for the teachers of U.S.D. 501. (T - 39, 40, 41)

11. That Mr. Angelo Cocolis contacted Mr. Ybara prior to the 1980-81 school year to ascertain what his salary would be. (T - 68)

12. That there is unrefuted testimony that since 1970 the salaries negotiated for coaches were interpreted as minimum salaries. (T - 80)

13. That there is unrefuted testimony that District 501 representative, Ned Nusbaum discussed additional salary amounts paid to coaches during the 1975-76 or 1976-77 negotiations. (T - 98, 105)

14. That there is unrefuted testimony that District 501 representative, Bill Haynes, discussed with NEA-Topeka representative Jim Nelson, the district's practice of paying coaches in excess of the amounts set forth in the Professional Agreement. These discussions occurred during the negotiations prior to 1980-81 and 1979-80.

15. That there is unrefuted testimony that in January of 1981 NEA-Topeka received a salary printout book from U.S.D. 501 which contained the supplemental or differential salaries paid to coaches.

(T - 2-7, 8)

16. That NEA-Topeka received a salary printout book the previous year, in which the association detected some discrepancies between salaries paid and salary amounts set forth in the Professional Agreement.

- 2-8)

CONCLUSIONS OF LAW - DISCUSSION

The Examiner believes that determination of the instant case is predicated on resolution of the following questions:

- (1) Has U.S.D. 501 negotiated individually with members of the bargaining unit represented by NEA-Topeka?
- (2) Is individual bargaining between U.S.D. 501 and members of the bargaining unit prohibited by K.S.A. 72-5413 et seq.?
- (3) Does the statute of limitations bar the complaint filed by NEA-Topeka?

NEA-Topeka has charged that "U.S.D. 501 has bargained individually with members of the bargaining unit and thereby denied the exclusive representation rights conferred upon it by K.S.A. 72-5415." NEA-Topeka in its initial complaint claims that the payment of supplemental/differential salary amounts that exceed the negotiated contractual amounts serve as evidence that individual bargaining has occurred between U.S.D 501 and members of the bargaining unit.

In the opinion of the examiner, the payment of supplemental/differential salary amounts that exceed contractual amounts is not a prohibited practice under K.S.A. 72-5413 et seq, unless it can be shown that the excess salary amounts were derived by negotiations between the school board and individuals other than the professional employees' exclusive representative. If differential/supplemental salary amounts represent a departure from the stated contractual amounts, complaints may be filed either through the grievance procedure, if one exists, or the district courts. The resolution of contractual disputes is not, however, within the jurisdiction of the Secretary of Human Resources.

The question of concern to the examiner is whether U.S.D. 501 has engaged in negotiations with individual members of the bargaining unit.

Mr. Ned Nusbaum has testified that:

"Each year the board receives letters from a number of teachers asking that consideration be given to their individual requests for salary increases and I have carried those letters to the Board."

"All the requests that were implemented were, of course, approved by the board." (T - 88)

Mr. Nusbaum further explains that the district has been interpreting contractual amounts for coaches as "minimum" salaries since 1970. (T - 98)

Mr. Richard Nitsch, former coach for Highland Park School, has testified that he talked in the spring of 1980 with Ron Epps, the building principal, about terminating his employment with U.S.D. 501. Subsequent to that discussion, Mr. Epps specifically offered money to Mr. Nitsch to continue his employment with U.S.D. 501.

Respondent in his post-hearing brief argues that K.S.A. 72-5415(b) permits individuals in the bargaining unit to make proposals to the Board of Education "as long as such proposals and agreements do not provide for less than that which is included within the Professional Agreement." The provision K.S.A. 72-5415(b), referred to by the Respondent, states:

"(b) Nothing in this act or in acts amendatory thereof or supplemental thereto shall be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education, a superintendent of schools or other chief executive officer employed by a board of education."

The examiner believes that respondent is not entirely correct in his interpretation of K.S.A. 72-5415(b). The Attorney General of Kansas has offered some guidance as to the meaning of this provision in A.G. opinion No. 81-185. The opinion states,

"While under K.S.A. 72-5430(b) (6), a board of education should not negotiate directly with the members of a collective negotiations unit, K.S.A. 72-5415(b) makes it clear the board of education may permit professional employees to present or make known to the board the positions or proposals or both of the professional employees." (emphasis added).

The Attorney General in his opinion has identified a distinction between "negotiations" and the "presentation of positions or proposals by the professional employees to the board." However, the nature of that distinction is not delineated in the opinion. Rather, the opinion states that "listening to positions or proposals does not constitute negotiations."

For further guidance, the examiner considers the statutory definition of professional negotiations which states:

72-5413(g) - "Professional negotiations means meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."

With this definition in mind, the examiner concludes that negotiations involve the endeavor to reach a settlement, whereas K.S.A.

72-5413 refers to the simple act of making proposals known to a board of education. The examiner believes that the legislature contemplated the preservation of an open forum in which teachers could express their positions or proposals to the board of education. However, negotiations between the school board and individuals in the bargaining unit were intended to be prohibited by K.S.A. 72-5430 (b) (6) which states:

K.S.A. 72-5430(b) - "It shall be a prohibited practice for a board of education or its designated representative willfully to:
(6) deny the rights accompanying recognition of a professional employees' organization which are granted in K.S.A. 72-5415;"

K.S.A. 72-5415 - "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."

The examiner believes that the language of these two provisions is unequivocal with regard to the negotiation rights of exclusive representatives.

The examiner has determined that negotiations involve the endeavor to reach an agreement and the authority to negotiate for the professional employees rests exclusively with the representative, if one has been designated by the professional employees. The examiner now turns to the record for evidence that NEA-Topeka's exclusive negotiating rights have been abridged. The record reflects that each year the school board receives letters from a number of teachers asking that consideration be given to their individual requests for salary increases. The school board responds by either granting or denying the salary increases. The same procedure is used for the hiring of new teachers to the districts. In addition, in the spring of 1980 Mr. Richard Nitsch, a coach at Highland Park High School informed Mr. Ron Epps the building principal, that he had intentions of leaving the school district. Mr. Epps offered Mr. Nitsch money to stay.

In the opinion of the examiner, the school board's positive action on individual salary requests does constitute negotiations as defined by the statute. The school board clearly has gone beyond simply listening to proposals or creating a forum for open expression when they act

directly on each request. In the opinion of the examiner, the board's act of accepting or denying individual salary requests by members of the bargaining unit is tantamount to "consultation in an effort to reach an agreement with respect to the terms and conditions of professional service," the statutory definition of professional negotiations. The same principle applies to the hiring of new employees in the district. Starting salaries for individuals who will assume positions that are contained within the bargaining unit are mandatory subjects of negotiations. Thus, the board's general practice of acting on salary requests from potential new hires that will assume positions within the bargaining unit, does circumvent the exclusive representation rights of NEA-Topeka.

The examiner believes that there is a proper procedure by which the school board may allow teachers to present their proposals or positions without violating the representation rights of the exclusive representative. The legislature in its enactment of K.S.A. 72-5415(b) is quite clear as to the rights of professional employees to make known to the board their positions or proposals. However, this provision does not authorize the school board to deal directly with the teachers on matters that are properly subjects of negotiations. Rather, K.S.A. 72-5430(b) provides that the representative of the professional employees has the exclusive right to represent teachers for the purposes of negotiations. Thus, the examiner believes that the legislature contemplated that professional employees may present their proposals or positions to the board, but if the proposals deal with matters of negotiations, the school board must negotiate these proposals with the exclusive representative before any action may be taken.

The respondent, in his brief, argues that the statute of limitations bars the complaint filed by NEA-Topeka. Respondent relies on the six-month statute of limitations set forth at K.S.A. 72-5430(a) which states,

"(a) Any controversy concerning prohibited practices may be submitted to the secretary. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six (6) months of the date of the alleged practice by service upon it by the secretary of a written notice, together with a copy of the charges."

Petitioner argues that (1) NEA-Topeka was unaware of the ongoing violation until it received the computer printout in January of 1981

and (2) even if NEA-Topeka did have knowledge of the violation, it had a right to file at any time because it was an ongoing, continuing violation.

The examiner agrees with Respondent that the Statute of Limitations bars this complaint. The record indicates that NEA-Topeka did have knowledge prior to January, 1981 of the district's general practice of paying excessive salary supplements or differentials. The record indicates that there were discussions in the 1976-77 negotiations between NEA-Topeka representative, Jim Nelson, and school board representative, Ned Nusbaum regarding this matter (T - 1-98). The practice was again discussed by NEA-Topeka and the board in the 1979 negotiations (T - 2-39) and the 1980 negotiations (T - 2-5). Based on the record the examiner can only conclude that NEA-Topeka did have reasonable knowledge of the district's general practice with regard to salary supplements or differentials.

Petitioner also argues that even if NEA-Topeka did have knowledge of the violation, it had a right to file at any time because it was an ongoing, continuing violation. However, the examiner finds only one specific incidence of individual negotiations between a professional employee (Jim Nitsch) and a school district administrator (Ron Epps). The testimony reflects that this incident occurred in the spring of 1980, more than one year before the filing of a complaint by NEA-Topeka. The examiner does not understand why NEA-Topeka delayed in filing its complaint. The record reflects that NEA-Topeka delayed its filing in order to find a witness who would testify. The examiner reminds counsel for the petitioner that witnesses may be subpoenaed to testify, at which time willingness to testify becomes moot. In addition, the examiner notes that NEA-Topeka had in a sense acquiesced to the district's practice in that it had knowledge of the practice for several years, but had not taken any action prior to the filing of the complaint. Thus, the examiner finds it difficult to hold Mr. Epps or the District accountable for practices that were heretofore unchallenged by NEA-Topeka.

Aside from the individual negotiations between Mr. Nitsch and Mr. Epps, there is insufficient evidence that any other specific acts of individual negotiations have occurred. The record reflects that Mr. Frank Walton and Mr. Angelo Cocolis made inquiries of district administrators regarding their salaries. However, the record does

not reflect that these individuals made any specific requests or proposals that were subsequently acted upon by the board or a representative of the board.

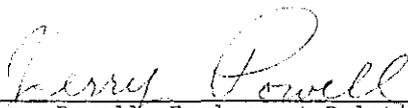
The examiner is aware that Mr. Nusbaum testified that individual requests are submitted and acted upon by the board "each year." However, specific instances of individual negotiations have not been identified. It would be irresponsible for the examiner to rule that a prohibited practice had occurred unless specific individuals and activities can be identified. This would be tantamount to convicting an individual of homicide without identifying the victim. Therefore, the examiner finds insufficient evidence of an ongoing continuing violation.

Petitioner has also argued that the payment of excess wages throughout the school year constitutes an ongoing, continuing violation of the Act. However, the examiner has previously ruled that the payment of excess wages alone is not a prohibited practice. Rather, this practice may be challenged as a contractual violation which is beyond the Secretary's jurisdiction.

ORDER OF THE SECRETARY

The Statute of Limitations bars the complaint 72-CAE-16-1981 filed by NEA-Topeka. The complaint is hereby dismissed.

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



Jerry Powell, Employment Relations
Administrator, (Designee for the
Secretary of Human Resources)
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