

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

DIANE MARIE TAYLOR, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 U.S.D. 501, Topeka, KS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 72-CAE-2-1981

ORDER

Comes now on this 9th day of December, 1986, the above captioned case for consideration by the Secretary of the Department of Human Resources. This case comes before the Secretary on remand of Shawnee County District Court Division Five. This order is based upon specific direction from the Court. Previously submitted pleadings and the hearing examiners order dated August 17, 1981 are incorporated and made a part of this order.

APPEARANCES

This matter comes before the Secretary on the record of pleadings and stipulations of the parties. Briefs were filed on behalf of both parties.

FINDINGS OF FACT

Stipulations of fact relating to this case were submitted to the Secretary by the parties. Those stipulated facts are made a part of this order.

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CONCLUSIONS OF LAW/ORDER

The case comes before the Secretary on remand from Shawnee County District Court. This case was originally submitted to the Secretary under the signature of Ms. Diane Marie Taylor alleging that the Board of Education of U.S.D. 501 had engaged in violations of K.S.A. 72-5430 (b) (1) and (5). Specifically the complaint alleged that the Board had failed to meet and confer in good faith with Complainant's representatives when the Board enacted or changed a policy on nepotism. This change in policy allegedly impacted on Complainant's salary which is a mandatorily negotiable subject.

The Secretary's designee had ruled that Complainant Ms. Taylor had, as an individual, no standing to file a charge under K.S.A. 72-5430 (b) (5). He opined that (b) (5) violations could only be brought by the exclusive representative of employees. Individual employees would file such a charge under K.S.A. 72-5430 (b) (1). The basis of such a filing would be that an employer had interfered with the employees right to "participate in professional negotiations with boards of education through representatives of their own choosing for the purpose of establishing . . . terms and conditions of employment." (K.S.A. 72-5414). Thus the Secretary's designee viewed a (b) (1) complaint to provide the individual employee a forum for resolution of such disputes and a (b) (5) to provide the forum for organizations. This interpretation would afford both the individual and the organization a forum while protecting all parties to the process from outside charges.

The Secretary designee did accept jurisdiction of the complaint under K.S.A. 72-5430 (b) (1) and wrote concerning the merits of the complaint under that subsection of the statute. Next the Secretary designee looked at the stipulated facts presented and concluded that the "issue" or "subject" upon which the Board took action was "nepotism". The Secretary designee found this subject to be permissively negotiable thus within the Board's authority to change. It was of no consequence to the

bargaining process that the end result of the change in policy impacted salary. Rather the result of the change in the permissive subject was perhaps a violation of Ms. Taylor's contract to teach for a specifically negotiated salary. The Secretary designee thus dismissed the charge in order that Ms. Taylor might take her charge to the proper jurisdiction. The Secretary designee viewed that jurisdiction to be either the contracted grievance procedure or district court. The logic in the Secretary designee's thinking rested in a distinction between prohibited practices and contract violations. That is, contract violations are quite commonplace in any labor/management relationship and are usually adjudicated by agreement of the parties through the contracted grievance procedure. The Secretary designee viewed this failure to pay Ms. Taylor in the same light as one would view a board's failure to pay any teacher pursuant to the contracted salary schedule or plan.

The court has now directed the Secretary's representative to allow Ms. Taylor to bring the action as a violation of K.S.A. 72-5430 (b) (5) as well as K.S.A. 72-5430 (b) (1). Further the court ordered that; "The Board had no authority to issue the order without first submitting it to negotiations between NEA-Topeka and the Board pursuant to K.S.A. 72-5423." The order referenced in the decision is defined by a previous sentence in the decision. That sentence states; "By changing the anti-nepotism policy to allow employment without compensation, the Board unilaterally made an order concerning a mandatory negotiable item."

The key to this case rests with the determination that the nepotism policy is a "wage issue" (mandatorily negotiable term and condition of employment) rather than a nepotism policy (permissive negotiable issue) which could be acted upon without negotiations. The Secretary had viewed the policy as other than a "wage issue" and thus he found no violation of the duty to bargain. Additionally the examiner found that good faith negotiations over wages had taken place and a memorandum of agreement resulted.

The court however, has viewed the "nepotism policy" as a wage issue and the district's failure to pay Ms. Taylor to be the result of a failure to bargain "nepotism". There can be no doubt that a "wage issue" must be noticed and negotiated prior to implementation. Failure of an employer to comply with this procedure results in a violation of K.S.A. 72-5430 (b) (5). Further such a failure to notice and negotiate a mandatorily negotiable issue results in a violation of K.S.A 72-5430 (b) (1) when applied to the individual employee.

The Board has cited Article III of the negotiated agreement as granting leave for the district to make unilateral change on any issue except those covered by the provisions of the contract. This "closure clause" is not unusual in labor agreements and would alter the decision in Dodge City National Education Association v. USD 443, 6 Kan. App. 2d 810, 635 P. 2d 1263 (1981), if in fact the "issue" being changed was not contained or spoken to in the contract. However the Court has found the "issue" to be a wage issue which was, in fact, included within the negotiated agreement. The Boards' position or argument is thus invalid since the unilateral change they desired to make was specifically limited by the agreement.

It therefore appears that the court has remanded the case to the Secretary with direction for the Secretary to enter an order that a prohibited practice has taken place. It follows then that the court has further left it to the Secretary to determine what, if any, harm was caused by this act and to fashion a remedy for that harm.

Since it has been established that a prohibited act occurred, the hearing examiner must now determine whether any harm resulted from the act. It is interesting to note that the district argues that even if their implementation of the policy constituted bad faith, no harm came to Ms. Taylor. That is, under the preexisting nepotism policy Ms. Taylor would have been ineligible for employment in USD 501 so long as she was married to a Board member. Technically the Board is correct. The policy in existence prior to the prohibited act of changing the policy

stated in part; "spouses of board members will not be employed in USD 501." Further the policy appears to give the husband/wife the option of which will continue with USD 501.

The facts in this case show that Ms. Taylor was offered a contract of employment which she accepted. Subsequent to her acceptance the Board approved and an authorized representative signed her contract. While the record is void of evidence or testimony to demonstrate how Board policy is enacted, the examiner must assume that such policy is set by majority vote of the Board. Policy of the Board can, as demonstrated by the change in the nepotism policy, be changed by action of the Board. It appears to the examiner that the Board's act of approving Ms. Taylor's contract may have served to amend the Board policy on nepotism. The examiner might also speculate that the Board had assumed that Mr. Taylor was going to resign his position at the time they approved Ms. Taylor's contract. In such a case it would follow that any conflict should have resulted in a case against Mr. Taylor rather than a denial of paying Ms. Taylor's salary. In any event Ms. Taylor was denied her salary although she was given a written contract calling for a specific annual salary. The examiner rejects the logic of the Board in this area inasmuch as under either policy Ms. Taylor should not have been offered a contract at a specific salary unless the Board had intended to employ and pay Ms. Taylor during the coming school year.

The board points to paragraph 5 of the employment contract as somehow "conditioning" the proffer of the contract by the Board. The examiner also rejects this logic in light of the language of paragraph 5. That paragraph states; "this contract is subject to the satisfactory performance of the employee according to the applicable orders, rules, and regulations of the district which are hereby incorporated herein and made a part hereof by reference as though fully set forth herein." It appears that under either

nepotism policy Ms. Taylor was never given an opportunity to perform services. Rather she was caught in a "catch 22" situation. On one hand she was given an employment contract while on the other she was not allowed to work. At very least it was made abundantly clear to her that she would not receive any compensation for her services if she did choose to work. It was therefore the Board's action that caused Ms. Taylor not to work thus receiving no compensation.

It appears to the Secretary's representative that he must view the totality of the act rather than to simply order the district to cease and desist changing mandatorily negotiable terms and conditions of employment and to revert to the former nepotism policy. Such a ruling would only place the examiner and Ms. Taylor in another "catch 22" situation. It seems that the bottom line is that the Board should not have offered Ms. Taylor an employment contract if they did not desire to receive and pay her for her services.

Since the Board apparently "amended" whatever nepotism policy was in effect at the time they "reemployed" Ms. Taylor for the 1980-81 school year, it is evident that the failure to compensate Ms. Taylor resulted from the illegal implementation of the new nepotism policy. Thus Ms. Taylor was harmed by the illegal act and the Secretary's representative must determine the extent of that damage.

The Secretary's representative had previously ruled that this action could have been a contract violation which might be subject to arbitration under the memorandum of agreement. The action still qualifies as such a violation. However the court has now ruled that the action was also a prohibited practice. Therefore the Secretary has jurisdiction to review the arbitration award to determine whether the relief granted by the arbitrator satisfies the harm caused by the commission of the prohibited practice.

The Secretary's representative has reviewed the arbitration awards and finds that he agrees with the conclusions reached by Mr. Aisenberg and Judge Klien. That is, the nepotism policy in effect prior to December 1980 was a reasonable policy and one within the right of the Board to enact. The tender of a contract to Ms. Taylor at a specific salary for the 1980-81 year without further qualification served to "amend" the policy for the 1980-81 school year. No such amendment was offered by the Board for years subsequent to 1980-81.

It appears that the arbitrator's opinions are based in fact and upon sound legal principals. Further these opinions serve to determine the harm caused by U.S.D. 501 to Ms. Taylor in their violation of the collective bargaining contract when the Board implemented the nepotism policy. Arbitrator Aisenberg stated at page 16 of his March 14, 1983 award;

"The grievant's right to file a grievance accrued as of August 22, 1980 when she was notified that she would not be employed by the school district with compensation. However, since the failure to pay compensation is a continuing violation, each time a pay period is missed, a new contractual violation occurs for the failure to pay compensation during that pay period."

The arbitrators then limited their awards by the limitations spelled out in the contract between the parties. The Secretary's representative is not so limited by contract or statute when determining the extent of damage resulting from a violation of K.S.A. 72-5430. Therefore he must find that Ms. Taylor would have been compensated for the entire contract year were it not for the prohibited act of the Board. However he must also rule that Ms. Taylor's failure to receive compensation for the subsequent school years resulted from the Board's failure to "employ" Ms. Taylor because of the "old" nepotism policy rather than the Board's implementation of the "new" nepotism policy. The examiner cannot speculate what might have occurred if the prohibited practice had not happened. Logic dictates, however, that whatever occurred during the 1981-82 school year would have occurred during the 1980-81 school year if the prohibited practice had not occurred.

In any event the failure to employ without proper "notice" in April of 1981 may violate the provisions of K.S.A. 72-5437.

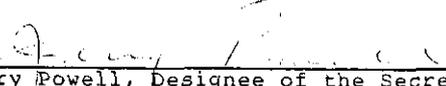
The Secretary's representative must state that he has no jurisdiction to determine whether a teacher has been properly terminated unless such termination is based upon a violation of K.S.A. 72-5430. In the instant case the Secretary's representative has determined that the Board failed to compensate Ms. Taylor during the 1980-81 school year to be a result of a prohibited act. However the Board's failure to compensate Ms. Taylor during 1981-82 and subsequent years resulted from the nepotism policy which disallowed "employment" of a teacher married to a Board member. The Secretary's representative cannot rule on the necessity of giving notice under the provisions of K.S.A. 72-5437. It appears that any determination in that area is vested in district court.

In sum the Secretary has been directed by the court to view the change in the nepotism policy as a wage issue thus subject to the negotiations process. It therefore follows that the Board's action violated the provisions of K.S.A. 72-5430 (b) (1) and (5). As a result of that prohibited act, Ms. Taylor was damaged in the amount of her annual contracted salary. Failure by the Board to employ and/or compensate Ms. Taylor for school years subsequent to 1980-81 or to serve notice pursuant to the provisions of K.S.A. 72-5437 may result in a continued employment status. However the Secretary's representative is without jurisdiction to rule on the above issue since the issue did not arise as a result of a prohibited act.

The Board is hereby ordered to pay Ms. Taylor the amount contracted for the 1980-81 school year less any earnings or unemployment compensation payments during that period. The Secretary's representative further awards interest on that amount at the rate of 10% per annum.

The Secretary's representative shall retain jurisdiction over this matter and orders the parties to attempt to resolve the question of damages within the following 15 days. In the event the parties are unable to resolve the question within this time period the Secretary shall convene a hearing to determine the exact amount to be paid by the Board to Ms. Taylor in order to satisfy the remedy as herein stated.

IT IS SO ORDERED THIS 9th DAY OF December, 1986.

  
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Jerry Powell, Designee of the Secretary  
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