

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Association of Basehor-Linwood Educators,)	
Petitioner,)	Case No(s). 72-CAE-2-1997
v.)	
)	
Unified School District No. 458,)	
Basehor, Kansas,)	
)	
<u>Respondent.</u>)	

AMENDED ORDER

COMES NOW on for hearing before Presiding Officer George M. Wolf on this 15th day of November, 1996, the Motion In Limine and To Dismiss Complaint filed by Respondent on October 31, 1996. Respondent Unified School District No. 458 ("USD #458") appears by and through counsel, John R. Vratil and W. Joseph Hatley. Petitioner appeared by and through counsel, David M. Schauner. Also appearing were Greg Brownfield of Kansas-National Education Association and Dr. David Pendleton, Superintendent, USD #458.

The presiding officer, after hearing statements and arguments of counsel, finds the following:

1. Petitioner alleges that Respondent committed a prohibited practice in violation of K.S.A. 72-5430 (b)(1),(2), and (7), based on verbal and written statements made by a representative for USD #458 during a mediation conference on August 20, 1996, which was held pursuant to K.S.A. 72-5427.

2. Respondent is moving for an Order *in limine* excluding from evidence all statements made by any person and all documents created during mediation of the impasse between the District and the Association of Basehor-Linwood Educators ("ABLE").

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3. USD #458 contends that ABLE's complaint "should be dismissed because it is based entirely upon communications which were made during a confidential mediation." (Resp. Brief in Support of Motion, p.2)

4. Chapter 129, Section 5, of the 1996 Kansas Session Laws amended K.S.A.72-5427 to include the following provision:

(d) All verbal or written information transmitted between any party to a dispute and a mediator conducting the proceeding, or the staff of an approved program under K.S.A. 5-501 *et seq.* and amendments thereto shall be confidential communications. No admission, representation or statement made in the proceeding shall be admissible as evidence or subject to discovery. A mediator shall not be subject to process requiring the disclosure of any matter discussed during the proceedings unless all the parties consent to a waiver. Any party, including the neutral person or staff of an approved program conducting the proceeding, participating in the proceeding has a privilege in any action to refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the proceeding. The privilege may be claimed by the party or anyone the party authorizes to claim the privilege.

(e) The confidentiality and privilege requirements of this section shall not apply to:

(1) Information that is reasonably necessary to establish a defense for the mediator or staff of an approved program conducting the proceeding in the case of an action against the mediator or staff of an approved program that is filed by a party to the mediation;

(2) any information that the mediator is required to report under K.S.A. 38-1522 and amendments thereto;

(3) any information that is reasonably necessary to stop the commission of an ongoing crime or fraud or to prevent the commission of a crime or fraud in the future for which there was an expressed intent to commit such crime or fraud; or

(4) any information that the mediator is required to report or communicate under the specific provisions of any statute or in order to comply with orders of the court.

5. Chapter 140, Section 1, of the 1996 Kansas Session Laws amended K.S.A. 1995 Supp. 5-501 to include the following provision:

(a) K.S.A. 1995 Supp. 5-501 through 5-516, and amendments thereto, shall be known and may be cited as the dispute resolution act.

(b) The dispute resolution act shall apply to registered and approved programs and individuals, and personnel thereof, to parties to dispute resolution being conducted by registered programs and individuals, and to disputes referred by a court to dispute resolution other than litigation. The dispute resolution act shall not apply to any judge acting in an official capacity.

In addition, Chapter 140, Section 9 amended K.S.A. 1995 Supp. 5-509 to include the following provision:

(a) The following types of cases may be accepted for dispute resolution by an approved program or individual:

. . . (7) disputes involving employer and employee relations under K.S.A. 72-5413 through 72-5432, and amendments thereto . . .

6. None of the exceptions to the confidentiality provision in Chapter 129, Section 5, of the 1996 Kansas Session Laws applies in this case.

7. Proponents of Senate Bill No. 584, passed by the 1996 Kansas Legislature, "said confidentiality and the resulting ability to be candid was one of the most attractive qualities that dispute resolution has to offer." (Supp. Note on Senate Bill No. 584, Session of 1996).

8. K.S.A. 1995 Supp. 72-5430 (b)(7) provides that:

(b) It shall be a prohibited practice for a board of education or its designated representative willfully to: . . . (7) refuse to participate in good faith in the mediation as provided in K.S.A. 72-5427. . .

9. K.S.A. 72-5423 (b) provides that:

. . . Meetings, conferences, consultations and discussions held by the secretary under K.S.A. 72-5426, and amendments thereto, for investigation of the question of the existence of impasse, and meetings, conferences, consultations and discussions held during the course of and in connection with, and the meeting required at the conclusion of, impasse resolution proceedings. . . are specifically made exempt from the provisions of the Kansas Open Meetings Law, and any amendments or supplements thereto.

10. There is no conflict between K.S.A. 1995 Supp. 72-5430 (b)(7) and Chapter 129, Section 5, of the 1996 Kansas Session Laws, as the former does not expressly or implicitly provide or allow for the disclosure of confidential communications made during mediation.

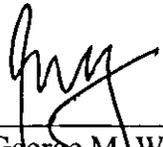
11. The Kansas Legislature has decided that the public policy of promoting confidentiality during mediation must prevail. Further evidence of the Legislature's intent to promote alternative dispute resolution is apparent in its amendment of all statutes containing dispute resolution process language, including amendments to K.S.A. 23-605, K.S.A. 44-817, K.S.A. 60-452a, K.S.A. 72-5427, K.S.A. 74-545, and K.S.A. 75-4332.

12. The Kansas Supreme Court has also expressed its conclusion that public policy dictates communications made in mediation must be confidential and protected when it enacted Supreme Court Rule 903 on February 13, 1996, which prohibits a mediator from disclosing any matter that a party expects to be confidential.

CONCLUSION

ABLE cannot prove its allegation of a prohibited practice pursuant to K.S.A. 72-5430(b)(1), (2), or (7) without disclosing the confidential communications made by the parties during mediation. Chapter 129, Section 5, of the 1996 Kansas Session Laws creates a statutory, privileged communication which controls in this matter. Therefore, Petitioner's complaint shall be dismissed.

IT IS SO ORDERED this 29th day of January, 1997.



George M. Wolf
Presiding Officer
Labor Relations
1430 SW Topeka Blvd.
Topeka, KS 66612

NOTICE OF RIGHT TO REVIEW

This is an Initial Order and is the official notice of the presiding officer's decision in this case. The 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: Kansas Department of Human Resources, Labor Relations, 1430 Topeka Boulevard, Topeka, Kansas 66612.

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of January, 1997, a true and correct copy of the above and foregoing Order was deposited in the United States Mail, first class, postage prepaid, addressed to:

David M. Schauner
Kansas National Education Association
715 W. 10th
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and in the building mail to:

Wayne L. Franklin
Secretary of Human Resources
401 SW Topeka Blvd.
Topeka, KS 66612



Sharon Tunstall